

# Chapter 34 - Arbitration

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

## Chapter 34 - Arbitration<sup>1</sup>

*P.J.S. MacDonald Eggers*

### Introductory

- 34-001 References to arbitration are of two main kinds, conventional and statutory. In the first, the parties agree to refer their present or future disputes to a tribunal of their own choosing, instead of to a court. In the second, such reference is imposed upon them by the terms of a particular statute.<sup>2</sup> This chapter is concerned only with the first kind of arbitration, and in particular with the validity and scope of arbitration agreements, the enforcement of such agreements by the court's power to stay an action brought in breach thereof, the appointment and removal of arbitrators, the conduct of the arbitral proceedings, the extent to which the court can assist the arbitral process, the arbitral award, the powers of the court in relation to the award and the enforcement of the award. These matters are for the most part regulated by statute.

### Footnotes

- <sup>1</sup> For a more detailed account of arbitration, and practice and procedure, the reader should consult: Merkin, *Arbitration Law* (2007); Merkin and Flannery, *Arbitration Act 1996*, 5th edn (2014); Russell on *Arbitration*, 24th edn (2015); Tweeddale and Tweeddale, *Arbitration of Commercial Disputes*, 2nd edn (2012); Harris, Planterose and Tecks, *Arbitration Act 1996*, 5th edn (2014); Mustill and Boyd, *Commercial Arbitration*, 2nd edn (1989) and Supplement (2001); Redfern and Hunter, *Law and Practice of International Arbitration*, 5th edn (2009); Park, *Arbitration of International Business Disputes*, 2nd edn (2012).
- <sup>2</sup> See [Arbitration Act 1996 ss.94–98](#). The [County Courts Act 1984 s.64](#), enabled a county court in such cases as might be prescribed, to order any proceedings to be referred to arbitration. By [s.92 of the 1996 Act](#), nothing in [Pt I of that Act](#) applies to such county court arbitration. The “small claims track” has now replaced small claims arbitration: [CPR Pt 27](#).

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# Section 1. - Statutory Regulation

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Section 1. - Statutory Regulation

## Arbitration Act 1996

- 34-002 The current principal statute is the [Arbitration Act 1996](#). This Act reproduced, with very few changes, the provisions of a draft Bill formulated by a Departmental Advisory Committee on International Commercial Arbitration Law appointed by the Secretary of State for Trade and Industry and chaired by Saville LJ. The Committee produced a detailed Report on the Bill (“the DAC Report”)<sup>3</sup> and this report has often been referred to in construing the provisions of the Act. To a limited extent the Act restated, in different language, the previous legislation on arbitration as set out in the [Arbitration Acts 1950, 1975](#) and [1979](#), whilst at the same time codifying principles established by case law. But, more importantly, it introduced a number of substantial changes designed to clarify and improve the arbitral process. Its provisions reflect as far as possible those of the United Nations Commission on International Trade Law (“UNCITRAL”) Model Law on International Commercial Arbitration.<sup>4</sup>
- 34-003 The Act is written in clear “user-friendly” language and this should lessen the need to have regard to the pre-1996 law where the provisions of the Act set out the law.<sup>5</sup> It is also unusual in that it sets out, in s.1, certain general principles on which [Pt I of the Act](#)—which contains its main substantive provisions—is stated to be founded and in accordance with which it is to be construed. These are that:

- “(a)the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense;
- “(b)the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest;

(c)in matters governed by [Pt I] the court should not intervene except as provided in this Part.”

Following these general principles, the Act allows considerable flexibility in the way arbitrations are conducted, recognises party autonomy and limits the role of the courts to supporting the arbitral process and intervening only in cases where there is, or is likely to be, a denial of justice. Certain provisions of Pt I are mandatory<sup>6</sup> and have effect notwithstanding any agreement to the contrary. But, for the most part, the provisions of Pt I are not mandatory: they permit the parties to make their own arrangements by written agreement<sup>7</sup> but provide rules which apply in the absence of such agreement. The parties may make such arrangements by agreeing to the application of institutional rules,<sup>8</sup> such as those of the International Chamber of Commerce, the London Court of International Arbitration or any other international or national institution.

## Commencement

- 34-004 The Act was brought into force (except for ss.85 to 87) on 31 January 1997,<sup>9</sup> and the provisions of Pt I apply to arbitral proceedings commenced on or after that date under an arbitration agreement whenever made. They do not apply to arbitral proceedings commenced before that date,<sup>10</sup> but they do apply to arbitration applications made on or after that date (except those relating to arbitration proceedings commenced before that date).<sup>11</sup>
- 34-005 Sections 85 to 87 of the Act,<sup>12</sup> which make special provision in relation to domestic arbitration agreements, are unlikely to be brought into force, since there appears to be little support for the maintenance of a distinction between international and domestic agreements.<sup>13</sup> Indeed, these sections are likely to be repealed by an order made under s.88(1).
- 34-006 As a result of the Civil Procedure (Amendment No.5) Rules 2001,<sup>14</sup> the rules relating to the arbitration claims and arbitration enforcement proceedings are CPR Pt 62, rr.62.1 to 62.21, and there is also a practice direction CPR PD62 (in this chapter referred to as “PD62”).

## Scope of application of the Act: seat of arbitration in England<sup>15</sup>

- 34-007

**Section 2(1)** sets out the basic rule which governs the application of **Pt I of the Act**: it applies where the seat of the arbitration is in England.<sup>16</sup> The *seat of the arbitration* means “the juridical seat of the arbitration which is designated:

- (a)by the parties to the arbitration agreement,<sup>17</sup> or
- (b)by any arbitral or other institution or person vested by the parties with powers in that regard, or
- (c)by the arbitral tribunal if so authorised by the parties,<sup>18</sup>

or which, in the absence of any such designation, has been determined having regard to the parties’ agreement and all the relevant circumstances”.<sup>19</sup> The “seat” is not necessarily the *place* where the arbitration is conducted, but usually the seat of the arbitration and that place will coincide. Once identified, the seat cannot move.<sup>20</sup>

## Applicants’ arbitrations not seated in England

34-008 This basic rule is, however, subject to a number of exceptions. The effect of these is to enable the English courts to recognise and enforce foreign arbitration agreements and awards and to support, in appropriate cases, foreign arbitral proceedings.<sup>21</sup> First, the provisions relating to a stay of legal proceedings ([ss.9 to 11](#)) and to the enforcement of arbitral awards ([s.66](#)) apply even if the seat of the arbitration is outside England or no seat has been designated or determined.<sup>22</sup> Secondly, the powers conferred by [s.43](#) (securing the attendance of witnesses) and [s.44](#) (court powers exercisable in support of arbitral proceedings) likewise apply even if the seat of the arbitration is outside England or no seat has been designated or determined, but the court may refuse to exercise the power if in its opinion the fact that the seat of the arbitration is or is likely to be elsewhere makes it inappropriate to do so.<sup>23</sup> Thirdly, the court may exercise any other power conferred on it by **Pt I of the Act** for the purpose of supporting the arbitral process where no seat of arbitration has been designated or determined and by reason of a connection with England it is satisfied that it is appropriate to do so.<sup>24</sup> Fourthly, the provisions of [s.7](#) (separability of the arbitration agreement) and [s.8](#) (death of a party) apply where the law applicable to the arbitration agreement is the law of England even if the seat of the arbitration is elsewhere or has not been designated or determined.<sup>25</sup> It is generally irrelevant that the law applicable to the substance of the dispute is a foreign law.

## Choice of foreign law

34-009

The Act does not purport to set out any comprehensive regime concerning the conflict of laws issues that may arise in relation to arbitration.<sup>26</sup> It has been pointed out<sup>27</sup> that three potentially relevant systems of law may be involved:

- (i)the law governing the substance of the dispute<sup>28</sup>;
- (ii)the law governing the agreement to arbitrate<sup>29</sup>; and
- (iii)the law governing the arbitral proceedings (the lex arbitri), which will normally be the law of the seat of the arbitration.<sup>30</sup>

These three laws may well be the same. But the law that governs the substance of the dispute may often differ from the lex arbitri<sup>31</sup> and the law governing the agreement to arbitrate may be different from that of the substantive contract out of which the dispute has arisen and of which it forms part.<sup>32</sup> Moreover, even if the seat of the arbitration is in England, the parties may choose a foreign law to govern any matter provided for in a non-mandatory provision of Pt I of the Act, such as, for example, the arbitration procedure, and effect must then be given to their choice.<sup>33</sup>

## Prior legislation

- 34-010 The previous principal statute was the [Arbitration Act 1950](#) (as amended). Part I of that Act was repealed by the [1996 Act](#),<sup>34</sup> but Pt II, which deals with the enforcement of certain foreign awards and in particular with those to which the Geneva Protocol (1923) applies, remains unrepealed.<sup>35</sup>
- 34-011 The [Arbitration Act 1975](#), which gave effect in the United Kingdom to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958), and the [Arbitration Act 1979](#), which abolished the much-criticised “case stated” procedure, established a new procedure for judicial review of an award and made other amendments to the [1950 Act](#), were entirely repealed by the [1996 Act](#).<sup>36</sup> Their provisions were incorporated, though not without changes, into the [1996 Act](#).
- 34-012 The [1996 Act](#) also repealed<sup>37</sup> and reproduced<sup>38</sup> the provisions of the [1950 Act](#)<sup>39</sup> and of the [Administration of Justice Act 1970](#)<sup>40</sup> which allowed for the appointment of a judge of the Commercial Court or an official referee as sole arbitrator or umpire by or by virtue of an arbitration agreement.

## Consumer arbitration agreements

- 34-013 It may be detrimental to the interests of consumers to require them, by contract, to submit disputes to arbitration rather than to have resort to legal proceedings, in particular because of the increased expense involved. The [Consumer Arbitration Agreements Act 1988](#) extended to consumers the right, in certain circumstances, not to be compelled to take a dispute to arbitration. This Act was repealed by the [1996 Act](#).<sup>41</sup> But the [Unfair Terms in Consumer Contracts Regulations 1999](#)<sup>42</sup> and the [Consumer Rights Act 2015 Pt 2](#) (the scope and effect of which are discussed in Ch.40) includes in the “grey list” of the terms that may be regarded as unfair a term which has the object or effect of “excluding or hindering the consumer’s right to take legal action or exercise any other legal remedy, in particular by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions”.<sup>43</sup> Moreover, by [s.89 of the 1996 Act](#),<sup>44</sup> ss.90 and 91 extend the application of the Regulations and [Pt 2 of the 2015 Act](#) in relation to a term which constitutes an arbitration agreement. [Section 90](#)<sup>45</sup> provides that the Regulations and [Pt 2 of the 2015 Act](#) apply where the consumer is a legal person (for example, a company) as they apply where the consumer is a natural person or (under the [2015 Act](#)) an individual. And [s.91](#)<sup>46</sup> provides that a term which constitutes an arbitration agreement is unfair for the purposes of the Regulations and [Pt 2 of the 2015 Act](#) so far as it relates to a claim for a pecuniary remedy which does not exceed the amount specified by order for the purposes of this section. An amount of £5,000 has been so specified.<sup>47</sup> The result is that an arbitration agreement which is not individually negotiated is not binding on the consumer if it requires him to submit to arbitration a claim which does not exceed £5,000.<sup>48</sup> But even where a claim exceeds this limit, an arbitration clause may be held to be unfair and so not binding on the consumer.<sup>49</sup>

## ACAS arbitration

- 34-014 The Act has been amended with respect to ACAS arbitration by the [ACAS Arbitration Scheme \(England and Wales\) Order 2001](#).<sup>50</sup>

## Human Rights Act 1998

- 34-015 The implications of the [Human Rights Act 1998](#) for arbitration are by no means certain.<sup>51</sup> It is necessary to bear in mind that the European Convention on Human Rights, to which the Act

gives effect, creates rights against states and not against private individuals. Article 6(1) of the Convention provides:

“In the determination of his civil rights and obligations ... everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”

An arbitral tribunal established by voluntary agreement of the parties is not a “tribunal established by law” within the meaning of the article as it is not an emanation of the state.<sup>52</sup> It might therefore appear that to compel a person to resort to arbitration would be incompatible with his entitlement under the article to have his civil rights and obligations determined by a tribunal established by law, e.g. by a court. And, in any event, there would be a clear infringement of the “public hearing” requirement of the article, since an arbitral hearing will not be public unless all parties so agree. The way out of these difficulties has been to hold that a person who freely and unequivocally enters into a valid arbitration agreement thereby waives his right to have his dispute determined at a public hearing by a tribunal for which the state is responsible under the Convention.<sup>53</sup> But this may be the full extent of the waiver,<sup>54</sup> and it is probable that a party to an arbitration agreement does not thereby waive his right under the article to a fair hearing by an independent and impartial tribunal and within a reasonable time. The question then arises as to the remedies available to a person who claims that proceedings before an arbitral tribunal to which he was a party have not complied with art.6 of the Convention (except to the extent that his rights under the article have been validly waived). [Section 6 of the 1998 Act](#) provides that “it is unlawful for a public authority to act in a way that is incompatible with a Convention right” and [s.7](#) gives a direct right of action to a person who claims that a public authority has acted (or proposes to act) in such a way. Despite the fact that a “public authority” is defined in [s.6\(3\)](#) to include “a court or tribunal”, and “tribunal” is further defined in [s.21\(1\)](#) as “any tribunal in which legal proceedings may be brought”, it is submitted that an arbitral tribunal to which the parties have agreed to submit their dispute for adjudication is not a “public authority” within the meaning of the Act, since its functions are not of a public nature. Any direct action against the arbitrators, based on the [1998 Act](#), is therefore ruled out.

<sup>34-016</sup> The expression “public authority” in the Act does, however, include a court.<sup>55</sup> In *KR v Switzerland*<sup>56</sup> the European Commission on Human Rights expressed the opinion that “the State cannot be held responsible for the arbitrators’ actions unless, and only in so far as, the national courts were required to intervene”. This leaves open the question whether, if required to intervene, national courts must ensure that arbitral tribunals comply with the procedural safeguards of art.6(1) except insofar as these have been validly waived. To this question conflicting answers have been given. In *Nordstrom-Janzon v Netherlands* (1996)<sup>57</sup> the Commission stated that the Convention does not require national courts to ensure that arbitration proceedings have been conducted in conformity with art.6(1). But in the earlier case of *Jakob Boss Sohne KG v Germany* (1991)<sup>58</sup> the Commission decided that the courts did have the role of guaranteeing the fairness of arbitral

proceedings and of ensuring that they were conducted in accordance with fundamental rights. It is submitted that the latter view is to be preferred and that courts, when exercising regulatory or enforcement functions in relation to arbitration, are under a duty to ensure that the arbitral proceedings have been conducted in conformity with art.6(1), except where validly waived. The provisions of the [Arbitration Act 1996](#) confer sufficient powers on the English courts to enable them, if called upon to intervene, to ensure that proceedings before an arbitral tribunal seated in England have complied with the requirements of the Article.<sup>59</sup>

- 34-017 National courts must also, when exercising their regulatory or enforcement functions, themselves comply with art.6(1).<sup>60</sup> Thus in *North Range Shipping Ltd v Seatrans Shipping Corp*<sup>61</sup> the Court of Appeal held that art.6 requires that a judge of the High Court must, when dismissing an application for permission to appeal on a point of law from an arbitrator's award under [s.69 of the 1996 Act](#), give adequate reasons for his decision, although the adequacy of those reasons is dependant on the circumstances of the particular case. However, it has been held that none of the following involved an infringement of art.6 rights: the absence of any right to an oral hearing on an application under [s.69 of the 1996 Act](#),<sup>62</sup> an order that a judgment rendered on an application under [s.68](#) should remain private and not be disclosed to the public,<sup>63</sup> the exclusion by mutual agreement of any right of appeal on a point of law under [s.69](#),<sup>64</sup> and the absence of any right of appeal from a refusal of permission to appeal on a [s.68](#) application,<sup>65</sup> from a refusal of permission to appeal under [s.69\(8\)](#),<sup>66</sup> and from a refusal of permission to appeal on a [s.67](#) application.<sup>67</sup>
- 34-018 The broader question also arises whether an arbitral tribunal seated in England, when applying English law to the substance of the dispute, is bound to decide the issues presented to it in a manner compatible with the parties' substantive rights under the Convention, for example, the right to protection of property conferred by art.1 of the first Protocol, and what remedies would be available if the tribunal decided in a way incompatible with those rights. [Section 6 of the 1998 Act](#) provides that it is illegal for a public authority to act in a way that is incompatible with a Convention right. If either of the parties to the arbitral proceedings is a public authority, it is arguable that the arbitral tribunal must take account of and, as appropriate,<sup>68</sup> give effect to this provision as part of English law in making its award. In the event that the tribunal fails to do so, then the award will be subject to appeal on a point of law under [s.69 of the Arbitration Act 1996](#).<sup>69</sup> More tentatively perhaps, whether or not English law is the law applicable to the dispute, it might be argued that the award is open to challenge under [s.68 of the 1996 Act](#) (serious irregularity)<sup>70</sup> on the ground that the award or the way in which it was procured is contrary to public policy.<sup>71</sup> There is, however, considerably more doubt as to whether the same principle will apply if neither of the parties to the arbitral proceedings is a public authority.<sup>72</sup> In the first chapter of Vol.I of this book the view has been expressed that in certain circumstances a court in a similar situation will be under a duty to interpret and apply English substantive law in a way that is compatible with the convention.<sup>73</sup> If that is so, then to that extent, when applying English law, an arbitral tribunal ought to interpret it

and apply it in the same manner. Failure to do so would constitute an error of law which, again, would render the award open to appeal under [s.69](#).

## Composition of arbitral tribunal

- 34-019 It has also been held that there was no infringement of art.6 rights where an arbitration clause incorporated the rules of a trade association and the application of those rules might lead to the result that a majority of the tribunal would consist of arbitrators approved by the association, of which one party was a member but the other was not.<sup>74</sup> In *Jivraj v Hashwani*<sup>75</sup> the Supreme Court unanimously reversed a decision of the Court of Appeal<sup>76</sup> which had held an arbitration clause, which required that the tribunal should be composed of members of a particular religious community (the Ismaili community), was rendered void as a result of the [Employment Equality \(Religion or Belief\) Regulations 2003](#).<sup>77</sup>

## Footnotes

- 1 For a more detailed account of arbitration, and practice and procedure, the reader should consult: Merkin, Arbitration Law (2007); Merkin and Flannery, Arbitration Act 1996, 5th edn (2014); Russell on Arbitration, 24th edn (2015); Tweeddale and Tweeddale, Arbitration of Commercial Disputes, 2nd edn (2012); Harris, Planterose and Tecks, Arbitration Act 1996, 5th edn (2014); Mustill and Boyd, Commercial Arbitration, 2nd edn (1989) and Supplement (2001); Redfern and Hunter, Law and Practice of International Arbitration, 5th edn (2009); Park, Arbitration of International Business Disputes, 2nd edn (2012).
- 3 February 1996. See also the 1997 Supplementary Report (January 1997).
- 4 <http://www.uncitral.org> [Accessed 1 September 2021]. See *Hacking* (1997) 63 *Arbitration* 291. The Model Law was revised in 2006 (the “Revised Model Law”).
- 5 *Seabridge Shipping AB v AC Orssleff's Eftf's A/S* [1999] 2 *Lloyd's Rep.* 685, 690; *Lesotho Highlands Development Authority v Impregilo SpA* [2005] UKHL 43, [2006] 1 A.C. 221 at [19]; *Bilta (UK) Ltd v Nazir* [2010] EWHC 1086 (Ch), [2010] 2 *Lloyd's Rep.* 29 at [22].
- 6 Arbitration Act 1996 s.4(1) and Sch.1. The sections are: ss.9–13, 24, 26(1), 28, 29, 31–33, 37(2), 40, 43, 56, 60, 66–68, 70–75.
- 7 s.4(2).
- 8 s.4(3).
- 9 Arbitration Act 1996 (Commencement No.1) Order 1996 (SI 1996/3146).
- 10 s.84(1), SI 1996/3146 art.4 and Sch.2(2)(a); *Great Ormond Street Hospital NHS Trust v Secretary of State for Health* [1998] C.L.Y. 250.
- 11 SI 1996/3146 art.4 and Sch.2.
- 12 DAC Report paras 317–331; Supplementary Report paras 47–49.

- 13    *Philip Alexander Securities & Futures Ltd v Bamberger [1996] C.L.C. 1757, CA.*  
14    SI 2001/4015.  
15    The Act extends to England and Wales but not, in general, to Scotland: [s.108](#).  
16    References in this chapter to England include Wales and Northern Ireland.  
17    *XL Insurance Ltd v Owens Corning [2000] 2 Lloyd's Rep. 500, 508; Shashoua v Sharma [2009] EWHC 957 (Comm), [2009] 2 Lloyd's Rep. 376; Enercon GmbH v Enercon (India) Ltd [2012] EWHC 689 (Comm), [2012] 1 Lloyd's Rep. 519.* Contrast *Braes of Doune Wind Farm (Scotland) Ltd v Alfred McAlpine Business Services Ltd [2008] EWHC 426 (TCC), [2008] 1 Lloyd's Rep. 608* (contract provides that seat of arbitration to be Scotland but that English courts should have exclusive jurisdiction and *Arbitration Act 1996* should apply: Akenhead J held seat of arbitration was England).  
18    *Arab National Bank v El Abdali [2004] EWHC 2381 (Comm), [2005] 1 Lloyd's Rep. 541.*  
19    Arbitration Act 1996 s.3. See DAC Report paras 26, 27; *ABB Lummus Global Ltd v Keppel Fels Ltd [1999] 2 Lloyd's Rep. 24* (LCIA rules); *Dubai Islamic Bank PJSC v Paymentech Merchant Services Inc [2001] 1 Lloyd's Rep. 65, 74; Arab National Bank v El Abdali [2004] EWHC 2381 (Comm), [2005] 1 Lloyd's Rep. 541*; and *Braes of Doune Wind Farm (Scotland) Ltd v Alfred McAlpine Business Services Ltd [2008] EWHC 426 (TCC), [2008] 1 Lloyd's Rep. 608* (relevant circumstances); *Petrodulos [2002] L.M.C.L.Q. 66*. See also *Tonkstar Ltd v American Home Assurance Co [2006] EWHC 1234 (Comm), [2005] 1 Lloyd's Rep. I.R. 32* (which court is to determine seat); *Process and Industrial Developments Ltd v Nigeria [2019] EWHC 2241 (Comm), [2019] 2 Lloyd's Rep. 361* at [42]–[53].  
20    *Dubai Islamic Bank PJSC v Paymentech Merchant Services Inc [2001] 1 Lloyd's Rep. 65.*  
21    See *Blackaby (1997) 3 Arbitration International 431*.  
22    s.2(2). See *A v B [2006] EWHC 2006 (Comm), [2007] 1 Lloyd's Rep. 237* and below, paras 34-074, 34-187.  
23    s.2(3); *Mobil Cerro Negro Ltd v Petroleos de Venezuela SA [2008] EWHC 532 (Comm), [2008] 1 Lloyd's Rep. 684.*  
24    s.2(4); *Chalbury McCouat International Ltd v PG Foils Ltd [2010] EWHC 2050 (TCC), [2011] 1 Lloyd's Rep. 23* (English law likely to be applied to substance of dispute).  
25    s.2(5).  
26    See Dicey, Morris and Collins on the Conflict of Laws, 15th edn (2012), Ch.16.  
27    *Black Clawson International Ltd v Papierwerke Wildhof Aschaffenburg AG [1981] 2 Lloyd's Rep. 446, 453; Naviera Amazonica Peruana SA v Compania Internacional de Seguros de Peru [1988] 1 Lloyd's Rep. 116, 119; C v D [2007] EWCA Civ 1282, [2008] 1 Lloyd's Rep. 239* at [24].  
28    See [s.46](#); below, para.34-134; Dicey, Morris and Collins 15th edn (2012), at paras 16-047 –16-061. The rules of Regulation 593/2008 (Rome I) (see Vol.I, para.33-018) may apply. The Rome I Regulation continues to apply after the UK's exit from the EU: see *European Union (Withdrawal) Act 2018; the Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment, etc.) (EU Exit) Regulations 2019 (SI 2019/834)*; see Vol.I, paras 1-021 et seq. and 33-002. See also *Chalbury McCouat International Ltd v PG Foils Ltd [2010] EWHC 2050 (TCC), [2011] 1 Lloyd's Rep. 23* at [26].

- 29 See Dicey, Morris and Collins 15th edn (2012), at paras 16-011—16-028. The rules of Regulation 593/2008 (Rome I) do not apply: see Vol.I, para.[33-051](#) and *Parish (2010) 76 Arbitration 661*.
- 30 See Dicey, Morris and Collins 15th edn (2012), at paras 16-029—16-046.
- 31 e.g. because the parties have expressly chosen a different law to be applicable to the substance of the dispute: *Shagang South-Asia (Hong Kong) Trading Co Ltd v Daewoo Logistics [2015] EWHC 194 (Comm), [2015] 1 Lloyd's Rep. 504*.
- 32 *Deutsche Schachtbau v Shell International Petroleum Ltd [1990] 1 A.C. 295, 310, CA* (reversed on other grounds at 329); *XL Insurance Ltd v Owens Corning [2000] 2 Lloyd's Rep. 500; CvD [2007] EWCA Civ 1282, [2008] 1 Lloyd's Rep. 239; Tamil Nadu Electricity Board v ST-CMS Electric Co Private Ltd [2007] EWHC 1713 (Comm), [2008] 1 Lloyd's Rep. 93; Musawi v RE International (UK) Ltd [2007] EWHC 2981 (Ch), [2008] 1 Lloyd's Rep. 326; Sulamerica CIA Nacional de Seguros SA v Enesa Engenharia SA [2012] EWCA Civ 638, [2012] 1 Lloyd's Rep. 671; Abuja International Hotels Ltd v Meridien SAS [2012] EWHC 87 (Comm), [2012] 1 Lloyd's Rep. 461; Habas Sinai Ve Tibbi Gazlar Istihsal Endustrisi As v VSC Steel Co Ltd [2013] EWHC 4071 (Comm), [2014] 1 Lloyd's Rep 479. cf. *Arsanovia Ltd v Cruz City 1 Mauritius Holdings [2012] EWHC 3702 (Comm), [2013] 2 All E.R. (Comm) 1*. See Vol.I, paras.[33-051](#) and [34-029](#), below.*
- 33 s.4(5). But see *Naviera Amazonica Peruana SA v Compania Internacional de Seguros de Peru [1998] 1 Lloyd's Rep. 116; Halpern v Halpern [2006] EWHC 603 (Comm), [2006] 2 Lloyd's Rep. 83* at [62] (reversed in part [2007] EWCA Civ 291, [2007] 2 Lloyd's Rep. 56). There is no general inference to be drawn from the choice of an English seat of arbitration that the parties intended their arbitration agreement to be governed by English law: *Enka Insaat Ve Sanayi AS v OOO "Insurance Co Chubb" [2020] UKSC 38, [2020] 1 W.L.R. 4117* at [82].
- 34 s.[107\(2\)](#) and [Sch.4](#).
- 35 s.[99](#). Its effect has been largely superseded by the New York Convention. See below, para.[34-191](#).
- 36 s.[107\(2\)](#) and [Sch.4](#).
- 37 s.[107\(2\)](#) and [Sch.4](#).
- 38 s.[93](#) and [Sch.2](#).
- 39 s.[11](#), as substituted by s.[99](#) of the Courts and Legal Services Act 1990.
- 40 s.[4](#) and [Sch.3](#).
- 41 s.[107\(2\)](#) and [Sch.4](#).
- 42 SI 1999/2083; replaced by the Consumer Rights Act 2015 Pt 2 for contracts made on or after 1 October 2015. See below, para.[40-273](#).
- 43 1999 Regulations Sch.2 para.1(q); Consumer Rights Act 2015 Sch.2 Pt 1 para.20.
- 44 As amended by the 2015 Act Sch.4 para.31.
- 45 As amended by the 2015 Act Sch.4 para.32.
- 46 As amended by SI 1999/678 art.6 and the 2015 Act Sch.4 para.33.
- 47 Unfair Arbitration Agreements (Specified Amount) Order 1999 (SI 1999/2167).

- 48 This should not prevent the consumer from relying on the clause if the consumer wishes to do so.
- 49 *Zealandair v Laing Homes Ltd* (2000) 2 T.C.L.R. 724; *Mylcrist Builders v Buck* [2008] EWHC 2172 (TCC), [2008] B.L.R. 611. cf. *Heifer International Inc v Christiansen* [2007] EWHC 3015 (TCC), [2008] 2 All E.R. (Comm) 831 (Danish arbitration clause inserted by consumer's own lawyers); below, para.40-324. See also *Mostaza Claro v Centro Movil Milenium SL* (C-168/05) EU:C:2006:675, [2007] Bus. L.R. 60, ECJ (consumer's failure to raise unfairness in arbitral proceedings does not determine issue); but see *Asturcom Telecommunications SL v Rodriguez Nogueira* (C-40/08) EU:C:2009:615 on this point.
- 50 SI 2001/1185. But ACAS deals only with employment relations and not with commercial disputes: *Flight Training International Inc v International Fire Training Equipment Ltd* [2004] EWHC 721, [2004] 2 All E.R. (Comm) 568.
- 51 See *Ambrose* [2000] L.M.C.L.Q. 468; *Nappert* [2001] B.J.I.B. & F.L. 16(3), 108–113; *Haydn-Williams* (2001) 67 Arbitration 289; *Robinson and Kasolowsky* (2002) 18 Arbitration International 453; *Sandy* (2004) 20 Arbitration International 305; *Berkovits* (2005) 71 Arbitration 189; *Qureshi* (2007) 157 N.L.J. 46; *Stothard* (2008) 29 Bus. L.R. 2.
- 52 *Le Compte, Van Leuven and De Meyere v Belgium* Unreported 27 May 1981, EHR Court (not an arbitration case).
- 53 *Deweer v Belgium* [1980] 2 E.H.R.R. 439 EHR Court, 27 February 1980; *KR v Switzerland*, E Com. H.R., Application No.10881/84, 4 March 1987; *Axelsson v Sweden*, E Com. H.R., Application No.11960/86, 13 July 1990; *Jakob Boss Sohne KG v Germany*, E Com. H.R., Application No.18479/91, 2 December 1991; *Molin v Turkey*, E Com. H.R., Application No.23173/94, 22 October 1996; *Nordstrom-Janzon v Netherlands*, E Com. H.R., Application No.2810/95, 22 November 1996; *Suovaniemi v Finland*, E Com. H.R., Application No.31737/96, 23 February 1999; *North Range Shipping Ltd v Seatrans Shipping Corp* [2002] EWCA Civ 405, [2002] 1 W.L.R. 2397 at [17]; *Welex AG v Rosa Maritima Ltd (The Epsilon Rosa)* [2002] EWHC 762 (Comm), [2002] 2 Lloyd's Rep. 81 at [31] (affirmed [2003] EWCA Civ 938, [2003] 2 Lloyd's Rep. 509); *BLCT (13096) Ltd v J Sainsbury Plc* [2003] EWCA Civ 884, [2004] 2 P. & C.R. 3; *Department of Economics, Policy and Development of the City of Moscow v Bankers Trust Co* [2004] EWCA Civ 314, [2005] Q.B. 207 at [27]; *Stretford v Football Association Ltd* [2007] EWCA Civ 238, [2007] 2 Lloyd's Rep. 31 at [45]; *Premium Nafta Products Ltd v Fili Shipping Co Ltd* [2007] UKHL 40, [2008] 1 Lloyd's Rep. 254 at [20]; *El Nasharty v J Sainsbury Plc* [2007] EWHC 2618 (Comm), [2008] 1 Lloyd's Rep. 360 at [25]; *Broda Agro Trade (Cyprus) Ltd v Alfred C Toepfer International GmbH* [2009] EWHC 3318 (Comm), [2010] 1 Lloyd's Rep. 533 at [37]–[43] (affirmed on other grounds [2010] EWCA Civ 1100, [2011] 1 Lloyd's Rep. 243). See also *Nishin Shipping Co Ltd v Cleaves & Co Ltd* [2003] EWHC 2602, [2004] 1 Lloyd's Rep. 38 at [52] (third parties). cf. *Shuttari v Solicitors' Indemnity Fund* [2007] EWCA Civ 244, [2007] 1 C.L.C. 303.
- 54 cf. *Nordstrom-Janzon v Netherlands* E Com. H.R., Application No.2810/95, 22 November 1996; *Suovaniemi v Finland* E Com. H.R., Application No.31737/96, 23 February 1999; *Stretford v Football Association Ltd* [2007] EWCA Civ 238, [2007] 2 Lloyd's Rep. 31 at [56].
- 55 1998 Act s.6(3).

56 *E Com. H.R.*, Application No.10881/84, 4 March 1987.

57 *E Com. H.R.*, Application No.2810/95, 22 November 1996.

58 *E Com. H.R.*, Application No.18479/91, 2 December 1991.

59 See *Stretford v Football Association Ltd* [2007] EWCA Civ 238, [2007] 2 Lloyd's Rep. 31 at [36]; *Broda Agro Trade (Cyprus) Ltd v Alfred C Toepfer International GmbH* [2009] EWHC 3318 (Comm), [2010] 1 Lloyd's Rep. 533 at [46] (affirmed on other grounds [2010] EWCA Civ 1100, [2011] 1 Lloyd's Rep. 243); *Haydn-Williams* (2001) 67 Arbitration 289. However, s.24 of the 1996 Act (see below, paras 34-096—34-097) only empowers the court to remove an arbitrator if circumstances exist which give rise to justifiable doubts as to his impartiality, and not his *independence*. But s.3(1) of the 1998 Act requires (so far as it is possible to do so) that statutes be read and given effect in a way compatible with convention rights so that the concept of independence may be imported from art.6(1): See *R. v A (No.2)* [2001] UKHL 25, [2002] A.C. 45 at [44]; *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 A.C. 557 at [37]–[52]. See also *Stretford v Football Association Ltd* [2007] EWCA Civ 238, [2007] 2 Lloyd's Rep. 31 at [39]–[40]; *Sandy* (2004) 20 Arbitration International 305.

60 *Axelsson v Sweden*, *E Com. H.R.*, Application No.11960/86, 13 July 1990; *Stran Greek Refineries v Greece*, *EHR Court*, Application No.13427/87, 9 December 1994; *Molin v Turkey*, *E Com. H.R.*, Application No.23173/94, 22 October 1996.

61 [2002] EWCA Civ 405, [2002] 1 W.L.R. 2397: see below, para.34-170.

62 *BLCT (13096) Ltd v J Sainsbury Ltd* [2003] EWCA Civ 884, [2004] 2 P. & C.R. 3; para.34-173, below.

63 *Department of Economics, Policy and Development of the City of Moscow v Banters Trust Co* [2004] EWCA Civ 314, [2005] Q.B. 207.

64 *Sumukan Ltd v Commonwealth Secretariat* [2007] EWCA Civ 243, [2007] 2 Lloyd's Rep. 87.

65 *ASM Shipping Ltd of India v TTMI Ltd of England* [2006] EWCA Civ 1341, [2007] 1 Lloyd's Rep. 136; but see below, para.34-186.

66 *CGU International Insurance Plc v Astrazenka Insurance Co Ltd* [2006] EWCA Civ 1340, [2007] 1 Lloyd's Rep. 142; but see below, para.34-186.

67 *Republic of Kazakhstan v Istil Group Ltd* [2007] EWCA Civ 471, [2007] 2 Lloyd's Rep. 548; but see below, para.34-186. See also *Yegiazaryan v Smagin* [2016] EWCA Civ 1290, [2017] 1 Lloyd's Rep. 102 at [26].

68 Depending on the issue involved, see Vol.I, para.3-116.

69 See below, para.34-136.

70 See below, para.34-164.

71 s.68(2)(g), para.34-164, below.

72 See Vol.I, para.3-126.

73 See Vol.I, paras 3-131 et seq.

74 *Capes Hatherden Ltd v Western Arable Services* [2009] EWHC 3065 (QB), [2010] 1 Lloyd's Rep. 477.

75 [2011] UKSC 40, [2011] 1 W.L.R. 1872. See *Style and Cleobury* (2011) 27 Arbitration International 563.

76 [2010] EWCA Civ 712, [2010] 2 Lloyd's Rep. 534.

- 77 SI 2003/1660; see now the [Equality Act 2010](#), para.42-041 below. But see the Arbitration and Mediation Services (Equality) Bill (HL) which prohibits any preference being given to the evidence, interests or property of a man over that of a woman.

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## Section 2. - The Arbitration Agreement

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Chapter 34 - Arbitration<sup>1</sup>

Section 2. - The Arbitration Agreement

### Definition of “arbitration agreement” and arbitrability

34-020

The [Arbitration Act 1996](#) defines an arbitration agreement to mean “an agreement to submit to arbitration present or future disputes (whether they are contractual or not)”<sup>78</sup> and *dispute* is defined to include any difference.<sup>79</sup> It is clear, therefore, that a claim in tort or a dispute which involves a charge of fraud may be the subject matter of an arbitration agreement, although the Act expressly preserves any rule of law as to matters which are “not capable of settlement by arbitration”.<sup>80</sup> However, an agreement to submit a dispute to non-binding arbitration will not constitute an arbitration agreement within the meaning of [s.6 of the Arbitration Act 1996](#) because it is a necessary requirement of such an arbitration agreement that it provides for the parties to submit a dispute to be determined by an individual or panel of individuals, by whose decision and consequent award the parties will, by their agreement, be bound.<sup>81</sup> Certain disputes will obviously not be arbitrable, for example, in family matters, disputes as to the marital status of the parties or the custody of children,<sup>82</sup> or disputes as to the existence or validity of an intellectual property right granted by the state, such as a patent or trade mark, or disputes concerning insolvency claims at least where the interests of third parties are involved.<sup>83</sup> But most commercial disputes will be arbitrable.<sup>84</sup> However, the question has arisen as to the arbitrability of commercial disputes which involve consideration of anti-trust or competition laws, having regard to the complexity of the issues raised and the public interest in ensuring compliance with and observance of those laws.<sup>85</sup> There is little doubt that, in English law, such disputes are arbitrable, although there may be doubts in a particular case whether the claim made falls within the scope of the arbitration agreement on its true construction.<sup>86</sup> The mere fact that some of the relief sought by a party is not arbitrable does not mean that the underlying dispute is not arbitrable.

<sup>87</sup>



## Form of agreement

- 34-021 The arbitration agreement need be in no particular form, and an arbitration clause even in a most summary form, e.g. “arbitration to be settled in London”,<sup>88</sup> “& arbitration … in London”,<sup>89</sup> “arbitration, if any, by ICC rules in London”<sup>90</sup> or “suitable arbitration clause”<sup>91</sup> may be sufficient to amount to an arbitration agreement. But a clause providing, first for arbitration and then, where no resolution is forthcoming for litigation, is not a valid arbitration agreement.<sup>92</sup> An agreement to submit a matter to the decision of a third party as valuer or expert will ordinarily not be an arbitration agreement,<sup>93</sup> but it will be an arbitration agreement if the intention of the parties was that he should hold an inquiry in the nature of a judicial inquiry and hear the respective cases of the parties and decide upon evidence laid before him.<sup>94</sup> There can be a valid arbitration agreement even though the agreement confers on one party alone the right to refer a matter to arbitration, and does not give mutual rights of reference.<sup>95</sup> A clause which provides that “either party may elect to have the dispute referred to arbitration” becomes a binding arbitration agreement once a valid election is made.<sup>96</sup>
- 34-022 The arbitration agreement may be an ad hoc agreement to refer a particular matter to arbitration<sup>97</sup> or it may consist of an arbitration clause in a larger agreement between the parties.<sup>98</sup> It may also consist of, or be limited or extended by, the terms of reference agreed to by the parties, as in the case of ICC arbitrations.<sup>99</sup>

## Agreements to be in writing

- 34-023 The provisions of Pt I of the 1996 Act apply only where the arbitration agreement is in writing.<sup>100</sup> But the concept of an agreement in writing is widely defined.<sup>101</sup> There is an agreement in writing:
- (a)if the agreement is made in writing (whether or not it is signed by the parties);
  - (b)if the agreement is made by the exchange of communications in writing; or
  - (c)if the agreement is evidenced in writing.<sup>102</sup>

An oral agreement made by reference to terms which are in writing, for example, to a standard form of salvage agreement such as Lloyd’s Open Form which contains an arbitration clause, is an agreement “made in writing”<sup>103</sup>; and an oral agreement is “evidenced in writing” if it is recorded

by one of the parties to the agreement, or by a third party, with the authority of the parties to the agreement.<sup>104</sup> Further, if in an exchange of written submissions in arbitral or legal proceedings the existence of an oral agreement is alleged by one party against another party and not denied by the latter in his response, this constitutes as between those parties an agreement in writing to the effect alleged.<sup>105</sup> In view of rapidly evolving means of recording, “writing” includes recording by any means.<sup>106</sup>

- 34-024 Any other agreement between the parties as to any matter provided for in Pt I of the 1996 Act is likewise effective only if in writing.<sup>107</sup> Thus any derogation by agreement from the non-mandatory provisions of Pt I must be in writing, subject to the broad definition mentioned above.

## Oral agreements

- 34-025 An oral agreement to arbitrate is not invalid, since the common law recognises such an agreement and it is expressly saved by s.81(1)(b). But the provisions of Pt I do not then apply, including, for example, the right to require a stay of legal proceedings<sup>108</sup> and the right to summary enforcement of the award.<sup>109</sup>

## Incorporation by reference

- 34-026 An arbitration clause may be incorporated in a contract by reference, e.g. to the standard terms of a trade association or other organisation,<sup>110</sup> or by course of dealing between the parties.<sup>111</sup> If this is disputed, the final decision rests with the court, since it goes to the substantive jurisdiction of the arbitral tribunal. By s.6(2) of the 1996 Act, the reference in an agreement to a written form of arbitration clause or to a document containing an arbitration clause constitutes an arbitration agreement if the reference is such as to make that clause part of the agreement. This subsection does not, however, purport to decide what is required for the effective incorporation of an arbitration clause by reference, i.e. whether there must be a specific reference to the arbitration clause or whether a reference to a document containing an arbitration clause will suffice.<sup>112</sup> That is left to be decided by the common law. It has been pointed out<sup>113</sup> that the authorities recognise a distinction between cases in which the parties incorporate the terms of a contract between two other parties or between one of them and a third party (such as bills of lading, reinsurance contracts, excess insurance contracts and building or engineering sub-contracts) and those in which they incorporate standard terms. A restrictive approach is adopted to the incorporation of arbitration clauses in two-contract situations, whereas in a one-contract situation general words suffice. It is therefore a question of construction in each case whether words in a bill of lading which incorporate

some or all of the terms of a charterparty into the bill will have the effect of incorporating into the bill an arbitration clause contained in the charterparty.<sup>114</sup> Where the parties enter into an agreement subsequent to an agreement which contains an arbitration clause, the clause may be incorporated into the subsequent agreement only if that agreement is not a separate and independent contract.<sup>115</sup>

## Onerous or unusual clauses

- 34-027 An arbitration clause incorporated by reference may be challenged on the ground that it was an onerous or unusual term that ought to have been drawn specifically to the attention of the party alleged to be bound by it.<sup>116</sup>

## Separability of arbitration agreement<sup>117</sup>

- 34-028 Where parties enter into an ad hoc agreement to refer to arbitration an existing or future dispute between them relating to an alleged contract, it is clear that the arbitration agreement is an agreement distinct and separate from the contract in question. But an arbitration clause is often embedded in the substantive contract (the “matrix contract”) to which it relates. **Section 7 of the 1996 Act** maintains the principle established by the common law<sup>118</sup> that, unless otherwise agreed,<sup>119</sup> the arbitration agreement is an agreement distinct from the contract of which it forms part and that its validity or existence or effectiveness is not affected by the fact that that contract is invalid, or did not come into existence or has become ineffective. Two consequences follow. First, since the arbitration clause must be treated as a “distinct agreement” it can be void or voidable only on grounds which relate directly to that agreement.<sup>120</sup> Thus the clause may be valid and binding even if, for example, the matrix contract is void, voidable for fraud or misrepresentation, or if it has been discharged by breach, frustration or supervening illegality. Of course, there may be cases in which a claim that no contract came into existence between the parties necessarily entails a denial that there was any agreement to arbitrate. Cases of non est factum, forgery and mistake as to the person may provide instances. But the initial invalidity or illegality of the matrix contract will not necessarily involve these consequences unless it is such as directly to impeach the arbitration agreement itself.<sup>121</sup> Also an arbitration agreement may be binding even though the matrix contract has not come into existence.<sup>122</sup> Secondly, if the arbitration agreement is valid and binding and is sufficiently wide in its terms,<sup>123</sup> issues relating to the validity, existence or effectiveness of the matrix contract are within the substantive jurisdiction of the arbitral tribunal and it can decide on those issues. So, for example, it can decide whether an initially valid but voidable contract has been or ought to be rescinded,<sup>124</sup> whether an allegedly illegal contract is unenforceable by one or

both of the parties,<sup>125</sup> whether a breach of the contract by one party has brought the contract to an end,<sup>126</sup> whether the contract has been frustrated and the consequences of frustration,<sup>127</sup> and whether one party is entitled to terminate or invalidate the contract by virtue of a term contained in it.<sup>128</sup> Even if the arbitration agreement is directly impeached, the tribunal may rule on this issue, though not conclusively.<sup>129</sup> An appropriately worded arbitration clause may also be held to confer upon the tribunal jurisdiction to rectify the contract in which the clause is contained.<sup>130</sup> However, the concept of separability does not preclude the arbitration agreement being construed with the remainder of the matrix agreement as a whole, especially where that is the parties' intention.

<sup>131</sup>



- 34-029 **Section 7** applies where the law applicable to the arbitration agreement is the law of England even if the seat of the arbitration is elsewhere or has not been designated or determined.<sup>132</sup> The law applicable to the arbitration agreement may be different from that which is applicable to the matrix contract.<sup>133</sup> Where there is in the same contract an arbitration clause and a clause submitting disputes to the exclusive jurisdiction of a national court, the arbitration clause may be held to have priority over the jurisdiction clause on the ground that the parties must be taken to have agreed on a single tribunal for the resolution of their disputes.<sup>134</sup> Alternatively the arbitration clause might be construed as applying to all disputes relating to substantive issues and the jurisdiction clause as a submission to the supervisory or ancillary jurisdiction of the court in respect of the arbitration.<sup>135</sup>

## Scope of the arbitration agreement

- 34-030 The scope of an arbitration agreement is to be determined by reference to the precise wording of the agreement, construed according to its language and in the light of the circumstances in which it was made.<sup>136</sup> But the court will endeavour to give a sensible and effective interpretation to the words used,<sup>137</sup> and will start with the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal.<sup>138</sup> The words "all disputes or differences" or "all claims" are words of wide import, but must necessarily be controlled by the subject-matter to which they relate.<sup>139</sup> The word "difference" is wide enough to embrace a difference between the parties, e.g. as to the price, where the contract provides for this to be determined by mutual agreement, and the parties fail to agree.<sup>140</sup> There can be a "dispute" between the parties if a claim is made by one party on the other, which is neither admitted nor disputed, but merely ignored.<sup>141</sup> There is also a "dispute" even if the claim made by one party on the other is indisputable, that is, one to which there is no arguable defence.<sup>142</sup> The words "in connection with" "in relation to"

“in respect of” “concerning” or “with regard to” (a contract) are clearly wide in scope. A wide meaning will also be attributed to the words “arising out of”. <sup>143</sup> Thus even a claim for damages in tort <sup>144</sup> or for contribution under the Civil Liability (Contribution) Act 1978 <sup>145</sup> or for general average <sup>146</sup> may be within an arbitration clause if closely connected with the contract, but not a claim on a bill of exchange. <sup>147</sup> The words “arising under” a contract were at one time thought to have a narrower meaning <sup>148</sup>; but this distinction has now been rejected by the House of Lords. <sup>149</sup>

- 34-031 Under a clause submitting to arbitration any dispute arising out of a contract, an arbitrator has jurisdiction finally to determine the application of a trade custom affecting the rights and obligations of the parties, <sup>150</sup> provided that it is not inconsistent with the contract or unreasonable. <sup>151</sup>

## Set-off and counterclaim

- 34-032 Subject to the terms of the arbitration clause, a counterclaim by way of set-off arising out of the same or a closely related contract will be within the scope of the clause but not a counterclaim by way of set-off arising out of a separate and unconnected contract. <sup>152</sup>

## Substantive jurisdiction for court

- 34-033 Though the arbitral tribunal may (unless otherwise agreed) rule whether or not the dispute is within the scope of the arbitration agreement, <sup>153</sup> it cannot finally decide this issue: it goes to the substantive jurisdiction of the arbitral tribunal which, if challenged, is a matter for the court to determine. <sup>154</sup>
- 34-034 A dispute as to whether notices of appeal from an arbitrator’s award to an appellate tribunal have been properly served does not arise out of the contract but out of the award and is therefore not within the scope of an arbitration clause. <sup>155</sup>

## Pre-conditions

- 34-035

There will normally be no valid reference to arbitration if the arbitration agreement stipulates that certain facts or events shall be a pre-condition of a reference to arbitration and the pre-condition is not fulfilled.<sup>156</sup> Here, too, the arbitral tribunal may rule whether or not facts or events exist which found its jurisdiction,<sup>157</sup> but the final determination of this question rests with the court.<sup>158</sup> A stipulation that the parties should first strive to settle the dispute amicably, or that the dispute should, in the first place, be submitted for conciliation, is not normally such a pre-condition and may not create an enforceable legal obligation.<sup>159</sup> Where parties agreed that arbitration would be held in London before two arbitrators and an umpire in accordance with ICC rules, the fact that the ICC declined jurisdiction did not frustrate the reference.<sup>160</sup>

## **Parties bound by arbitration agreement: minors**

- 34-036 A minor is bound by an arbitration agreement in a contract of apprenticeship if the contract as a whole is for his benefit.<sup>161</sup>

## **Trustees in bankruptcy**

- 34-037 Where a bankrupt has become party to a contract containing an arbitration agreement before the commencement of his bankruptcy, then, if the trustee in bankruptcy adopts the contract, the arbitration agreement is enforceable by or against the trustee in relation to matters arising from or connected with the contract.<sup>162</sup> Even if the trustee does not adopt the contract, the court has power, on the application either of the trustee with the consent of the creditors' committee established under s.301 of the Insolvency Act 1986, or of any other party to the arbitration agreement, to make an order that the matter be referred to arbitration.<sup>163</sup> A trustee in bankruptcy may, with the permission of the creditors' committee, refer any dispute to arbitration.<sup>164</sup> The making of a bankruptcy order does not terminate or operate as a stay of current arbitration proceedings unless the court so orders.<sup>165</sup>

## **Companies**

- 34-038 A party must make an application to the court for permission to bring an arbitration against a company in compulsory liquidation<sup>166</sup> and the same applies to a party that wishes to commence or continue arbitration proceedings against a company in administration.<sup>167</sup> Where a company is being wound up, the liquidator may, with the sanction of the court or of the liquidation committee,

bring or defend proceedings in the name of and on behalf of the company.<sup>168</sup> But once a company in liquidation is struck off the register of companies it will be dissolved<sup>169</sup> and ceases to exist. Any arbitration to which the company was a party then comes to an end<sup>170</sup>: it cannot be revived unless the company is restored to the register.<sup>171</sup> If the rights and obligations of a party to the arbitration agreement are transferred to another company before or at the time of the original party's dissolution by a doctrine of universal succession or a similar mechanism, the successor may rely on and enforce the arbitration agreement.<sup>172</sup>

## Group of companies

- 34-039 The “group of companies” doctrine which in some legal systems allows a claim to be made in arbitral proceedings by or against a company in the same group of companies as the company that entered into the arbitration agreement forms no part of English law.<sup>173</sup>

## Personal representatives

- 34-040 Unless otherwise agreed by the parties, an arbitration agreement is not discharged by the death of a party and may be enforced by or against the personal representatives of that party.<sup>174</sup> Personal representatives may submit to arbitration any debt or claim relating to the deceased's estate.<sup>175</sup>

## The Crown

- 34-041 Part I of the Arbitration Act 1996 binds the Crown.<sup>176</sup>

## Assignees

- 34-042 An assignee of a contract is bound by and may take the benefit of an arbitration clause contained therein,<sup>177</sup> but he cannot continue an arbitration already commenced by the assignor unless and until he gives notice of the assignment to the other party to the dispute and submits to the jurisdiction of the arbitrator.<sup>178</sup> However, if the right to assign the contract in which the arbitration clause is contained is taken away or restricted, then the right to claim arbitration will be similarly circumscribed.<sup>179</sup>

## Novation

- 34-043 Where, as a result of a consensual novation<sup>180</sup> the claimant has replaced the person originally named as a party, who therefore has ceased to have any rights or duties under the contract, the new party can and must enforce the arbitration clause, for his position is the same as if he had been a party from the outset.<sup>181</sup>

## Third parties

- 34-044 The Contracts (Rights of Third Parties) Act 1999 enables third parties, that is to say, persons who are not parties to a contract, to enforce a substantive term contained in it in their own right in certain circumstances. Section 8(1) of the Act provides that, where a right to enforce such a term is subject to a term which provides in writing for the submission of disputes to arbitration, then the third party is to be treated for the purposes of the Arbitration Act 1996 as a party to the arbitration agreement as regards disputes between himself and the promisor relating to the enforcement of the substantive term by the third party.<sup>182</sup> Thus, a third party who is granted the right to enforce a term of the contract, takes it subject to any obligation imposed by the contract to resort to arbitration in order to exercise that right.<sup>183</sup> Section 8(2) of the 1999 Act further provides for the rare situation which may arise where a right is expressly conferred upon a third party (who does not fall within subs.(1)) to enforce a written arbitration agreement. In such a case, he is to be treated as a party to the agreement for the purposes of the 1996 Act.<sup>184</sup>

## Subrogation

- 34-045 A person subrogated to the rights of an assured under a policy of insurance by virtue of the Third Parties (Rights against Insurers) Act 2010 or otherwise is bound by an arbitration clause contained in the policy.<sup>185</sup> In *Irwell Insurance Co Ltd v Watson*<sup>186</sup> it was held that where proceedings are instituted by an employee before the Employment Tribunal against an employer insured under an employers' liability insurance policy, and where the Employment Tribunal has exclusive jurisdiction over the employee's claim, the general policy of the 2010 Act overrides the arbitration agreement in the employers' liability insurance policy so that the proceedings against the insurer should not be stayed pursuant to s.9 of the Arbitration Act 1996.

## Guarantor

- 34-046 A guarantor may be held to have agreed to arbitration where it has specifically endorsed as surety the contract between the creditor and the principal debtor which contains an arbitration clause.<sup>187</sup>

## Award a condition precedent to action

- 34-047 The parties to a contract can agree that the award of an arbitrator shall be a condition precedent to the right to bring any legal action in relation to the contract.<sup>188</sup> Such a provision is known as a “*Scott v Avery* clause”. Its effect is that no action or other legal proceedings<sup>189</sup> may be brought until the matters in dispute have been submitted to arbitration,<sup>190</sup> unless the condition has been waived by the party relying on the clause,<sup>191</sup> or if his neglect or default has prevented the other party from obtaining an award.<sup>192</sup> However, if an application is made for a stay of legal proceedings under s.9 of the 1996 Act, and the court refuses a stay, the condition is of no effect in relation to those proceedings.<sup>193</sup>
- 34-048 Since the cause of action under such a clause does not arise until an arbitrator has made his award, it was formerly held that time under the Statutes of Limitation ran from the date of the award and not from the date of the breach.<sup>194</sup> But s.13(3) of the 1996 Act provides that, in determining for the purposes of the Limitation Acts when a cause of action accrued, any provision that an award is a condition precedent to the bringing of legal proceedings in respect of a matter to which an arbitration agreement relates is to be disregarded.<sup>195</sup>
- 34-049 If an accident insurance policy contains a *Scott v Avery* clause, and by reason of the insolvency of the insured his rights pass to the injured third party under the Third Parties (Rights against Insurers) Act 2010, the third party is bound by the clause, for he is merely subrogated by the statute to the rights of the insured.<sup>196</sup>

## Confidentiality

- 34-050 Parties who arbitrate in England expect that the hearing will be in private. But an essential corollary of the privacy of arbitral proceedings is that they should be and remain confidential. The parties

to an arbitration are therefore under a duty to keep confidential information acquired by them in the course of the arbitration.<sup>197</sup> The obligation of confidentiality has often been said to depend upon an implied term in the arbitration agreement but the better view is that it is a rule of law,<sup>198</sup> the existence and extent of which in a particular case is to be determined by the court and not by the arbitral tribunal.<sup>199</sup> The duty extends not only to the award<sup>200</sup> but also to pleadings, written submissions, proofs of witnesses as well as transcripts and notes of the evidence given in the arbitration.<sup>201</sup> It is, however, not absolute. It is subject to a number of exceptions, in particular if the other party consents to disclosure, or if disclosure is by order or leave of the court or if it is reasonably necessary for the establishment or protection of the legitimate interests of the arbitrating party or if it is required in the interests of justice.<sup>202</sup> But there may be further exceptions or qualifications: for example, the existence and details of an arbitration claim may need to be disclosed to insurers, or to shareholders, or to regulatory authorities.<sup>203</sup> The law in this area has still to be worked out<sup>204</sup> and there is in any event a certain measure of discretion vested in the court to decide whether an exception to confidentiality exists or applies.<sup>205</sup> In particular there is some doubt whether the duty of confidence is subject to any broad “public interest” exception.<sup>206</sup> Breach of the obligation of confidentiality will be restrained by injunction unless the objecting party can be shown to be fraudulent or the claim to relief is in the nature of an abuse of process.<sup>207</sup> An implied, or even express, confidentiality provision will not, however, prevent a party from enforcing or challenging the award by proceedings in open court, or from relying on the award to found a plea of issue estoppel<sup>208</sup> in subsequent arbitration proceedings between the same parties.<sup>209</sup> Where an arbitration claim form is made and determined by the court in a judgment, the court may order the publication of the judgment taking into account the competing interests in favour of confidentiality and in favour of publicity.<sup>210</sup>

## Footnotes

- 1 For a more detailed account of arbitration, and practice and procedure, the reader should consult: Merkin, *Arbitration Law* (2007); Merkin and Flannery, *Arbitration Act 1996*, 5th edn (2014); Russell on *Arbitration*, 24th edn (2015); Tweeddale and Tweeddale, *Arbitration of Commercial Disputes*, 2nd edn (2012); Harris, Planterose and Tecks, *Arbitration Act 1996*, 5th edn (2014); Mustill and Boyd, *Commercial Arbitration*, 2nd edn (1989) and Supplement (2001); Redfern and Hunter, *Law and Practice of International Arbitration*, 5th edn (2009); Park, *Arbitration of International Business Disputes*, 2nd edn (2012).
- 78 s.6(1). In *Yegiazaryan v Smagin [2016] EWCA Civ 1290, [2017] 1 Lloyd's Rep. 102* at [43], the Court of Appeal held that the contractual provision under review was an arbitration agreement because it was a mechanism by which a contracting party could be compelled through arbitration to ensure that it complies with its obligations. By contrast, in *Berkeley Burke SIPP Administration LLP v Charlton [2017] EWHC 2396 (Comm), [2018] 1 Lloyd's Rep. 337* at [15]–[22], it was held that an agreement pursuant to which a third party, such

as the Financial Ombudsman, is asked to resolve a dispute but on terms which do not bind the complainant to accept the decision of the third party cannot be an arbitration agreement within the meaning of s.6(1).

79 s.82(1).

80 s.81(1)(a).

81 *IS Prime Ltd v TF Global Markets Ltd [2020] EWHC 3375 (Comm), [2021] Bus. L.R. 493*  
at [65].

82 But see *AI v MT [2013] EWHC 100 (Fam), [2013] 2 F.L.R. 371* (“non-binding arbitration”).

83 *Riverrock Securities Ltd v International Bank of St Petersburg [2020] EWHC 2483 (Comm),*  
*[2020] 2 Lloyd's Rep. 591* at [67]–[87].

84 But see *O'Callaghan v Coral Racing Ltd [1998] C.L.Y. 854* (gaming contract); *Accentuate Ltd v Asigra Inc [2009] EWHC 2655 (QB), [2009] 2 Lloyd's Rep. 599* at [62]–[89] (mandatory provisions of EU law); *Clyde & Co LPP v Bates van Winkelhof [2011] I.R.L.R. 467* (sex discrimination in employment). See also *Interprods Ltd v De la Rue International Ltd [2014] EWHC 68 (Comm), [2014] 1 Lloyd's Rep. 540*; *London Steam Ship Owners Mutual Insurance Association Ltd v Spain (No.2) [2013] EWHC 3188 (Comm), [2014] 1 Lloyd's Rep. 309* (allegations of criminality) and *Re Vocam Europe Ltd [1998] B.C.C. 396; Exeter City Association Football Club v Football Conference Ltd [2004] EWHC 31 (Ch), [2004] 1 W.L.R. 2910; Fulham Football Club (1987) Ltd v Richards [2011] EWCA Civ 855, [2012] 1 All E.R. 414* (statutory rights of a member of a company); *Watson v Hemingway Design Ltd [2020] I.C.R. 1063* at [56]–[61] (arbitration agreement void by the Employment Rights Act 1996 s.203 and the Equality Act 2010 s.144); *Bridgehouse (Bradford No. 2) Ltd v BAE Systems Plc [2020] EWCA Civ 759, [2021] 1 Lloyd's Rep 225* at [55]–[65] (arbitrability of applications for relief under the Companies Act 2006 s.1028(3)). The arbitral tribunal may decide the issue: *Azov Shipping Co v Baltic Shipping Co [1999] 2 Lloyd's Rep. 159, 178; Republic of Serbia v Image Sat International [2009] EWHC 2583 (Comm), [2010] 1 Lloyd's Rep. 324* at [114], [123]. Arbitrability and who should determine it is discussed by various authors in *(1996) 12 Arbitration International, Issues 2 and 3*.

85 See *Mitsubishi Motors Corp v Soler Chrysler-Plymouth, 473 U.S. 614 (1985); Att-Gen of New Zealand v Mobil Oil New Zealand Ltd [1989] 2 N.Z.L.R. 649; IBM Australia Ltd v National Distribution Services Pty Ltd (1991) 100 A.L.R. 361 Australia; Carboneau (1986) 2 Arbitration International 116; Lowenfeld (1986) 2 Arbitration International 178; Kühn (1987) 3 Arbitration International 226; Park (1989) 63 Tulane L.R. 648; Dalhuisen (1995) 11 Arbitration International 151; von Mehren (2003) 19 Arbitration International 465; Billiet (2010) 76 Arbitration (1) 86; Radicati Di Brozolo (2011) 27 Arbitration International 1.*

86 *ET Plus SA v Welter [2005] EWHC 2115 (Comm), [2006] 1 Lloyd's Rep. 251* at [51].

87 *NDK Ltd v HUO Holding Ltd [2022] EWHC 1682 (Comm)* at [69]–[71].

88 *Tritonia Shipping Inc v South Nelson Products Corp [1966] 1 Lloyd's Rep. 114.* See also *Naviera Amazonica Peruana v Compañía Internacional de Seguros de Peru [1988] 1 Lloyd's Rep. 116* (“arbitration under the conditions and laws of London”—seat of arbitration London).

- 89 *Transamerican Ocean Contractors Inc v Transchemical Rotterdam BV* [1978] 1 *Lloyd's Rep.* 238.
- 90 *Mangistaumunaigaz Oil Production Association v United World Trade Inc* [1995] 1 *Lloyd's Rep.* 617.
- 91 *Hobbs Padgett & Co (Reinsurance) Ltd v Kirkland Ltd* [1969] 2 *Lloyd's Rep.* 547.
- 92 *Kruppa v Benedetti* [2014] EWHC 1887 (Comm), [2014] 2 All E.R. (Comm) 617.
- 93 See below, para.34-198.
- 94 *Re Carus-Wilson v Greene* (1886) 18 Q.B.D. 7, 9. See *David Wilson Homes Ltd v Survey Services Ltd* [2000] EWCA Civ 34, [2001] 1 All E.R. (Comm) 449 (reference to QC of English bar an arbitration agreement); *Walkinshaw v Diniz* [2000] 2 All E.R. (Comm) 237 (reference to Contract Recognition Board, motor racing federation in part an arbitration agreement). cf. *O'Callaghan v Coral Racing Ltd*, *The Times*, 26 November 1998, CA (reference of disputes to the editor of Sporting Life, not an arbitration agreement); *Wilky Property Holdings Plc v London & Surrey Investments Ltd* [2011] EWHC 2226 (Ch) (reference to valuer not arbitration agreement).
- 95 *Pittalis v Sherefettin* [1986] Q.B. 868; *RGE (Group Services) Ltd v Cleveland Offshore Ltd* (1986) 11 Con. L.R. 77; *NB Three Shipping Ltd v Harebell Shipping Ltd* [2004] EWHC 2001, [2005] 1 *Lloyd's Rep.* 509. See *Mulcahy* (2004) 70 *Arbitration* 172; *Nesbitt and Quinlan* (2006) 22 *Arbitration International* 133. Such a provision may be valid in some countries but not in others, e.g. Russia, Sweden.
- 96 *Westfal-Larsen & Co A/S v Ikerigi Compañía Naviera SA* [1983] 1 *Lloyd's Rep.* 424; *Whiting v Halverson* [2003] EWCA Civ 403.
- 97 It has been said that any such ad hoc agreement should be clear and unqualified: *Manek v IFL Wealth (UK) Ltd* [2021] EWCA Civ 625 at [41]–[42].
- 98 But see below, para.34-028 (separability).
- 99 *Republic of Serbia v Image Sat International NV* [2009] EWHC 2853 (Comm), [2010] 1 *Lloyd's Rep.* 324 at [66], [95], [97]–[99].
- 100 s.5(1).
- 101 DAC Report, paras 31–40.
- 102 s.5(2); *TTMI SARL v Statoil ASA* [2011] EWHC 1150 (Comm), [2011] 2 *Lloyd's Rep.* 220; *Barrier Ltd v Redhall Marine Ltd* [2016] EWHC 381 (QB).
- 103 s.5(3). See also *Oceanografia SA De CV v DSND Subsea AS* [2006] EWHC (Comm), [2007] 1 All E.R. (Comm) 28 (waiver of condition precedent and estoppel by convention): above, Vol.I, paras 6-089, 6-093, 6-116.
- 104 1996 Act s.5(4).
- 105 s.5(5).
- 106 s.5(6). Quaere whether a voicemail message is included.
- 107 s.5(1). But see s.23(4) (termination of the arbitration agreement).
- 108 1996 Act s.9.
- 109 s.66.
- 110 *Stretford v Football Association Ltd* [2007] EWCA Civ 238, [2007] 2 *Lloyd's Rep.* 31; *Sumukan v Commonwealth Secretariat* [2007] EWCA Civ 243, [2007] 2 *Lloyd's Rep.* 87.

- 111 See Vol.I, para.15-015.
- 112 DAC Report para.42; *Trygg Hansa Insurance Co Ltd v Equitas Ltd* [1998] 2 Lloyd's Rep. 439, 446; *Trade Maritime Corp v Hellenic Mutual War Risks Assn (Bermuda) Ltd* [2006] EWHC 2530 (Comm), [2007] 1 Lloyd's Rep. 280 at [77].
- 113 By Christopher Clarke J in *Habas Sinai v Tibbi Gazlar Isthisal Endustri AS v Sometal SAL* [2010] EWHC 29 (Comm), [2010] 1 Lloyd's Rep. 661 at [12], [13], [34]. See also *Sea Trade Maritime Corp v Hellenic Mutual War Risks Association (Bermuda) Ltd* [2006] EWHC 2530 (Comm), [2007] 1 Lloyd's Rep. 280 at [65], [81] (Langley J); *Tweeddale and Tweeddale* (2010) 76 Arbitration 656; *Ahmed* (2010) 26 Arbitration International 409; *Allison and Dharmananda* (2014) 30 Arbitration International (2) 265.
- 114 The principles to be derived from previous cases were summarised by Brandon J at first instance in *The Annefield* [1971] P. 168. See *Hamilton & Co v Mackie & Sons* (1889) 5 T.L.R. 677; *T W Thomas & Co Ltd v Portsea SS Co Ltd* [1912] A.C. 1; *The Njegos* [1936] P. 90; *The Merak* [1965] P. 223 (but see *Caresse Navigation Ltd v Zurich Assurances Maroc (The Channel Ranger)* [2014] EWCA Civ 1366, [2015] 1 Lloyd's Rep. 256 at [37]–[39]); *The Phonizien* [1966] 1 Lloyd's Rep. 150; *The Annefield* [1971] P. 168; *The Rena K* [1978] 1 Lloyd's Rep. 545, 550, [1979] Q.B. 377; *Astro Valiente Compania Naviera SA v Govt of Pakistan (No.2)* [1982] 1 W.L.R. 1096; *The Sevonia Team* [1983] 2 Lloyd's Rep. 640; *Miramar Maritime Corp v Holborn Oil Trading Ltd* [1984] A.C. 676; *Skips A/S Nordheim v Syrian Petroleum Co Ltd* [1984] Q.B. 599; *Navigazione Alta Italia SpA v Svenska Petroleum AB* [1988] 1 Lloyd's Rep. 452; *Federal Bulk Carriers Inc v C Itoh & Co Ltd* [1989] 1 Lloyd's Rep. 103; *Partenreederei m/s Heidberge and Vega Reederei Friedrich Dauber v Grosvenor Grain and Feed Co* [1994] 2 Lloyd's Rep. 287; *Daval Aciers d'Usinor et de Sacilor v Armare SRL* [1996] 1 Lloyd's Rep. 1; *The Delos* [2001] 1 Lloyd's Rep. 703; *Welex AG v Rosa Maritime Ltd* [2003] EWCA Civ 938, [2003] 2 Lloyd's Rep. 509; *Sotrade Denizcilik Sanayi ve Ticaret AS v Amadon Lo* [2008] EWHC 2762 (Comm), [2009] 1 Lloyd's Rep. 145; *Kallang Shipping SA Panama v AXA Assurances Senegal* [2008] EWHC 2761 (Comm), [2009] 1 Lloyd's Rep. 124; *Caresse Navigation Ltd v Zurich Assurances Maroc (The Channel Ranger)* [2014] EWCA Civ 1366, [2015] 1 Lloyd's Rep. 256; *Golden Endurance Shipping SA v RMA Watanya SA* [2014] EWHC 3917 (Comm), [2015] 1 Lloyd's Rep. 266. See also (in other contexts) *Modern Building Wales Ltd v Limmer & Trinidad Co Ltd* [1975] 1 W.L.R. 1281; *The St Raphael* [1985] 1 Lloyd's Rep. 403; *Pine Top Insurance Co Ltd v Unione Italiana Anglo Saxon Reinsurance Co Ltd* [1987] 1 Lloyd's Rep. 476; *Aughton v MF Kent Services* (1991) 57 B.L.R. 1; *Barrett v Henry Boot Management Ltd* [1995] C.I.L.L. 1026; *Co-operative Wholesale Soc v Saunders and Taylor* [1995] 11 Const. L.J. 118; *OK Petroleum AB v Vitol Energy SA* [1995] 2 Lloyd's Rep. 160; *Ceval Alimentos v Agrimpex Trading Co Ltd* [1996] 2 Lloyd's Rep. 319; *Extrudakerb (Maltby Engineering) Ltd v Whitemountain Quarries Ltd*, *The Times*, 10 July 1996; *Excess Insurance Co Ltd v Mander* [1997] 2 Lloyd's Rep. 119; *Roche Products Ltd v Freeman Process Systems Ltd* (1997) 80 B.L.R. 102; *Trygg Hansa Insurance Co Ltd v Equitas Ltd* [1998] 2 Lloyd's Rep. 439; *Secretary of the State for Foreign and Commonwealth Office v Percy Thomas Partnership* (1998) 65 Con. L.R. 11; *Cigna Life Insurance Co of Europe SA NV v Intercaser SA de Seguros y Reaseguros* [2002] 1 All E.R. (Comm) 235; *Sea Trade Maritime Corp v Hellenic Mutual War Risks Assn*

- (*Bermuda*) Ltd [2006] EWHC 2530 (Comm), [2007] 1 Lloyd's Rep. 280; *Habas Sinai v Tibbi Gazlar Isthisal Endustri AS v Sometal SAL* [2101] EWHC 29 (Comm), [2010] 1 Lloyd's Rep. 661; *British American Insurance (Kenya) Ltd v Matelec SAL* [2013] EWHC 3278 (Comm), [2014] Lloyd's Rep. I.R. 287; *Ulusoy Denizilik AS v Cofco Global Harvest (Zhangjiagang) Trading Co Ltd* [2020] EWHC 3645 (Comm), [2021] 1 Lloyd's Rep. 177.
- 115 *Taylor v Warden Insurance Co Ltd* (1933) 45 Ll.L. Rep. 218; *Kianta Osakeytio v Britain & Overseas Trading Co Ltd* [1954] 1 Lloyd's Rep. 247; *Union of India v EB Aaby's Rederi A/S* [1975] A.C. 797; *Faghirzadeh v Rudolf Wolff (SA) Pty Ltd* [1977] 1 Lloyd's Rep. 630; *Fletamentos Maritimos SA v Effjohn International BV* [1996] 2 Lloyd's Rep. 304. See also *Viscous Global Investment Ltd v Palladium Navigation Corp* [2014] EWHC 2654 (Comm), [2014] 2 Lloyd's Rep. 600 (arbitration clause in letter of undertaking replacing charterparty arbitration clauses).
- 116 *Kaye v Nu Skin UK Ltd* [2009] EWHC 3509 (Ch), [2011] 1 Lloyd's Rep. 40 and para.15-012 above. But see *Sumukan v Commonwealth Secretariat* [2007] EWCA Civ 243, [2007] 2 Lloyd's Rep. 87; *Stretford v Football Association Ltd* [2007] EWCA Civ 238, [2007] 2 Lloyd's Rep. 31; *William McIlroy Swindon Ltd v Quinn Insurance Ltd* [2010] EWHC 2448 (TCC), [2011] B.L.R. 136.
- 117 See Schwebel, International Arbitration: Three Salient Problems (1987), pp.1–60; *Rogers and Launder* (1994) 10 *Arbitration International* 77; *Samuel* (2008) 24 *Arbitration International* 489. Under Regulation 593/2008 (Rome I) (Vol.I, para.33-018) arbitration agreements are excluded from the scope of the Regulation, although the contract in which the agreement is contained is subject to the Regulation: see below, para.34-051 (note).
- 118 *Harbour Assurance Co (UK) Ltd v Kansa General International Insurance Co Ltd* [1993] Q.B. 701; *Lesotho Highlands Development Authority v Impregilo SA* [2005] UKHL 43, [2006] 1 A.C. 221 at [21]. See DAC Report paras 43–47.
- 119 In *National Iranian Oil Co v Crescent Petroleum Co International Ltd* [2016] EWHC 510 (Comm), [2016] 2 Lloyd's Rep. 146 at [7]–[14] the Court held that a contractual choice of law clause, on its own, will not operate as an agreement to the contrary for the purposes of s.7.
- 120 *Premium Nafta Products Ltd v Fili Shipping Co Ltd* [2007] UKHL 40, [2008] 1 Lloyd's Rep. 254 at [17] [19] [35]. See also *Harbour Assurance Co (UK) Ltd v Kansa General International Insurance Co Ltd* [1993] Q.B. 701 at 724; *Vee Networks Ltd v Econet Wireless International Ltd* [2004] EWHC 2909 (Comm), [2005] 1 Lloyd's Rep. 192 at [20]; *DDT Trucks or North America Ltd v DDT Holdings Ltd* [2007] EWHC 1542 (Comm), [2007] 2 Lloyd's Rep. 213; *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* [2006] FCAFC 192, [2008] 1 Lloyd's Rep. 119 at [218]–[230]; *El Nasharty v J Sainsbury Plc* [2007] EWHC 2618 (Comm), [2008] 1 Lloyd's Rep. 360. See also *Associated British Ports v Tata Steel UK Ltd* [2017] EWHC 694 (Ch), [2017] 2 Lloyd's Rep. 11.
- 121 *Harbour Assurance Co (UK) Ltd v Kansa General International Insurance Co Ltd* [1993] Q.B. 701 at 712, 715, 724; *Westacre Investments Inc v Jugo-import-SPDR Holding Co Ltd* [2000] Q.B. 288; *FAI General Insurance Ltd v Ocean Marine Mutual Protection and Indemnity Assn (No.2)* [1998] Lloyd's Rep. IR 24. *Vee Networks Ltd v Econet Wireless International Ltd* [2006] EWHC 1664 (Comm), [2006] 2 Lloyd's Rep. 423 at [21]; *Premium Nafta Products Ltd v Fili Shipping Co Ltd* [2007] UKHL 40, [2008] 1 Lloyd's Rep. 254 at

- [17]–[19]; *Beijing Jianlong Heavy Industry Group v Golden Ocean Group Ltd* [2013] EWHC 1063 (Comm), [2013] 2 All E.R. (Comm) 436. cf. *Smith, Coney & Barrett v Becker, Gray & Co* [1916] 2 Ch. 86, 92 (war); *Soleimany v Soleimany* [1999] Q.B. 785 (public policy); *Credit Suisse First Boston (Europe) Ltd v Seagate Trading Co Ltd* [1999] 1 Lloyd's Rep. 784 (fraud and mistake); *Capital Structures Plc v Time & Tide Construction Ltd* [2006] B.L.R. 226 at [28], [29] (duress); *Albon v Naza Motor Trading Sdn Bhd* (No.3) [2007] EWHC 665 (Ch), [2007] 2 Lloyd's Rep. 1 (forgery).
- 122 *Premium Nafta Products Ltd v Fili Shipping Co Ltd* [2007] UKHL 40, [2008] 1 Lloyd's Rep. at [18]; *UR Power GmbH v Kuok Oils and Grains Pte Ltd* [2009] EWHC 1940 (Comm), [2009] 2 Lloyd's Rep. 495 at [40]; *Novasen SA v Alimenta* [2011] EWHC 49 (Comm), [2011] 1 Lloyd's Rep. 390 at [52]. The wording of s.7 provides for this. cf. *Hyundai Merchant Marine Co Ltd v Americas Bulk Transport Ltd* [2013] EWHC 470 (Comm), [2013] 2 All E.R. (Comm) 649 at [35].
- 123 See below, para.34-030.
- 124 *Mackender v Feldia AG* [1967] 2 Q.B. 590; *Ashville Investments Ltd v Elmer Contractors Ltd* [1989] 1 Q.B. 488; *Premium Nafta Products Ltd v Fili Shipping Co Ltd* [2007] UKHL 40, [2008] 1 Lloyd's Rep. 254; *El Nasharty v J Sainsbury Plc* [2007] EWHC 2618 (Comm), [2008] 1 Lloyd's Rep. 360.
- 125 *Harbour Assurance Co (UK) Ltd v Kansa General International Insurance Co Ltd* [1993] Q.B. 701; *Westacre Investments Inc v Jugo-import-SDPR Holding Co Ltd* [2000] Q.B. 288 at 129. See also *Prodexport State Company for Foreign Trade v ED & F Man Ltd* [1973] Q.B. 389 (supervening illegality); *Azov Shipping Co v Baltic Shipping Co* [1999] 2 Lloyd's Rep. 159, 178 (non-justiciability).
- 126 *Heyman v Darwins Ltd* [1942] A.C. 356.
- 127 *Heyman v Darwins Ltd* [1942] A.C. 356 at 366, 383, 400–401; *Kruse v Questier & Co Ltd* [1953] 1 Q.B. 669; *Government of Gibraltar v Kenney* [1956] 2 Q.B. 410.
- 128 *Stebbing v Liverpool and London Globe Insurance Co Ltd* [1917] 2 K.B. 433; *Woodall v Pearl Assurance* [1919] 1 K.B. 593; *Freshwater v Western Australian Assurance Co* [1933] 1 K.B. 515; *Paul Smith Ltd v H & S International Holding Inc* [1991] 2 Lloyd's Rep. 127. See also *De la Garde v Workshop & Co* [1928] Ch. 17 (condition precedent).
- 129 See below, para.34-102.
- 130 *Ashville Investments Ltd v Elmer Contractors Ltd* [1989] Q.B. 488; *Overseas Union Insurance Co Ltd v AA Mutual Insurance Co Ltd* [1988] 2 Lloyd's Rep. 63; *Ethiopian Oil Seeds & Pulses Export Corp v Rio del Mar Foods Inc* [1990] 1 Lloyd's Rep. 86. Contrast *Printing Machinery Co Ltd v Linotype and Machinery Ltd* [1912] 1 Ch. 566; *Crane v Hegeman-Harris Co Inc* [1939] 3 All E.R. 68.
- 131 *Kabab-Ji Sal (Lebanon) v Kout Food Group (Kuwait)* [2020] EWCA Civ 6, [2020] 1 Lloyd's Rep. 269 at [66]; [2021] UKSC 48, [2022] 2 All E.R. 911 at [35].
- 132 1996 Act s.2(5).
- 133 *C v D* [2007] EWCA Civ 1282, [2008] 1 Lloyd's Rep. 239 at [22]–[29]; *Sulamerica CIA Nacional de Seguros SA v Enesa Engenharia SA* [2012] EWCA Civ 638, [2012] 1 Lloyd's Rep. 671; *Abuja International Hotels Ltd v Meridien SAS* [2012] EWHC 87 (Comm),

- [2012] 1 Lloyd's Rep. 461; *Habors Sinai Ve Tibbi Gazlar Istihsal Endustrisi As v VSC Steel Co Ltd* [2013] EWHC 4071 (Comm), [2014] 1 Lloyd's Rep. 479 at [99]–[119]. cf. *Arsanovia Ltd v Cruz City 1 Mauritius Holdings* [2012] EWHC 3702 (Comm), [2013] 2 All E.R. (Comm) 1. See *Haydn-Williams* (2012) 78 Arbitration (4) 387; *Pearson* (2013) 29 Arbitration International (1) 115; *Dundas* (2013) 79 Arbitration (3) 325; *Charles* (2014) 80 Arbitration (1) 55; and see above, para.34-009.
- 134 *Sulamerica CIA Nacional de Seguros SA v Enesa Enghenharia SA* [2012] EWHC 42 at [48], [2012] EWCA Civ 638, [2012] 1 Lloyd's Rep. 671; *British American Insurance (Kenya) Ltd v Matelec SAL* [2013] EWHC 3278 (Comm), [2014] Lloyd's Rep. I.R. 287 at [51].
- 135 *Paul Smith Ltd v H & S International Holdings Inc* [1991] 2 Lloyd's Rep. 127; *Tri MG Intra Asia Airlines v Norse Air Charter Ltd* [2009] SGHC 13, [2009] 1 Lloyd's Rep. 258. Courts exercising their supervisory role under the 1996 Act do so as a branch of the state, not as a mere extension of the consensual arbitration process: *Minister of Finance v International Petroleum Investment Co* [2019] EWCA Civ 2080, [2020] Bus. L.R. 45 at [44], [54]. See also *Enka Insaat Ve Sanayi AS v OOO "Insurance Co Chubb"* [2020] EWCA Civ 574, [2020] 3 All E.R. 577 at [42]–[56]; [2020] UKSC 38, [2020] 1 W.L.R. 4117.
- 136 *Heyman v Darwins Ltd* [1942] A.C. 356, 366; *Lobb Partnership Ltd v Aintree Racecourse Ltd* [2000] B.L.R. 65.
- 137 *Star Shipping AS v China National Foreign Trade Transportation Corp* [1999] 2 Lloyd's Rep. 445, 452; *Benford Ltd v Lopecan SL* [2004] EWHC 1897 (Comm), [2004] 2 Lloyd's Rep. 618 at [26].
- 138 *Premium Nafta Products Ltd v Fili Shipping Co Ltd* [2007] UKHL 40, [2008] 1 Lloyd's Rep. 254 at [13]; *Comandate Marine Corp v Pan Australia Shopping Pty Ltd* [2006] FCAFC 192, [2008] 1 Lloyd's Rep. 119 at [165]; *Emmott v Michael Wilson & Partners Ltd (No.2)* [2009] EWHC 1 (Comm), [2009] 1 Lloyd's Rep. 233; *Bilta (UK) Ltd v Nazir* [2010] EWHC 1086 (Ch), [2010] 2 Lloyd's Rep. 29 at [18]. See also *CMA CGM SA v Hyundai Mipo Dockyard Co Ltd* [2008] EWHC 2791, [2009] 1 Lloyd's Rep. 213 (“if any dispute should arise in connection with the interpretation and fulfilment of this contract”). cf. *Secretary of State for Transport v Stagecoach South Western Trains Ltd* [2009] EWHC 2431 (Comm), [2010] 1 Lloyd's Rep. 175 at [29], [36].
- 139 *Re Hohenzollern Act für Locomotivbahn and the City of London Contract Corp* (1886) 54 L.T. 596. In *Nori Holdings Ltd v Public Joint-Stock Co Bank Otkritie Financial Corp* [2018] EWHC 1343 (Comm), [2018] 2 Lloyd's Rep. 80 at [60], the Court held that an arbitration agreement in respect of “any dispute or disagreement” does not imply a limitation to the effect that the agreement did not extend to a claim in insolvency proceedings to avoid a transaction as being a transaction at an undervalue.
- 140 *F & G Sykes (Wessex) Ltd v Fine Fare Ltd* [1967] 1 Lloyd's Rep. 53; *Vosper Thorneycroft Ltd v Ministry of Defence* [1976] 1 Lloyd's Rep. 58; *Queensland Electricity Generating Board v New Hope Collieries Pty Ltd* [1989] 1 Lloyd's Rep. 205. The word “difference” is less hard-edged than “dispute”: *Amec Civil Engineering Ltd v Secretary of State for Transport* [2005] EWCA Civ 291, [2005] 1 W.L.R. 2339 at [31].
- 141 *Tradax Internacional SA v Cerrahogullari TAS* [1981] 3 All E.R. 344, 350; *Ellerine Bros (Pty) Ltd v Klinger* [1982] 1 W.L.R. 1375; *Secretary of State for Foreign and Commonwealth*

- Office v Percy Thomas Partnership* (1998) 65 Con. L.R. 11; *Marc Rich Agriculture Trading SA v Agrimex Ltd* [2000] 1 All E.R. (Comm) 951; *Amec Civil Engineering Ltd v Secretary of State for Transport* [2005] EWCA Civ 291, [2005] 1 W.L.R. 2339 at [30]–[31]; *Collins (Contractors) Ltd v Baltic Quay Management (1994) Ltd* [2004] EWCA Civ 1757 at [63]. See also *Exfin Shipping Ltd v Tolani Shipping Co Ltd* [2006] EWHC 1090 (Comm), [2006] 2 Lloyd's Rep. 388 (liability admitted but refusal of immediate payment).
- 142 *Halki Shipping Corp v Sopex Oils Ltd* [1998] 1 W.L.R. 726; *Wealands v CLC Contractors Ltd* [1999] 2 Lloyd's Rep. 739.
- 143 *Ethiopian Oil Seeds & Pulses Export Corp v Rio del Mar Foods Inc* [1990] 1 Lloyd's Rep. 86; *Harbour Assurance Co (UK) Ltd v Kansa General International Insurance Co Ltd* [1993] Q.B. 701; Mustill and Boyd, Commercial Arbitration, 2nd edn, p.120. Collateral or even prior or subsequent contracts may, in certain circumstances, be covered: *Faghirzadeh v Rudolf Wolff (SA) Pty Ltd* [1977] 1 Lloyd's Rep. 630; *Overseas Union Insurance Ltd v AA Mutual International Insurance Ltd* [1988] 2 Lloyd's Rep. 63; *Norscot Rig Management Pvt Ltd v Essar Oilfields Services Ltd* [2010] EWHC 195 (Comm), [2010] 2 Lloyd's Rep. 209 at [16]; *Deutsche Bank AG v Tongkah Harbour Public Co Ltd* [2011] EWHC 2251 (QB), (2011) 108 (34) L.S.G. 20. cf. *X Ltd v Y Ltd* [2005] EWHC 769 (TCC), [2005] Build. L.R. 341.
- 144 *Astro Vencedor Compañía Naviera SA of Panama v Mabanaft GmbH* [1971] 2 Q.B. 588; *Lonrho Ltd v Shell Petroleum Ltd*, *The Times*, 1 February 1978; *The Playa Larga* [1983] 2 Lloyd's Rep. 171; *Société Commerciale de Réassurance v Eras International Ltd* [1992] 1 Lloyd's Rep. 570; *Chimimport Plc v G D'Alesio SAS* [1994] 2 Lloyd's Rep. 366; *Abdullah M Fahem & Co v Mareb Yemen Insurance Co* [1997] 2 Lloyd's Rep. 738; *Wealands v CLC Contractors Ltd* [1999] 2 Lloyd's Rep. 739; *The Delos* [2001] 1 Lloyd's Rep. 703; *Capital Trust Investments Ltd v Radio Design TJAB* [2002] EWCA Civ 135, [2002] 2 All E.R. 450; *Asghar v Legal Services Commission* [2004] EWHC 1803 (Ch); *ET Plus SA v Welter* [2005] EWHC 2115 (Comm), [2006] 1 Lloyd's Rep. 251; *CMA CGM SA v Hyundai Mipo Dockyard Co Ltd* [2008] EWHC 2791 (Comm), [2009] 1 Lloyd's Rep. 213 at [31]; *Bilta (UK) Ltd v Nazir* [2010] EWHC 1086 (Ch), [2010] 2 Lloyd's Rep. 29 at [17].
- 145 *Wealands v CLC Contractors Ltd* [1999] 2 Lloyd's Rep. 739.
- 146 *Union of India v EB Aaby's Rederi A/S* [1975] A.C. 797.
- 147 *Nova (Jersey) Knit Ltd v Kammgarn Spinnerei GmbH* [1977] 1 W.L.R. 713. Contrast *Parharpur Cooling Towers Ltd v Paramount (WA) Ltd* [2007] WASC 234 (Australia).
- 148 *Heyman v Darwins Ltd* [1942] A.C. 356, 399 (cf. at 393, 394); *Government of Gibraltar v Kenney* [1956] 2 Q.B. 410, 421; *Fillite (Runcorn) Ltd v Aqua-Lift* (1989) 45 Build. L.R. 27.
- 149 *Premier Nafta Products Ltd v Fili Shipping Co Ltd* [2007] UKHL 40, approving the view of Longmore LJ in the Court of Appeal sub nom. *Fiona Trust and Holding Corp v Privalov* [2007] EWCA Civ 20, [2007] 2 Lloyd's Rep. 267 at [17]–[18]. See also *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* [2006] FCAFC 192, [2008] 1 Lloyd's Rep. 119 at [162]–[187]; *Yegiazaryan v Smagin* [2016] EWCA Civ 1290, [2017] 1 Lloyd's Rep. 102 at [44]. cf. *Microsoft Mobile Oy (Ltd) v Sony Europe Ltd* [2017] EWHC 374 (Ch), [2017] 5 C.M.L.R. 5 at [43]–[54]. However, there are limitations to this approach: *Manek v IFL Wealth (UK) Ltd* [2021] EWCA Civ 625 at [25].
- 150 *Produce Brokers Co Ltd v Olympia Oil and Cake Co Ltd* [1916] 1 A.C. 314.

- 151 *Produce Brokers Co Ltd v Olympia Oil and Cake Co Ltd* [1916] 2 K.B. 296, [1917] 1 K.B. 320, described by Scrutton LJ at 324 as “a terrible example of the disadvantages of combining a commercial arbitration with proceedings in the courts”. See Vol.I, paras 16-035, 16-037.
- 152 *Metal Distributors (UK) Ltd v ZCCM Investment Holdings Plc* [2005] EWHC 156 (Comm), [2005] 2 Lloyd's Rep. 37 at [18]. See also *ED&F Man v Société Anonyme Tripolitaine des Usines* [1970] 2 Lloyd's Rep. 416; *Aectra Refining and Manufacturing Inc v Exmar NV* [1994] 1 W.L.R. 1634, 1650; *Ronly Holdings v JSC Zestafoni Nikoladze Ferroalloy Plant* [2004] EWHC 1354 (Comm), [2004] 1 C.L.C. 1168; *Benford Ltd v Lopecan SL* [2004] EWHC 1897 (Comm), [2004] 2 Lloyd's Rep. 618; *Prekons Insaat Sanayi AS v Rowlands Castle Contracting Group Ltd* [2006] EWHC 1367 (Comm), [2007] 1 Lloyd's Rep. 98; *Norscot Rig Management Pvt Ltd v Essar Oilfields Services Ltd* [2010] EWHC 195 (Comm), [2010] 2 Lloyd's Rep. 209 at [16]. Contrast *Econet Satellite Services Ltd v Vee Networks Ltd* [2006] EWHC 1664 (Comm), [2006] 2 Lloyd's Rep. 423 (UNCITRAL rules); *Emmott v Michael Wilson & Partners Ltd (No.2)* [2009] EWHC 1 (Comm), [2009] 1 Lloyd's Rep. 233.
- 153 Arbitration Act 1996 ss.30, 31. See below, para.34-102.
- 154 ss.32, 67, 72.
- 155 *Getreide-import GmbH v Contimar SA Compañía Industrial Commercial y Maritima* [1953] 1 W.L.R. 793. Contrast *Gunter Henck v André et Cie SA* [1970] 1 Lloyd's Rep. 235.
- 156 *Smith v Martin* [1925] 1 K.B. 745; *Mid-Glamorgan CC v Land Authority for Wales* (1990) 49 B.L.R. 61. See, e.g., *Ruby Roz Agricol LLP v Republic of Kazakhstan* [2017] EWHC 439 (Comm).
- 157 Arbitration Act 1996 ss.30, 31.
- 158 ss.32, 67, 72.
- 159 *Courtney & Fairbairn Ltd v Tolaini Bros (Hotels) Ltd* [1975] 1 W.L.R. 297; *Itex Shipping Pte Ltd v China Ocean Shipping Co* [1989] 2 Lloyd's Rep. 522, 525; *Paul Smith Ltd v H & S International Holding Inc* [1991] 2 Lloyd's Rep. 127, 131; *Sulamerica CIA Nacional de Seguros SA v Enesa Enghenharia SA* [2012] EWCA Civ 638, [2012] 1 Lloyd's Rep. 671 at [35], [36]; *Wah v Grant Thornton International Ltd* [2012] EWHC 3198 (Ch), [2013] 1 Lloyd's Rep. 11. But see *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] A.C. 334; *Halifax Financial Services Ltd v Intuitive Systems Ltd* [1999] 1 All E.R. (Comm) 303; *Cable & Wireless Plc v IBM United Kingdom Ltd* [2002] EWHC 2059 (Comm), [2002] 2 All E.R. (Comm) 1041; *Holloway v Chancery Mead Ltd* [2007] EWHC 2495 (TCC), [2008] 1 All E.R. (Comm) 653; *International Research Corp v Lufthansa Systems Asia Pacific Pte Ltd* [2012] SGHC 226, [2013] 1 Lloyd's Rep. 24 (Singapore); *Emirates Trading Agency LLC v Prime Mineral Exports Private Ltd* [2014] EWHC 2104 (Comm), [2014] 2 Lloyd's Rep. 457 (alternative dispute resolution procedure) and ss.9(2), 12(1)(b) of the 1996 Act. See also *Amec Civil Engineering Ltd v Secretary of State for Transport* [2005] EWCA Civ 291, [2005] 1 W.L.R. 2339 (reference to engineer under ICE Conditions of Contract); *Dundas* (2013) 79 Arbitration (2) 221.
- 160 *Sumitomo Heavy Industries v Oil and Natural Gas Commission* [1994] 1 Lloyd's Rep. 45.
- 161 *Slade v Metrodent* [1953] 2 Q.B. 112.
- 162 Insolvency Act 1986 s.349A(2) (inserted by s.107(1) of and Sch.3 para.46 to the Arbitration Act 1996).

- 163 Insolvency Act 1986 s.349A(3).
- 164 Insolvency Act 1986 s.314 and Sch.5 para.6.
- 165 Under Insolvency Act 1986 s.285(1). See also *Syska v Vivendi Universal SA [2009] EWCA Civ 677, [2009] Bus. L.R. 1494* (foreign bankruptcy).
- 166 Insolvency Act 1986 s.130(2).
- 167 Insolvency Act 1986 Sch.B1 paras 43, 44 inserted by the Enterprise Act 2002 s.248 and Sch.16; *S. Straume (UK) Ltd v Bradlov Developments Ltd [2000] B.C.C. 33*.
- 168 Insolvency Act 1986 ss.165, 166, 167 and Sch.4 para.4.
- 169 Companies Act 2006 s.1001. See also ss.1000, 1003. As to a case where there is an issue whether a foreign company has been dissolved, see *Silver Dry Bulk Co Ltd v Homer Hulbert Maritime Co Ltd [2017] EWHC 44 (Comm), [2017] 1 Lloyd's Rep. 154* at [25]–[31].
- 170 *Morris v Harris [1927] A.C. 252; Baytur SA v Finagro Holdings SA [1992] 1 Lloyd's Rep. 134; Chung v Silver Dry Bulk Co Ltd [2019] EWHC 1147 (Comm)*. cf. *Eurosteel Ltd v Stinnes AG [2000] 1 All E.R. (Comm) 964* (assignment before dissolution).
- 171 Companies Act 2006 ss.1024–1034; *Union Trans-Pacific Co Ltd v Orient Shipping Rotterdam VB [2002] EWHC 1451 (Comm)*.
- 172 *A v B [2016] EWHC 3003 (Comm), [2017] 1 W.L.R. 2030*.
- 173 *Peterson Farms Inc v C & M Farming Ltd [2004] EWHC 121 (Comm), [2004] 1 Lloyd's Rep. 602* at [59].
- 174 Arbitration Act 1996 s.8. See also s.2(5) (conflict of laws).
- 175 Trustee Act 1925 s.15.
- 176 s.106.
- 177 *Aspell v Seymour [1929] W.N. 152; Shayler v Woolf [1946] 1 Ch. 320; Rumput (Panama) SA v Islamic Republic of Iran Shipping Lines [1984] 2 Lloyd's Rep. 259; Court Line Ltd v Aktiebolaget Gotaverken [1984] 1 Lloyd's Rep. 283, 289; The Padre Island [1984] 2 Lloyd's Rep. 408; Kaukomarkkinat O/Y v "Elbe" Transport Union GmbH [1985] 2 Lloyd's Rep. 85; Montedipe SpA v JTP-Ro Jugotanker [1990] 2 Lloyd's Rep. 11, 15; Schiffahrtsgesellschaft Detlev von Appen GmbH v Voest Alpine Intertrading GmbH [1997] 2 Lloyd's Rep. 279; STX Pan Ocean Co Ltd v Woori Bank [2012] EWHC 981 (Comm); Airbus SAS v Generali Italia SpA [2019] EWCA Civ 805, [2019] 2 Lloyd's Rep. 59; Argos Pereira España SL v Athenian Marine Ltd [2021] EWHC 554 (Comm)* at [6]. Contrast *Cottage Club Estates Ltd v Woodside Estates Co Ltd [1928] 2 K.B. 463; London Steamship Owners Mutual Insurance Association Ltd v Bombay Trading Co Ltd [1990] 2 Lloyd's Rep. 21, 25*; Mustill and Boyd at pp.137–139. See [1992] 8 Arbitration International 121. An assignor under an equitable assignment, of which no notice has been given to the respondent, may still commence an arbitration: *Herkules Piling Ltd v Tilbury Construction Ltd (1992) 61 Build. L.R. 107*. If the assignee commences proceedings otherwise than in accordance with the arbitration agreement, they may be held accountable to pay equitable compensation: *Argos Pereira España SL v Athenian Marine Ltd [2021] EWHC 554 (Comm)* at [19].
- 178 *Montedipe SpA v JTP-Ro Jugotanker [1990] 2 Lloyd's Rep. 11; Baytur SA v Finagro Holding SA [1992] Q.B. 610; Charles M Willie & Co (Shipping) Ltd v Ocean Laser Shipping Ltd [1999] 1 Lloyd's Rep. 225, 241*. See also *A v B [2016] EWHC 3003 (Comm), [2017] 1 W.L.R. 2030*.

- 179 *Yeandle v Wynn Realisations Ltd* (1999) 47 *Const. L.R.* 1; *Tackaberry* [2001] *Const. L.J.* 17(4), 287.
- 180 See Vol.I, para.22-089.
- 181 Mustill and Boyd, Commercial Arbitration, 2nd edn (1989), p.137. See *Freshwater v Western Australian Assurance Co Ltd* [1933] 1 K.B. 315; *Dennehy v Bellamy* (1938) 60 *Li. L. Rep.* 269; *Smith v Pearl Assurance Co Ltd* (1939) 63 *Li. L. Rep.* 1; *Oakland Metal Co Ltd v Banairn & Co Ltd* [1953] 2 *Lloyd's Rep.* 192; *CMA CGM SA v Hyundai Mipo Dockyard Co Ltd* [2008] EWHC 2791 (Comm), [2009] 1 *Lloyd's Rep.* 213 at [23].
- 182 *AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC* [2010] EWHC 772 (Comm), [2010] 2 *Lloyd's Rep.* 493 at [27], [28], [32] (affirmed [2011] EWCA Civ 647, [2011] 2 *Lloyd's Rep.* 233, [2013] UKSC 35); *Fortress Value Recovery Fund 1 LLC v Blue Skye Special Opportunities Fund LP* [2013] EWCA Civ 367, [2013] 1 *Lloyd's Rep.* 606; *Tweeddale* (2011) 27 *Arbitration International* 653.
- 183 *Nissrin Shipping Co Ltd v Cleaves & Co Ltd* [2003] EWHC 2602 (Comm), [2004] 1 *Lloyd's Rep.* 38; Vol.I, para.20-107. In *Fortress Value Recovery Fund 1 LLC v Blue Skye Special Opportunities Fund LP* [2013] EWCA Civ 367, [2013] 1 *Lloyd's Rep.* 606 the Court of Appeal stated that a third party, which seeks to rely on the defence of an exclusion clause in the contract, may in some circumstances be entitled to invoke an arbitration clause in the contract.
- 184 *Wright* (1999) 2 *Int. Arb. L.R.* 137; *Diamond* (2001) 17 *Arbitration International* 211; *Ambrose* [2001] *J.B.L.* 415. cf. *Fortress Value Recovery Fund 1 LLC v Blue Skye Special Opportunities Fund LP* [2013] EWCA Civ 367, [2013] 1 *Lloyd's Rep.* 606 at [31], [47].
- 185 *Freshwater v Western Australia Insurance Co Ltd* [1933] 1 K.B. 515; *Dennehy v Bellamy* [1938] 2 All E.R. 262; *Smits v Pearl Assurance Co Ltd* [1939] 1 All E.R. 95; *Digby v General Accident Fire and Life Assurance Corp Ltd* [1940] 2 K.B. 226, 236; *The Padre Island* [1984] 2 *Lloyd's Rep.* 408, 414; *The Padre Island* (No.2) [1987] 2 *Lloyd's Rep.* 529, 533; *London Steamship Owners Mutual Insurance Association Ltd v Bombay Trading Co Ltd* [1990] 2 *Lloyd's Rep.* 21, 26; *Schiffahrtsgesellschaft Detler von Appen GmbH v Wiener Allianz Versicherungs AG* [1997] 2 *Lloyd's Rep.* 279; *West Tankers Inc v Ras Riunione Adriatica di Sicurtà* [2005] EWHC 454 (Comm), [2005] 2 *Lloyd's Rep.* 257 (appealed to the House of Lords on another point: [2007] UKHL 4, [2007] 1 *Lloyd's Rep.* 391); *Through Transport Mutual Insurance Assn (Eurasia) Ltd v New India Assurance Co Ltd* (No.2) [2005] EWHC 455 (Comm), [2005] 2 *Lloyd's Rep.* 378; *Starlight Shipping Co v Tai Ping Insurance Co* [2007] EWHC 1893 (Comm), [2008] 1 *Lloyd's Rep.* 230 at [13]; *William McIlroy Swindon Ltd v Quinn Insurance Ltd* [2010] EWHC 2448 (TCC), [2011] *B.L.R.* 136. cf. *Markel International Co Ltd v Craft* [2006] EWHC 3150 (Comm), [2007] *Lloyd's Rep. I.R.* 403. See also *The Fanti and the Padre Island* (No.2) [1990] 2 *Lloyd's Rep.* 191. For the position where arbitration proceedings have already commenced, see *London Steamship Owners Mutual Insurance Association v Bombay Trading Co Ltd* [1990] 2 *Lloyd's Rep.* 21.
- 186 [2021] EWCA Civ 67, [2021] *Lloyd's Rep. I.R.* 145.
- 187 *Stellar Shipping Co LLC v Hudson Shipping Lines* [2010] EWHC 2985 (Comm), [2012] I.C.L.C. 476.
- 188 *Scott v Avery* (1856) 5 H.L.C. 811.

- 189 *B v S [2011] EWHC 691 (Comm), [2011] 2 Lloyd's Rep. 18*. cf. *Mantovani v Carapelli [1978] 2 Lloyd's Rep. 63*. See *Tweeddale and Tweeddale (2011) 77 Arbitration 423*.
- 190 A claim for damages may, in certain circumstances, lie for breach of the clause, which claim will be a dispute arising out of the contract and subject to the arbitration clause: *Mantovani v Carapelli SpA [1980] 1 Lloyd's Rep. 375*. See also *Glencore Grain Ltd v Agros Trading Ltd [1999] 2 Lloyd's Rep. 410*.
- 191 *Toronto Ry v National British, etc. Insurance Co (1914) 20 Com. Cas. 1*.
- 192 As to this, see *Hickman & Co v Roberts [1913] A.C. 229; Neale v Richardson [1938] 1 All E.R. 753*; cf. *Panamena Europea Navigacion Cia Lda v Frederick Leyland & Co Ltd [1947] A.C. 428*.
- 193 s.9(5). See also s.10(2) (interpleader).
- 194 *Board of Trade v Cayzer, Irvine & Co [1927] A.C. 610*.
- 195 See also s.71(4), para.34-182, below.
- 196 *Dennehy v Bellamy [1938] 2 All E.R. 262; Socony Mobil Oil Co Inc v West of England Shipowners Mutual Assurance (London) Ltd [1984] 2 Lloyd's Rep. 408*.
- 197 *Emmott v Michael Wilson & Partners Ltd [2008] EWCA Civ 184, [2008] 1 Lloyd's Rep. 616* at [79], [105], [115] and [134]. See also *Dolling-Baker v Merrett [1990] 1 W.L.R. 1205; Hassneh Insurance Co v Stewart J Mew [1993] 2 Lloyd's Rep. 243; London & Leeds Estates Ltd v Paribas (No.2) [1995] 1 E.G.L.R. 102; Ali Shipping Corp v Shipyard Trogir [1999] 1 W.L.R. 314; Halliburton Co v Chubb Bermuda Insurance Ltd [2020] UKSC 48, [2020] 3 W.L.R. 1474* at [82]–[105]. Contrast *Esso Australia Resources Ltd v Plowman (1995) 183 C.L.R. 10* (High Court of Australia) (not followed in *Secretary of State for Transport v Stagecoach South Western Trains Ltd [2009] EWHC 2431 (Comm), [2010] 1 Lloyd's Rep. 175*). See *Neill (1996) 12 Arbitration International 287; Rogers and Miller (1996) 12 Arbitration International 319; Fortier (1999) 15 Arbitration International 131; Trakman (2002) 18 Arbitration International 1; Rawding and Seeger (2003) 19 Arbitration International 483; Tweeddale (2005) 21 Arbitration International 59; Kovris (2005) 22 J. Int. Arb. (2) 127; Seriki [2006] J.B.L. 300; Misra and Jordans (2006) 23 J. Int. Arb. (1) 39; Crookenden (2009) 25 Arbitration International 603*. See also *Glidepath BV v Thomson [2005] EWHC 818 (Comm), [2005] 2 Lloyd's Rep. 548* (application by non-party for copies of documents on court record refused on grounds of confidentiality).
- 198 *Associated Electric and Gas Insurance Services Ltd v European Reinsurance Co of Zurich [2003] UKPC 11, [2003] 1 W.L.R. 1041* at [20]; *Emmott v Michael Wilson & Partners Ltd [2008] EWCA Civ 184, [2008] 1 Lloyd's Rep. 616* at [84].
- 199 *Emmott v Michael Wilson & Partners Ltd [2008] EWCA Civ 184, [2008] 1 Lloyd's Rep. 616* at [84]. But see Thomas LJ at [119].
- 200 See also *Department of Economics, Policy and Development of the City of Moscow v Bankers Trust Co [2004] EWCA Civ 314, [2005] Q.B. 307* (judgment on application to challenge award); CPR r.62.10. Contrast *C v D [2007] EWCA Civ 1282, [2008] 1 Lloyd's Rep. 239* at [34] (practice of Court of Appeal).
- 201 *Ali Shipping Corp v Shipyard Trogir [1999] 1 W.L.R. 314* at 327.
- 202 *Ali Shipping Corp v Shipyard Trogir [1999] 1 W.L.R. 314* at 326; *Emmott v Michael Wilson & Partners Ltd [2008] EWCA Civ 184, [2008] 1 Lloyd's Rep. 616* at [93], [107]; *Westwood*

- Shipping Lines Inc v Universal Schiffahrtsgesellschaft mbH [2012] EWHC 3837 (Comm), [2013] 1 Lloyd's Rep. 670.*
- 203 *Emmott v Michael Wilson & Partners Ltd [2008] EWCA Civ 184, [2008] 1 Lloyd's Rep. 616* at [85].
- 204 *Emmott v Michael Wilson & Partners Ltd [2008] EWCA Civ 184, [2008] 1 Lloyd's Rep. 616* at [107], [131].
- 205 cf. *Emmott v Michael Wilson & Partners Ltd [2008] EWCA Civ 184, [2008] 1 Lloyd's Rep. 616* at [87].
- 206 *Esso Australia Resources Ltd v Plowman* (1995) 183 C.L.R. 10; *Commonwealth of Australia v Cockatoo Dockyard Pty Ltd* (1995) 36 N.S.W.L.R. 662; *London and Leeds Estates Ltd v Paribas Ltd (No.2)* [1995] 1 E.G.L.R. 102, 109; *Ali Shipping Corp v Shipyard Trogir* [1999] 1 W.L.R. 314, 327–328; *Emmott v Michael Wilson & Partners Ltd [2008] EWCA Civ 184, [2008] 1 Lloyd's Rep. 616* at [96]–[100].
- 207 *Ali Shipping Corp v Shipyard Trogir* [1999] 1 W.L.R. 314 at 329.
- 208 See below, para.34-148.
- 209 *Associated Electric and Gas Insurance Services Ltd v European Reinsurance Co of Zurich* [2003] UKPC 11, [2003] 1 W.L.R. 1041.
- 210 *Manchester City Football Club Ltd v The Football Association* [2021] EWCA Civ 1110 at [62].

# Section 3. - Stay of Legal Proceedings

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Chapter 34 - Arbitration<sup>1</sup>

Section 3. - Stay of Legal Proceedings

## Resort to legal proceedings

- 34-051 If, contrary to an agreement to refer a matter to arbitration, one party resorts to legal proceedings in an English court in respect of that matter, the court has jurisdiction to hear the dispute.<sup>211</sup> The existence of the arbitration agreement, or even the fact that an arbitration is already in progress, affords no defence to the action. The appropriate course is for the other party to apply for a stay of the legal proceedings.<sup>212</sup> Conversely, there is no principle that requires arbitral proceedings to terminate if a party to the arbitration resorts to legal proceedings.<sup>213</sup> Nor does resort to legal proceedings of itself constitute a repudiation of the arbitration agreement,<sup>214</sup> However, where one party denies that he is bound by the arbitration agreement and thereby repudiates it, the issue of legal proceedings by the other party may amount to an acceptance of the repudiation and so bring the agreement to an end.<sup>215</sup> If there are concurrent or overlapping proceedings in respect of the same matter, both in arbitral and legal proceedings, the court may grant an injunction to restrain the continuance of the arbitral proceedings. But it will not necessarily do so and may allow them to continue.<sup>216</sup> Yet in such a case, it would seem that an award in concurrent proceedings without the consent of both parties would then have no effect.<sup>217</sup> Damages may be awarded against a party who resorts to legal proceedings in breach of an arbitration agreement,<sup>218</sup> or an indemnity,<sup>219</sup> although damages may well be an inadequate remedy.<sup>220</sup> A third party who knowingly and intentionally induces or procures such a breach of contract may also be liable in damages in tort.<sup>221</sup>

## Foreign proceedings

34-052



The court has power<sup>222</sup> to restrain by injunction the institution or continuance of proceedings in a foreign court which are brought in breach of an agreement to arbitrate in England.<sup>223</sup> Such an injunction will lie even when neither of the parties to the agreement has commenced or intends to commence arbitration proceedings.<sup>224</sup> It will also, where the parties have expressly chosen England as the seat of arbitration, restrain by injunction foreign legal proceedings seeking to challenge, vacate or review an English arbitral award<sup>225</sup> or if it is in the interests of justice to do so.<sup>226</sup> The courts now appear to be more willing to grant anti-suit injunctions and will generally do so in the absence of a strong reason not to do so.

<sup>227</sup>

**U** A judgment given by a court of an overseas country in any proceedings will not be recognised or enforced in the United Kingdom if the bringing of proceedings in that court was contrary to a valid and effective agreement<sup>228</sup> under which the dispute in question was to be settled otherwise than by proceedings in the courts of that country, and those proceedings were not brought in that court by, or with the agreement of, the person against whom the judgment was given, and that person did not counterclaim or otherwise submit to the jurisdiction<sup>229</sup> of that court.<sup>230</sup>

## Proceedings within the EU instituted before 31 December 2020

- 34-053 The UK is no longer a member of the European Union. The jurisdictional rules applicable under Regulation (EU) 1215/2012 (the Brussels Regulation Recast) continue in force in respect of proceedings instituted prior to 11.00 pm on 31 December 2020.<sup>231</sup> If those jurisdictional rules do not apply, then the position is that set out in para.34-052 above. This section addresses the position insofar as the EU jurisdictional rules continue to apply. In *West Tankers Inc v RAS Riunione Adriatica di Sicurtà*<sup>232</sup> the House of Lords referred to the European Court of Justice the following question:

“Is it consistent with EC Regulation 44/2001 for a court of a Member State to make an order to restrain a person from commencing or continuing proceedings in another Member State on the ground that such proceedings are in breach of an arbitration agreement?”

The Court, sub nom. *Allianz SpA v West Tankers Inc*,<sup>233</sup> answered that question in the negative. As a result of this ruling, it is clear that it was no longer open to an English court to issue an anti-suit injunction to restrain a party from commencing or continuing proceedings in another Member State (including a Lugano Convention State) in breach of an arbitration agreement, although it was equally clear that the ruling did not prevent the issue of an anti-suit injunction where the proceedings were in a non-Member State.<sup>234</sup>

34-054 The *Allianz* decision attracted considerable criticism because it appeared to create the opportunity to deploy what has been termed the “foreign torpedo”,<sup>235</sup> that is to say, that a recalcitrant party could effectively torpedo the arbitral process by initiating proceedings in another Member State where it considered that a favourable decision on the merits and/or on the invalidity or inapplicability of the arbitration agreement was more probable. The further implications of the decision were subsequently considered by the Court of Appeal in *National Navigation Co v Endesa Generacion SA (The Wadi Sudr)*.<sup>236</sup> In that case a number of important questions were addressed with respect to the effect on an arbitration in England, and on English proceedings relating to arbitration, of legal proceedings in another Member State. These questions involved, in particular, the scope of the “arbitration exception” in art.1(2)(d) of Regulation 44/2001, which provided that the Regulation as a whole should “not apply to arbitration”.<sup>237</sup> In the *Allianz* case, the European Court gave a narrow interpretation to that exception. Since that time, however, Regulation 44/2001 has been repealed and replaced (from 10 January 2015) by Regulation (EU) 1215/2012 of the European Parliament and the Council.<sup>238</sup> This new regulation (the “revised Regulation” or “Brussels Regulation Recast” or “Brussels bis”) explains and expands the meaning of the identical arbitration exception in its provisions. Certain aspects of the *National Navigation* case in consequence now require reconsideration in the light of this change.

34-055 Recital (12) of the revised Regulation provides:

“This Regulation should not apply to arbitration. Nothing in this Regulation should prevent the courts of a Member State, when seised of an action in a matter in respect of which the parties have entered into an arbitration agreement, from referring the parties to arbitration, from staying or dismissing the proceedings, or from examining whether the arbitration agreement is null and void, inoperative or incapable of being performed, in accordance with their national law.

A ruling given by a court of a Member State as to whether or not an arbitration agreement is null and void, inoperative or incapable of being performed should not be subject to the rules of recognition and enforcement laid down in this Regulation, regardless of whether the court decided on this as a principal issue or as an incidental question.

On the other hand, where a court of a Member State, exercising jurisdiction under this Regulation or under national law, has determined that an arbitration agreement is null and void, inoperative or incapable of being performed, this should not preclude that court’s judgment on the substance of the matter from being recognised or, as the case may be, enforced in accordance with this Regulation. This should be without prejudice to the competence of the courts of the Member States to decide on the recognition and enforcement of arbitral awards in accordance with the Convention on the Recognition

and Enforcement of Foreign Arbitral Awards, done at New York on 10 June 1958 ('the 1958 New York Convention'), which takes precedence over this Regulation.

This Regulation should not apply to any action or ancillary proceedings relating to, in particular, the establishment of an arbitral tribunal, the powers of arbitrators, the conduct of an arbitration procedure or any other aspects of such a procedure, nor to any action or judgment concerning the annulment, review, appeal, recognition or enforcement of an arbitral award."

- 34-056 The effect of Recital (12) is not entirely clear, but the following propositions can, it is submitted, be formulated as a result of the revised Regulation.
- 34-057 First, the revised Regulation does not revive the power of the English courts to issue an anti-suit injunction to restrain a party from commencing or continuing legal proceedings in another Member State in breach of an arbitration agreement since, as the European Court stated in the *Allianz* case, "an anti-suit injunction ... runs counter to the trust which the Member States accord to one another's legal systems and judicial Institutions".<sup>239</sup>
- 34-058 Secondly, where an arbitration is seated in England and one of the parties commences or continues proceedings in another Member State with respect to an identical or related matter either on the substantive claim, e.g. for damages for breach of contract or a declaration of non-liability, or as to the validity or applicability of the arbitration agreement, neither the arbitral tribunal nor an English court in proceedings ancillary to the arbitration is precluded from considering those matters by reason of the mere existence of the foreign proceedings.<sup>240</sup> There is nothing to prevent parallel proceedings in both jurisdictions.
- 34-059 Thirdly, neither the arbitral tribunal nor the court is bound to recognise or enforce the decision of a court of another Member State as to the validity or applicability of an arbitration agreement. The tribunal and the court are free to reach their own conclusion on this matter. This appears clearly from the first and second paragraphs of Recital (12). So, for example, in arbitral proceedings or on an application to the court under ss.32 or 67 of the Arbitration Act 1996 to determine the jurisdiction of the arbitral tribunal or under ss.66 or 101 to enforce the award, the tribunal and the court would not be bound to recognise the judgment of a court of another Member State which has held the arbitration agreement to be invalid or inapplicable. This effectively reverses the decision of the Court of Appeal in the *National Navigation* case where the court had held<sup>241</sup> that the judgment of a Spanish court that a London arbitration clause had never been effectively incorporated into the parties' contract had to be recognised under Regulation 44/2001.

- 34-060 Fourthly, it seems that an English court is (subject to certain exceptions) bound by arts 36 and 39 of the revised Regulation to recognise or, as the case may be, to enforce a judgment given in proceedings in another Member State on the *substance of the matter* where the foreign court has determined that the arbitration agreement is invalid or inapplicable. The third paragraph of Recital (12) indicates that the “arbitration exception” cannot then be invoked. An English court cannot refuse to recognise the judgment of a court of another Member State on the substance of the matter on the ground that the foreign court came to an erroneous decision on the applicability or enforceability of the arbitration agreement and wrongly assumed jurisdiction. Article 45(3) of the revised Regulation provides that the jurisdiction of a court of Member State cannot be reviewed by a court of another Member State. In any event, it has been held<sup>242</sup> that the mere fact that a claim is the subject of an arbitration agreement does not deprive a Member State’s court, which could otherwise determine the substance of the claim, of its jurisdiction under Regulation 44/2001 and the same would apply in the case of the revised Regulation. Nevertheless, it might be argued that, at least in certain circumstances, recognition of a judgment on the substance of the matter obtained in a court of a Member State in breach of an arbitration agreement might properly be refused by an English court on the ground that such recognition would be “manifestly contrary to public policy” (art.45(1)(a) of the revised Regulation): see Waller LJ in *Phillip Alexander Securities Ltd v Bamberger*.<sup>243</sup> However, it has been held that a refusal to recognise a judgment under the identical provision (art.34) in Regulation 44/2001 could only be justified if recognition would be “at variance to an unacceptable degree with the legal order of the state in which enforcement is sought inasmuch as it infringes a fundamental principle”.<sup>244</sup> In the *National Navigation* case the Court of Appeal<sup>245</sup> rejected the public policy argument: it could not be said that the judgment of the Spanish court in that case “would involve a manifest breach of a rule of law regarded as essential in the legal order of the United Kingdom or a right recognised as being fundamental within that legal order”. It is therefore unlikely whether circumstances would ever exist (e.g. even a “blatant disregard” of the arbitration agreement) for the application of art.45(1)(a) to be successfully invoked.
- 34-061 The obligation of the court to recognise a judgment given on the substance of the matter is, however, subject to two exceptions. The first is indicated in the third paragraph of Recital (12) itself. In the event of a conflict between the judgment of the Member State’s court on the substance of the matter and an arbitral award, an English court would be at liberty to decide not to recognise the judgment but instead to enforce the award in accordance with the New York Convention,<sup>246</sup> which takes precedence over the Regulation. The second exception is that art.45(1)(c) of the revised Regulation requires recognition to be refused “if the judgment sought to be enforced is irreconcilable with a judgment given between the same parties in the Member State addressed”. So, unless and until the foreign court gives judgment, it is open to the claimant to continue the arbitration, obtain an award<sup>247</sup> and then to enforce that award as a judgment under s.66 of the

**1996 Act.**<sup>248</sup> Any subsequent judgment of the foreign court to the contrary on the substance of the matter would not then be required to be recognised in England.<sup>249</sup>

- 34-062 The final question relates to the effect (if any) on the arbitration itself where the arbitration is seated in England and one of the parties brings proceedings on the substantive claim in another Member State in breach of the arbitration agreement and obtains a judgment on that claim. It is clear that the revised Regulation does not oblige the arbitral tribunal to recognise a judgment given in parallel proceedings in another Member State (even if an English court would be so obliged) because the revised Regulation does not apply to an arbitral tribunal.<sup>250</sup> Where, however, English law applies to the substance of the matter, then, if English law requires the court to recognise the foreign court's judgment, it would seem that the arbitral tribunal in applying English law would have to recognise that judgment. An arbitral tribunal, in applying English law, would therefore have to consider whether, under ordinary common law principles, the foreign judgment gives rise to an issue estoppel. In the *National Navigation* case Moore-Bick LJ said<sup>251</sup>:

“A judgment of a foreign court which is regarded under English conflict of laws rules as having jurisdiction and which is final and conclusive on the merits is entitled to recognition at common law: see Dicey, Morris and Collins on the Conflict of Laws, 14th Edition, paragraphs 14-027—14-029.<sup>252</sup> It follows, therefore, that arbitrators applying English law are bound to give effect to that rule.”

Nevertheless, despite this statement, it must be pointed out that, at common law, as a general rule (subject to certain exceptions) estoppel by res judicata cannot be raised against the party alleged to be estopped where that party has not submitted to the jurisdiction of the foreign court by voluntarily appearing in the foreign proceedings.<sup>253</sup>

- 34-063 The overall result of the changes made by the revised Regulation is to reduce the effectiveness of the “foreign torpedo” but to open up the possibility of conflicting Member State court decisions on the validity of the arbitration agreement and to accord a certain primacy to the judgment of that court which is the first to arrive at a decision on the substance of the matter. It would, perhaps, have been preferable if the revision had, instead, given to the courts of the seat, or putative seat, of arbitration the exclusive—or at least the primary—right to pronounce on the validity and applicability of the arbitration agreement and for that decision then to be recognised and enforceable in other Member States. Unfortunately, however, the concept of the seat is not favoured in certain Member States, nor is there unanimity as to how the seat is to be determined. Moreover, at present, even the English courts have not shown themselves averse to deciding questions on jurisdiction in respect of an alleged arbitration agreement providing for arbitration in another Member State.<sup>254</sup> A more far-reaching revision is therefore unlikely to be achieved.

## Stay of legal proceedings

- 34-064 Section 9 of the Arbitration Act 1996 provides for a stay of legal proceedings brought in an English court contrary to an arbitration agreement. It is a mandatory provision. By s.9(1):

“A party to an arbitration agreement against whom legal proceedings are brought … in respect of a matter which under the agreement is to be referred to arbitration may (upon notice to the other parties to the proceedings) apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter”.<sup>255</sup>

An application can only be made by a party against whom legal proceedings are brought (as opposed to any other party).<sup>256</sup> But “party” is defined to include any person claiming under or through a party to the arbitration agreement,<sup>257</sup> e.g. an assignee<sup>258</sup> or a statutory assignee under the Third Parties (Rights against Insurers) Act 2010.<sup>259</sup> The claimant in the legal proceedings must also be a party<sup>260</sup> and the claim in those proceedings must be in respect of a matter which under the agreement is to be referred to arbitration.<sup>261</sup> What constitutes a “matter” is to be determined in a practical and commonsense manner without adopting an analysis which is unduly broad or narrow.<sup>262</sup> A stay can be sought of a counterclaim as well as of a claim,<sup>263</sup> or of part of the legal proceedings only, and an application may be made notwithstanding that the matter is to be referred to arbitration only after the exhaustion of other dispute resolution procedures.<sup>264</sup> Section 9 applies even if the seat of the arbitration is outside England or no seat has been designated or determined.<sup>265</sup> An appeal lies to the Court of Appeal against the grant or refusal of a stay.<sup>266</sup>

- 34-065 Costs of a successful application for a stay may be awarded on an indemnity basis.<sup>267</sup>

## Time for application to stay

- 34-066 By s.9(3), an application for a stay:

“… may not be made by a person before taking the appropriate procedural step (if any) to acknowledge the legal proceedings against him or after he has taken any step in those proceedings to answer the substantive claim.”

These conditions reflect to some extent the language of s.4(1) of the Arbitration Act 1950 which stated that an application for a stay might be made “at any time after appearance, and before

delivering any pleadings or taking any other steps in the proceedings". With respect to the [1950 Act](#) it was said:

"The authorities show that a step in the proceedings means something in the nature of an application to the court, and not mere talk between solicitors and solicitors' clerks nor the writing of letters, but the taking of some step, such as taking out a summons or something of that kind, which is, in the technical sense, a step in the proceedings".<sup>268</sup>

**U** But [s.9\(3\) of the 1996 Act](#) adds to the words "after he has taken any step in those proceedings" the words "to answer the substantive claim", which limits still further the types of procedural steps that may be held to bar an application for a stay.

[269](#)

**U** Thus the following have been held not to constitute such a bar: an application for leave to defend and counterclaim,

[270](#)

**U** an application for summary judgment in the event that an application for a stay should prove unsuccessful,

[271](#)

**U** and filing a defence subject to a reservation of rights pending an application for permission to appeal from a decision refusing a stay.

[272](#)

**U** Commencing an action in a foreign court not having jurisdiction to try the claim is not a step in the proceedings.

[273](#)

**U** An application for a stay should nevertheless be made as soon as possible lest costs are unnecessarily incurred and thrown away by the delay in taking the arbitration point.

[274](#)

**U** CPR Pt 11 is not applicable to applications under [s.9](#).

[275](#)

**U**

## Mandatory stay

On an application under s.9, s.9(4) provides that the court *shall* grant a stay unless satisfied that the arbitration agreement is null and void,<sup>276</sup> inoperative,<sup>277</sup> or incapable of being performed.<sup>278</sup> This provision for a mandatory stay reflects the provisions of the UNCITRAL Model Law and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. It is in the same terms as that of s.1 of the Arbitration Act 1975 but with the significant omission of the further ground for refusing a stay contained in the 1975 Act that “there is not in fact any dispute between the parties with regard to the matter agreed to be referred”. The onus of satisfying the court that one or more of the three statutory grounds exist for refusing a stay rests upon the party resisting the stay.<sup>279</sup> A cross-claim by way of legal set-off which is subject to a mandatory stay, cannot be set-off against a claim in legal proceedings for summary judgment.<sup>280</sup>

- 34-068 The court has power to decide, on an application for a stay, whether there was an arbitration agreement and whether the dispute was within the agreement,<sup>281</sup> even though the same question could be decided by the arbitral tribunal under s.30.<sup>282</sup> The court can:

- (1)determine on affidavit evidence that there was an arbitration agreement in which case a stay must be granted;
- (2)stay the proceedings on the basis that the arbitral tribunal is to determine the jurisdictional question under s.30<sup>283</sup>;
- (3)refuse to decide the question immediately and order an issue to be tried<sup>284</sup>; or
- (4)decide that there was no arbitration agreement and dismiss the application for a stay.<sup>285</sup>

If the answer to the question is clear, the court should resolve the matter itself rather than grant a stay of the proceedings. Indeed, the Court has said that referring the issue to the arbitral tribunal would be contrary to s.9.<sup>286</sup> The Court has held that in order to determine that there is an applicable arbitration agreement in accordance with s.9(1), the Court must be satisfied that such an agreement exists; it is not sufficient for the applicant to show merely that it has an arguable case that it is a party to an arbitration agreement.<sup>287</sup> If the respondent to the application for a stay wishes to rely on s.9(4) in order to prevent the stay, the Court must come to a clear conclusion that the agreement is null and void, inoperative or incapable of performance; a mere arguable case to the contrary would be sufficient for the Court to give effect to the arbitration agreement under s.9(4) because the respondent would not have discharged its burden of proof under that subsection.<sup>288</sup>

## Discretionary stay

- 34-069 Section 86 of the 1996 Act nevertheless provides that, in the case of a “domestic agreement” (as defined in s.85(1)), the court may refuse a stay on the further ground that “there are other sufficient grounds for not requiring the parties to abide by the arbitration agreement”. This section, in effect,

confers upon the court a wide discretion to refuse a stay similar to that previously conferred in the case of “domestic arbitration agreements” by s.4(1) of the Arbitration Act 1950. But s.86 of the 1996 Act is unlikely to be brought into force<sup>289</sup> and in consequence a stay will be mandatory even in the case of a domestic agreement, subject to the exceptions set out in s.9.

- 34-070 The court also has power, under its inherent jurisdiction to grant a stay<sup>290</sup> and it has used this power, for example, to stay proceedings properly brought in England in order to await the outcome of an arbitration in a foreign country<sup>291</sup> or on case management grounds.<sup>292</sup>

## Claims indisputably due

- 34-071 The additional words, referred to in para.34-067 above, which were contained in the 1975 Act but omitted from s.9(4), were a source of some confusion and possible misinterpretation. In particular, they had been held to justify the court, upon an application by a claimant for summary judgment under the former RSC Ord.14,<sup>293</sup> to refuse a stay and give judgment for the amount claimed where the court was satisfied that the claim was indisputably due, on the ground that the court had then decided that in reality there was not in fact any “dispute” between the parties.<sup>294</sup> The omission of the additional words has taken away from the court the power to refuse a stay and give summary judgment on an indisputable, though nevertheless disputed, claim.<sup>295</sup> Accordingly a claimant will only be entitled to summary judgment without a stay if his claim is admitted. Where part of the claim is admitted, then the court may, on an application for a stay, give summary judgment for that amount, but stay the action in respect of the balance or other matters in dispute.<sup>296</sup> Likewise, if liability is admitted, but there is a dispute as to damages, it would seem that the court could grant a stay on the issue of damages only.<sup>297</sup> The power of the court to give summary judgment on an *admitted* claim appears to derive from the fact that an admission, in effect, amounts to an agreement to pay the claim, so that the legal proceedings are not brought “in respect of a matter which under the agreement is to be referred to arbitration”.<sup>298</sup>
- 34-072 It is arguable that the court has lost a useful power in no longer being able to give summary judgment on an indisputable, but nevertheless disputed, claim, especially in relation to construction disputes where arbitrations may be long drawn out. But, when seised of such a claim, the arbitration tribunal itself could (under and subject to s.33 of the Act)<sup>299</sup> adopt a procedure equivalent to summary judgment to deal with the claim. If, however, it feels that this is too bold a step to take, it could give directions for an early trial of the issue on the merits.<sup>300</sup>

## Interpleader issues

- <sup>34-073</sup> Section 10 of the 1996 Act provides<sup>301</sup> that where in legal proceedings relief by way of interpleader is granted and any issue between the claimants is one in respect of which there is an arbitration agreement between them, the court granting the relief is to direct that the issue be determined by arbitration. The court must so direct unless the circumstances are such that proceedings brought by a claimant in respect of the matter would not be stayed.<sup>302</sup>

## Admiralty proceedings

- <sup>34-074</sup> Under s.11,<sup>303</sup> where Admiralty proceedings are stayed on the ground that the dispute in question should be submitted to arbitration, the court granting the stay may, if in those proceedings property has been arrested or bail or other security has been given to prevent or obtain release from arrest, either order that the property arrested be retained as security for the satisfaction of an enforceable<sup>304</sup> award given in the arbitration in respect of that dispute, or order that the stay of those proceedings be conditional on the provision of equivalent security for the satisfaction of any such award.

## Footnotes

- 1 For a more detailed account of arbitration, and practice and procedure, the reader should consult: Merkin, Arbitration Law (2007); Merkin and Flannery, Arbitration Act 1996, 5th edn (2014); Russell on Arbitration, 24th edn (2015); Tweeddale and Tweeddale, Arbitration of Commercial Disputes, 2nd edn (2012); Harris, Planterose and Tecks, Arbitration Act 1996, 5th edn (2014); Mustill and Boyd, Commercial Arbitration, 2nd edn (1989) and Supplement (2001); Redfern and Hunter, Law and Practice of International Arbitration, 5th edn (2009); Park, Arbitration of International Business Disputes, 2nd edn (2012).
- 211 See also s.43A of the Senior Courts Act 1981, inserted by s.100 of the Courts and Legal Services Act 1990 (specific powers of arbitrator exercisable by High Court).
- 212 See below, paras 34-064—34-074.
- 213 *Lloyd v Wright [1983] Q.B. 1065*.
- 214 *Rederi Kommanditselskaabet Merc-Scandia IV v Couniotis SA [1980] 2 Lloyd's Rep. 183; Lloyd v Wright [1983] Q.B. 1065; World Pride Shipping Ltd v Daiichi Chuo Kisen Kaisha [1984] 2 Lloyd's Rep. 489; BEA Hotels NV v Bellway LLC [2007] EWHC 1363 (Comm), [2007] 2 Lloyd's Rep. 493; Entico Corp Ltd v UNESCO [2008] EWHC 531 (Comm), [2008] 1 Lloyd's Rep. 673 at [11]; Tri-MG Intra Asia Airlines v Norse Air Charter Ltd [2009] SGHC*

- 13, [2009] 1 *Lloyd's Rep.* 259 at [15]–[21]; *National Navigation Co v Endesa Generacion SA* [2009] EWHC 196 (Comm), [2009] 1 *Lloyd's Rep.* 666 at [113]–[117] (reversed on other grounds [2009] EWCA Civ 1397, [2010] 1 *Lloyd's Rep.* 193).
- 215 *Downing v Al Tameer Establishment* [2002] EWCA Civ 721, [2002] 2 All E.R. (Comm) 545. Contrast *Hackwood Ltd v Areen Design Services Ltd* [2005] EWHC 2322 (TCC), (2006) 22 Const. L.J. 68 (unsuccessful application under s.72).
- 216 *Northern Regional HA v Derek Crouch Construction Co Ltd* [1984] Q.B. 644; *Industrie Chimiche Italia Centrale v Alexander G Tsaviris & Sons* [1987] 1 *Lloyd's Rep.* 508. See also *Lloyd v Wright* [1983] Q.B. 1065. cf. *University of Reading v Miller Construction Ltd* (1995) 11 Const. L.J. 388; *National Navigation Co v Endesa Generacion SA* [2009] EWHC 196 (Comm), [2009] 1 *Lloyd's Rep.* 666 at [113].
- 217 *Doleman & Sons v Ossett Corp* [1912] 3 K.B. 257, as interpreted in *Lloyd v Wright* [1983] Q.B. 1065.
- 218 *Mantovani v Carapelli SpA* [1980] 1 *Lloyd's Rep.* 375; *Sotrade Denizcilik Sanayi Ve Ticaret AS v Amadou Lo* [2008] EWHC 2762 (Comm), [2009] 1 *Lloyd's Rep.* 145 at [55]; *Kallang Shipping SA Panama v AXA Assurances Senegal* [2008] EWHC 2761 (Comm), [2009] 1 *Lloyd's Rep.* 124 at [79]; *West Tankers Inc v Allianz SpA* [2012] EWHC 854 (Comm). See also *CMA CGH SA v Hyundai Mipo Dockyard Co Ltd* [2008] EWHC 2791 (Comm), [2009] 1 *Lloyd's Rep.* 213; *Michaelson and Blanke* (2008) 74 Arbitration 23. If an assignee commences proceedings otherwise than in accordance with the arbitration agreement in respect of which they have derived rights, they may be held accountable to pay equitable compensation: *Argos Pereira Espana SL v Athenian Marine Ltd* [2021] EWHC 554 (Comm) at [19].
- 219 *West Tankers Inc v Allianz SpA* [2012] EWHC 854 (Comm), [2012] 2 All E.R. (Comm) 395.
- 220 *Starlight Shipping Co v Tai Ping Insurance Co Ltd* [2007] EWHC 1893 (Comm), [2008] 1 *Lloyd's Rep.* 230 at [12]; *Sheffield United Football Club Ltd v West Ham United Football Club Plc* [2008] EWHC 2855 (Comm), [2009] 1 *Lloyd's Rep.* 167 at [22]. See *Tan and Yao* (2003) 4 L.M.C.L.Q. 435.
- 221 *Sotrade Denizcilik Sanayi Ve Ticaret AS v Amadou Lo* [2008] EWHC 2762 (Comm), [2009] 1 *Lloyd's Rep.* 145; *Kallang Shipping SA Panama v AXA Assurances Senegal* [2008] EWHC 2761 (Comm), [2009] 1 *Lloyd's Rep.* 124.
- 222 Under s.37 of the Senior Courts Act 1981 and s.44 of the Arbitration Act 1996; see *AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC* [2013] UKSC 35, [2013] 1 W.L.R. 1889; *BNP Paribas SA v Open Joint Stock Company Russian Machines* [2011] EWHC 308 (Comm), [2012] 1 *Lloyd's Rep.* 61. For the view that the jurisdiction resides only in s.37, see *Southport Success SA v Tsingshan Holding Group Co Ltd* [2015] EWHC 1974 (Comm), [2015] 2 *Lloyd's Rep.* 578.
- 223 *Pena Copper Mines Ltd v Rio Tinto Co Ltd* (1912) 105 L.T. 846; *Gorthon Invest AB v Ford Motor Co Ltd* [1976] 2 *Lloyd's Rep.* 720; *Marazura Navegacion SA v Oceanus Mutual Underwriting Association* [1977] 1 *Lloyd's Rep.* 283; *Tracomin SA v Sudan Oil Seeds Co Ltd (No.2)* [1983] 1 W.L.R. 1026; *Sokana Industries Co Inc v Freyre & Co Inc* [1994] 2 *Lloyd's Rep.* 57; *Aggeliki Charis Compania Maritima SA v Pagnan SpA* [1995] 1 *Lloyd's Rep.* 87; *Schiffahrtsgesellschaft Detlev von Appen GmbH v Voest Alpine Intertrading GmbH*

[1997] 1 Lloyd's Rep. 179; *Shell International Petroleum Co v Coral Oil Co Ltd* [1999] 1 Lloyd's Rep. 72; *Bankers Trust Co Ltd v PT Jakarta International Hotels and Development* [1999] 1 Lloyd's Rep. 910; *XL Insurance Ltd v Owens Corning* [2002] 2 Lloyd's Rep. 500; *The Epsilon Rosa (No.2)* [2002] EWHC 2033 (Comm), [2002] 2 Lloyd's Rep. 701; affirmed [2003] EWCA Civ 938, [2003] 2 Lloyd's Rep. 509; *Through Transport Mutual Insurance Association (Eurasia) Ltd v New India Assurance Co Ltd* [2004] EWCA Civ 1598, [2005] 1 Lloyd's Rep. 67; *Atlanska Plovibda v Consignaciones Asturianas SA* [2004] EWHC 1273 (Comm), [2004] 2 Lloyd's Rep. 109 at [25]; *Starlight Shipping Co v Tai Ping Insurance Co Ltd* [2007] EWHC 1893 (Comm), [2008] 1 Lloyd's Rep. 330; *Shashoua v Sharma* [2009] EWHC 957 (Comm), [2009] 2 Lloyd's Rep. 376; *Midgulf International Ltd v Groupe Chimiche Tunisien* [2010] EWCA Civ 66, [2010] 2 Lloyd's Rep. 543; *AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC* [2013] UKSC 35, [2013] 1 W.L.R. 1889; *REC Wafer Norway AS v Moser Baer Photo Voltaic Ltd* [2010] EWHC 2581 (Comm), [2011] 1 Lloyd's Rep. 410; *Tryggingarfelagio Foroyar P/F v CPT Empresas Maritimas SA* [2011] EWHC 589 (Admly); *STX Pan Ocean Co Ltd v Woori Bank* [2012] EWHC 981 (Comm); *Joint Stock Asset Management Co Ingosstrakh-Investments v BNP Paribas SA* [2012] EWCA Civ 644, [2012] 1 Lloyd's Rep. 649; *Caresse Navigation Ltd v Zurich Assurances Maroc (The Channel Ranger)* [2014] EWCA Civ 1366, [2015] 1 Lloyd's Rep. 256; *Golden Endurance Shipping SA v RMA Watanya SA* [2014] EWHC 3917 (Comm), [2015] 1 Lloyd's Rep. 266. See also *Ecom Agroindustrial Corp Ltd v Mosharaf Composite Textile Mill Ltd* [2013] EWHC 1276 (Comm), [2013] 2 All E.R. (Comm) 983 (mandatory injunction); *Michael Wilson & Partners Ltd v Emmott* [2018] EWCA Civ 51, [2018] 1 Lloyd's Rep. 299; *Nori Holdings Ltd v Public Joint-Stock Co Bank Otkritie Financial Corp* [2018] EWHC 1343 (Comm), [2018] 2 Lloyd's Rep. 80. cf. *Louis Dreyfus Commodities Kenya Ltd v Bolster Shipping Co Ltd* [2010] EWHC 1732 (Comm), [2011] 1 Lloyd's Rep. 455; Dicey, Morris and Collins on the Conflict of Laws, 15th edn (2012), para.16-088; Dunning (2008) 74 Arbitration 254, 259. The Hague Convention on Choice of Court Agreements 2005 does not apply to arbitration and related proceedings: art.2(4).

- 224 *AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC* [2013] UKSC 35, [2013] 1 W.L.R. 1889; *Bannai v Erez* [2013] EWHC 3689 (Comm), [2014] B.P.I.R. 4.
- 225 *C v D* [2007] EWCA Civ 1282, [2008] 1 Lloyd's Rep. 239; *Noble Assurance Co v Gerling-Konzern General Insurance Co* [2007] EWHC 253 (Comm), [2007] 1 C.L.C. 85.
- 226 *Midgulf International Ltd v Groupe Chimiche Tunisien* [2010] EWCA Civ 66, [2010] 2 Lloyd's Rep. 543 at [142]; *Terna Bahrain Holding Co WLL v Al Shamsi* [2012] EWHC 3283 (Comm), [2013] 1 All E.R. (Comm) 580 at [129]–[135].
- 227 For the test to be applied by an English court when invited to grant an anti-suit injunction, see *Donohue v Armco* [2001] UKHL 64, [2002] 1 Lloyd's Rep. 425; *Turner v Grovit* [2001] UKHL 65, [2002] 1 W.L.R. 107 at [22]–[29]; *Malhotra v Malhotra* [2012] EWHC 3020 (Comm), [2013] 1 Lloyd's Rep. 285; *AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC* [2013] UKSC 35, [2013] 1 W.L.R. 1889; Times

- Trading Corp v National Bank of Fujairah* [2020] EWHC 1078 (Comm), [2020] 2 Lloyd's Rep. 317 at [38]; *Enka Insaat Ve Sanayi AS v OOO "Insurance Co Chubb"* [2020] EWCA Civ 574, [2020] 3 All E.R. 577 at [42]–[56]; [2020] UKSC 38, [2020] 1 W.L.R. 4117; *Grace Ocean Private Ltd v MV "Bulk Poland"* [2020] EWHC 3343 (Comm), [2021] 1 Lloyd's Rep. 194. The court will not necessarily restrain an application brought in a foreign court for interim or conservatory measures with respect to an arbitration in England: *U&M Mining Zambia Ltd v Kankola Copper Mines Plc* [2013] EWHC 260 (Comm), [2013] 2 Lloyd's Rep. 218. Where a third party seeks to exercise rights under a contract containing an arbitration clause, see *Shipowners' Mutual Protection and Indemnity Association (Luxembourg) v Containerships Denizcilik Nakliyat ve Ticaret AS* [2016] EWCA Civ 386, [2016] 1 Lloyd's Rep. 641; *QBE Europe SA/NV v Generali España de Seguros y Reaseguros* [2022] EWHC 2062 (Comm) at [15]–[16] and [23]–[27].
- 228 Civil Jurisdiction and Judgments Act 1982 s.32(2). But see s.32(3) and above para.34-051.
- 229 Civil Jurisdiction and Judgments Act 1982 s.33.
- 230 Civil Jurisdiction and Judgments Act 1982 s.32(1). See *Tracomin SA v Sudan Oil Seeds Co Ltd (No.2)* [1983] 1 W.L.R. 1026; *AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC* [2013] UKSC 35, [2013] 1 W.L.R. 1889.
- 231 European Union (Withdrawal) Act 2018 ss.1B, 2, 3; Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019 (SI 2019/479) regs 82, 92–93; European Union (Withdrawal Agreement) Act 2020 ss.2, 39.
- 232 [2007] UKHL 4, [2007] 1 Lloyd's Rep. 391.
- 233 C-185/07, EU:C:2009:69, [2009] 1 Lloyd's Rep. 413 (see also the opinion of Advocate-General Kokott in the reference: [2008] 2 Lloyd's Rep. 661).
- 234 *Shashoua v Sharma* [2009] EWHC 957 (Comm) at [23] and [35]–[39]; *Midgulf International Ltd v Groupe Chimiche Tunisien* [2010] EWCA Civ 66, [2010] 2 Lloyd's Rep. 543 at [68].
- 235 See *Dutson and Howarth* (2009) 75 Arbitration (3) 334; (2010) 76 Arbitration (2) 374. See also generally on the effect of the Revised Regulation: *Camilleri* (2013) 62 I.C.L.Q. 899–916.
- 236 [2009] EWCA Civ 1397, [2010] 1 Lloyd's Rep. 175 (reversing a decision at first instance of Gloster J [2009] EWHC 196 (Comm), [2009] 1 Lloyd's Rep. 666).
- 237 See *Marc Rich & Co AG v Societa Italiana Impianti SpA (The Atlantic Emperor)* (C-190/89) EU:C:1991:319, [1991] E.C.R I-3855, [1992] 1 Lloyd's Rep. 342, ECJ.
- 238 The Regulation will not apply to proceedings of which the English Court is first seised after 31 December 2020: see European Union (Withdrawal) Act 2018 ss.1B, 2, 3; Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019 (SI 2019/479) regs 82, 92–93; European Union (Withdrawal Agreement) Act 2020 ss.2, 39. The UK has submitted a formal application to re-join the Lugano Convention as an individual member at the end of the implementation period but the outcome of that application, which will depend on assent being given by the current members, is presently unknown; the European Commission has recommended that EU Member States should deny the UK's accession to the Lugano Convention.

- 239 *Nori Holdings Ltd v Public Joint-Stock Co Bank Otkritie Financial Corp* [2018] EWHC 1343 (Comm). But see *Gazprom OAO* (C-536/13) EU:C:2015:316, [2015] 1 Lloyd's Rep. 610 (anti-suit injunction by arbitral tribunal).
- 240 *Toyota Tsusho Sugar Trading Ltd v Prolat SRL* [2014] EWHC 3649 (Comm) at [15]–[17].  
 241 [2009] EWCA Civ 1397, [2010] 1 Lloyd's Rep. 175.
- 242 *Youell v La Reunion Aerienne* [2009] EWCA Civ 175 at [34].  
 243 [1997] I.L.Pr. 73 at [14] (referred to in *CMA CGM SA v Hyundai Mipo Dockyard Co Ltd* [2008] EWHC 2791 (Comm), [2009] 1 Lloyd's Rep. 213 at [35], and *DHL GBS (UK) Ltd v Fallimento Finmatica SpA* [2009] EWHC 291 (Comm), [2009] 1 Lloyd's Rep. 430 at [21]).
- 244 *Krombach v Bamerski* (C-7/98) EU:C:2000:164, [2000] E.C.R. I-1935 at [23]; *Gambazzi v Daimler-Chrysler Canada Inc* (C-394/07) EU:C:2009:219, [2009] 1 Lloyd's Rep. 647 at [27].  
 245 [2009] EWCA Civ 1397 at [66], [131] (even by Waller LJ).
- 246 See below, para.34-191. But the New York Convention (art.1) applies essentially only to the recognition or enforcement in one state of an award made in another state and not to the recognition or enforcement of an award made in the state in which recognition or enforcement is sought.
- 247 Including an award of damages for breach of the obligation to arbitrate or for an indemnity: *West Tankers Inc v Allianz SpA* [2012] EWHC 854 (Comm).
- 248 *West Tankers Inc v Allianz SpA* [2012] EWCA Civ 27, [2012] 1 Lloyd's Rep. 398; *African Fertilizers and Chemicals NIG Ltd v BD Shipsnavo GmbH & Co Reederei KG* [2011] EWHC 2452 (Comm), [2011] 2 Lloyd's Rep. 531 (enforcement of declaratory awards).
- 249 art.45(1)(c).
- 250 *CMA CGM SA v Hyundai Mipo Dockyard Co Ltd* [2008] EWHC 2791 (Comm), [2009] 1 Lloyd's Rep. 213 at [43]–[46]; *National Navigation case* [2009] EWCA Civ 1397 at [118].  
 251 [2009] EWCA Civ 1397, [2010] 1 Lloyd's Rep. 175 at [115], disapproving the view to the contrary taken by Burton J in *CMA CGM SA v Hyundai Mipo Dockyard Ltd* [2008] EWHC 2791 (Comm), [2009] 1 Lloyd's Rep. 213 at [46].
- 252 In the 15th edition, paras 14-054—14-096.
- 253 Dicey, Morris and Collins on the Conflict of Laws, 15th edn (2012), para.14-068.
- 254 *Claxton Engineering Services Ltd v TXM Olaj-es Gazkutato Kft* [2010] EWHC 2567 (Comm), [2011] 1 Lloyd's Rep. 252; *Claxton Engineering Services Ltd v TXM Olaj-es Gazkutato Kft* [2011] EWHC 345 (Comm), [2011] 1 Lloyd's Rep. 510.
- 255 For procedure, see CPR r.62.8, PD 62.2. Contrast *Exeter City Association Football Club Ltd v Football Conference Ltd* [2004] EWHC 831 (Ch), [2004] 1 W.L.R. 2910 (no stay of petition under s.459 of Companies Act 1985); *Best Beat Ltd v Rossall* [2006] EWHC 1494, [2006] B.P.I.R. 1357 (no stay of winding-up petition).
- 256 *Excalibur Ventures LLC v Texas Keystone Inc* [2011] EWHC 1624 (Comm), [2011] 2 Lloyd's Rep. 289 at [74]. But see CPR r.3.1(2)(f).
- 257 1996 Act s.82(2). See *Roussel-Uclaf v GD Searle & Co Ltd* [1978] 1 Lloyd's Rep. 225 (overruled by the Court of Appeal in *City of London v Sancheti* [2008] EWCA Civ 1283, [2009] 1 Lloyd's Rep. 117); *Rumput (Panama) SA v Islamic Republic of Iran Shipping Lines* [1984] 2 Lloyd's Rep. 259. But not by a third party: *Etri Fans Ltd v NMB (UK) Ltd* [1987]

*1 W.L.R. 110*, or by the arbitrator: *A v B [2006] EWHC 2006 (Comm), [2007] 1 Lloyd's Rep. 237*. A guarantor of a party to a contract containing an arbitration clause is not such a person: *Alfred McAlpine Construction v Unex Corp [1994] N.P.C. 16*, but the court might stay an action against the guarantor under its inherent jurisdiction: as before and see *Roche Products Ltd v Freeman Process Systems Ltd (1997) 80 B.L.R. 102; Naibu Global International Co Plc v Daniel Stewart & Co Plc [2020] EWHC 2719 (Ch), [2021] P.N.L.R. 4* at [60]–[64].

258 See above, para.34-042.

259 *Naibu Global International Co Plc v Daniel Stewart & Co Plc [2020] EWHC 2719 (Ch), [2021] P.N.L.R. 4* at [60].

260 *City of London v Sanchezi [2008] EWCA Civ 1283, [2009] 1 Lloyd's Rep. 117; J&W Sanderson Ltd v Fenox (UK) Ltd [2014] EWHC 4322 (Ch)*.

261 *Lombard North Central Plc v GATX Corp [2012] EWHC 1067 (Comm), [2012] 1 Lloyd's Rep. 662*. cf. *Sheffield United Football Club v West Ham United Football Club Plc [2008] EWHC 2855 (Comm), [2009] 1 Lloyd's Rep. 167* (application for anti-suit injunction not such a matter). In *Sodzawiczny v Ruhan [2018] EWHC 1908 (Comm)*, [43], it was held that a “matter” was any issue which is capable of constituting a dispute or difference which may fall within the scope of an arbitration agreement.

262 *Autoridad del Canal de Panama v Sacyr SA [2017] EWHC 2228 (Comm), [2017] 2 Lloyd's Rep. 351* at [123]–[129].

263 1996 Act s.9(1).

264 s.9(2).

265 s.2(2); *ET Plus SA v Welter [2005] EWHC 2115 (Comm), [2006] 1 Lloyd's Rep. 251* (ICC arbitration in Paris). Contrast *Abu Dhabi Investment Co v H Clarkson & Co Ltd [2006] EWHC 1252 (Comm), [2006] 2 Lloyd's Rep. 381* (arbitration in UAR where not compulsory).

266 *Inco Europe Ltd v First Choice Distribution [2000] 1 W.L.R. 586 HL*.

267 *A v B (No.2) [2007] EWHC 54 (Comm), [2007] 1 Lloyd's Rep. 358*. See also *Kyrgyz Mobil Tel Ltd v Fellows International Holdings Ltd [2005] EWHC 1329 (HC)*; and (damages) *Michaelson and Blanke (2008) 74 Arbitration (1) 12*. Contrast *C v D [2007] EWCA Civ 1282, [2008] 1 Lloyd's Rep. 239* at [33].

268 *Ives and Barker v Willans [1894] 2 Ch. 478, 484*. See also *Eagle Star Insurance Co Ltd v Yuval Insurance Co Ltd [1978] 1 Lloyd's Rep. 357, 361*; and the cases cited in Mustill and Boyd, Commercial Arbitration, pp.472–473.

269 *Patel v Patel [2002] Q.B. 551; Fairpark Estates Ltd v Heals Property Developments Ltd [2022] EWHC 496 (Ch)*.

270 *Patel v Patel [2002] Q.B. 551*. cf. *Baker Hughes Ltd v Steadfast Engineering Ltd [2009] EWHC 3123 (QB); Bilta (UK) Ltd v Nazir [2010] EWHC 1086 (Ch), [2010] 2 Lloyd's Rep. 29* (application to extend time for defence).

271 *Capital Trust Investments Ltd v Radio Design TJAB [2002] EWCA Civ 1356, [2002] All E.R. 450*. See also *Deposit Guarantee Fund for Individuals v Bank Frick & Co AG [2021] EWHC 3226 (Ch), [2022] 1 Lloyd's Rep. 456*.

- ②72 *Autoridad del Canal de Panama v Sacyr SA* [2017] EWHC 2337 (Comm) at [20]–[40].
- ②73 *Thyssen Inc v Calypso Shipping Corp SA* [2002] 2 Lloyd's Rep. 243.
- ②74 *Bovis Homes Ltd v Kendrick Construction Ltd* [2009] EWHC 1359 (TCC), [2009] T.C.L.R. 8.
- ②75 *Bilta (UK) Ltd v Nazir* [2010] EWHC 1086 (Ch), [2010] 2 Lloyd's Rep. 29.
- 276 *Willcock v Pickfords Removals Ltd* [1979] 1 Lloyd's Rep. 244; *AB Bofors-UVA v AB Skandia* [1982] 1 Lloyd's Rep. 410; *Accentuate Ltd v Asigra Inc* [2009] EWHC 2655 (QB), [2009] 2 Lloyd's Rep. 599 at [89]; cf. *Cia Maritima Zorroza SA v Sesostris* [1984] 1 Lloyd's Rep. 652; *JSC BTA Bank v Ablyazov* [2011] EWHC 587 (Comm), [2011] 2 Lloyd's Rep. 129; *Assaubayev v Michael Wilson and Partners Ltd* [2014] EWHC 821 (QB). See also *Associated British Ports v Tata Steel UK Ltd* [2017] EWHC 694 (Ch), [2017] 2 Lloyd's Rep. 11 at [20] (the issue in this case was whether the arbitration agreement was void for uncertainty).
- 277 *Downing v Al Tameer Establishment* [2002] EWCA Civ 721, [2002] 2 All E.R. (Comm) 545; *Accentuate Ltd v Asigra Inc* [2009] EWHC 2655, [2009] 2 Lloyd's Rep. 599 at [89]; *Aeroflot-Russian Airlines v Berezovsky* [2012] EWHC 1610 (Ch) at [104]–[112]; cf. *Lonrho v Shell Petroleum Co*, *The Times*, 1 February 1978; *The Merak* [1965] P. 223, 229; *Ethiopian Oilseeds & Pulses Export Corp v Rio del Mar Foods Inc* [1990] 1 Lloyd's Rep. 86, 98; *JSC BTA Bank v Ablyazov* [2011] EWHC 587 (Comm), [2011] 2 Lloyd's Rep. 129; *Lombard North Central Plc v GATX Corp* [2012] EWHC 1067 (Comm), [2012] 1 Lloyd's Rep. 662; *Joint Stock Co Aeroflot Russian Airlines v Berezovsky* [2013] EWCA Civ 784, [2013] 2 Lloyd's Rep. 242; *BDM Ltd v Rafael Advance Defence Systems* [2014] EWHC 451 (Comm). An arbitration agreement may be inoperative if it has been abandoned or repudiated, or if a party to the agreement is estopped from relying on it: *Costain Ltd v Tarmac Holdings Ltd* [2017] EWHC 319 (TCC), [2017] 1 Lloyd's Rep. 331 at [81]–[127].
- 278 cf. *The Rena K.* [1979] Q.B. 377 (ability to satisfy award irrelevant); *Paczy v Haendler & Natermann GmbH* [1981] 1 Lloyd's Rep. 302 (impecuniosity of claimant irrelevant).
- 279 *Nova (Jersey) Knit Ltd v Kammgarn Spinnerei GmbH* [1977] 1 W.L.R. 713, 718. But cf. at 732. See also *Associated British Ports v Tata Steel UK Ltd* [2017] EWHC 694 (Ch), [2017] 2 Lloyd's Rep. 11 at [20].
- 280 *Aectra Refining and Manufacturing Inc v Exmar NV* [1994] 1 W.L.R. 1634.
- 281 This has been described as a two-stage process, in identifying the matter in respect of which court proceedings have been instituted and whether that matter falls within the scope of an arbitration agreement: *The Republic of Mozambique v Credit Suisse International* [2021] EWCA Civ 329 at [64]–[68], [72]; *Tugashev v Orlov* [2021] EWHC 926 (Comm) at [24]–[26]. The “matter” does not have to be a cause of action; it can refer to any issue in dispute: *The Republic of Mozambique v Credit Suisse International* [2021] EWCA Civ 329 at [63].
- 282 See below, para.34-102. In *Fiona Trust & Holding Corp v Privalov* [2007] EWCA Civ 20, [2007] 2 Lloyd's Rep. 267 (affirmed sub nom. *Premier Nafta Products Ltd v Fili Shipping Co Ltd* [2007] UKHL 40) the Court of Appeal appears to have suggested (at [34]) that the arbitrators should be the first tribunal to consider jurisdiction. Contrast *Law Debenture*

- Trust Corp v Elektrim Finance Debenture Trust Corp v Elektrim Finance BV [2005] EWHC 1412 (Ch), [2005] 2 Lloyd's Rep. 755; Albon v Naza Motor Trading Sdn Bhd (No.3) [2007] EWHC 327 (Ch), [2007] 2 Lloyd's Rep. 1; JSC BTA Bank v Ablyazov [2011] EWHC 587 (Comm), [2011] 2 Lloyd's Rep. 129; AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC [2011] EWCA Civ 647, [2011] 2 Lloyd's Rep. 233 at [81]–[85], [98]–[100], [2013] UKSC 35, [2013] 1 W.L.R. 1889; Excalibur Ventures LLC v Texas Keystone Inc [2011] EWHC 1624 (Comm), [2011] 2 Lloyd's Rep. 289 at [57]–[67].*
- 283 In *Albon v Naza Motor Trading Sdn Bhd (No.3) [2007] EWHC 327 (Ch), [2007] 2 Lloyd's Rep. 1* at [16] it was suggested that this could only be done under the inherent jurisdiction (below, para.34-070) as s.9 requires the court to be satisfied that there is an arbitration agreement and that the dispute is within that agreement before granting a stay. See also *Capes (Hatherden) Ltd v Western Arable Services Ltd [2009] EWHC 3065 (QB), [2010] 1 Lloyd's Rep. 477* at [22]; *Hashwani v OMV Maurice Energy Ltd [2015] EWHC 1811 (Comm)* at [26], [2015] EWCA Civ 1171, (2015) 163 Con. L.R. 259 at [31]–[34] (reversing the judge's decision in exercising his discretion to order a stay).
- 284 *Bilta (UK) Ltd v Nazir [2010] EWHC 1086 (Ch), [2010] 2 Lloyd's Rep. 29; Kaye v Nu Skin UK Ltd [2009] EWHC 3509 (Ch), [2011] 1 Lloyd's Rep. 40.* But see *JSC BTA Bank v Ablyazov [2011] EWHC 587 (Comm), [2011] 2 Lloyd's Rep. 129* at [29], [50].
- 285 *Ahmad Al-Naimi (t/a Buildmaster Construction Services) v Islamic Press Agency Inc [2000] 1 Lloyd's Rep. 522*; approving the analysis in *Birse Construction Ltd v St David Ltd [1999] B.L.R. 194; [2000] B.L.R. 57; Capes (Hatherden) Ltd v Western Arable Services Ltd [2009] EWHC 3065 (QB), [2010] 1 Lloyd's Rep. 477; Dallah Real Estate & Tourism Co v Ministry of Religious Affairs of the Government of Pakistan [2010] UKSC 46, [2011] 1 A.C. 763* at [97]; *JSC BTA Bank v Ablyozov [2011] EWHC 587 (Comm), [2011] 2 Lloyd's Rep. 129* at [28]. But see the observations of the Court of Appeal in *Claxton Engineering Services Ltd v TXM Olaj-es Gazkutato Kft [2011] EWCA Civ 410, [2011] Arb. L.R. 16*.
- 286 *Joint Stock Company "Aeroflot Russian Airlines" v Berezovsky [2013] EWCA Civ 784, [2013] 2 Lloyd's Rep. 242* at [76]–[79]; *Costain Ltd v Tarmac Holdings Ltd [2017] EWHC 319 (TCC), [2017] 1 Lloyd's Rep. 331* at [80]; *Microsoft Mobile Oy (Ltd) v Sony Europe Ltd [2017] EWHC 374 (Ch), [2017] 5 C.M.L.R. 5* at [41] and [82]–[84].
- 287 *Associated British Ports v Tata Steel UK Ltd [2017] EWHC 694 (Ch), [2017] 2 Lloyd's Rep. 11* at [20].
- 288 *Golden Ocean Group Ltd v Humpuss Intermoda Transportasi TBK Ltd (The Barito) [2013] EWHC 1240 (Comm), [2013] 2 Lloyd's Rep. 421* at [59].
- 289 See above, para.34-005.
- 290 *Ahmad Al-Naimi (t/a Buildmaster Construction Services) v Islamic Press Agency [2000] 1 Lloyd's Rep. 522, 525; T&N Ltd v Royal & Sun Alliance Plc [2002] EWHC 2420, [2002] C.L.C. 1342; Albon v Naza Motor Trading Sdn Bhd (No.3) [2007] EWHC 327 (Ch), [2007] 2 Lloyd's Rep. 1* at [16]–[24]; *Turville Heath Inc v Chartis Insurance UK Ltd [2012] EWHC 3019 (TCC), 145 Con. L.R. 163; Assaubayev v Michael Wilson and Partners Ltd [2014] EWHC 821 (QB); cf. El Nasharty v J Sainsbury Plc [2003] EWHC 2195 (Comm), [2004] 1 Lloyd's Rep. 309* at [29]; *City of London v Sanchez [2008] EWCA Civ 1283, [2009] 1 Lloyd's Rep. 117; Clyde & Co LLP v Bates van Winkelhof [2011] EWHC 668 (QB), [2011] I.R.L.R.*

- 467; *PT Thiess Contractors Indonesia v PT Kaltim Prima Coal* [2011] EWHC 1842 (Comm); *Deutsche Bank AG v Tongkah Harbour Public Co Ltd* [2011] EWHC 2251 (QB), [2012] 1 All E.R. (Comm) 194; *J&W Sanderson Ltd v Fenox (UK) Ltd* [2014] EWHC 4322 (Ch).
- 291 *Reichhold Norway ASA v Goldman Sachs International* [2002] 1 W.L.R. 173; *ET Plus SA v Welter* [2005] EWHC 2115 (Comm), [2006] 1 Lloyd's Rep. 251 at [91]; *Citigroup Global Markets Ltd v Amatra Leveraged Feeder Holdings Ltd* [2012] EWHC 1331 (Comm) at [73]–[82]. See also *A v B* [2006] EWHC 2006 (Comm), [2007] 1 Lloyd's Rep. 237 (application by arbitrator). cf. *Classic Maritime Inc v Lion Diversified Holdings Berhad* [2009] EWHC 1142 (Comm), [2010] 1 Lloyd's Rep. 59.
- 292 *JSC BTA Bank v Ablyazov* [2011] EWHC 587 (Comm), [2011] 2 Lloyd's Rep. 129; *Lombard North Central Plc v GATX Corp* [2012] EWHC 1067 (Comm), [2012] 1 Lloyd's Rep. 662.
- 293 Now CPR Pt 24.
- 294 See the discussion in *Hayter v Nelson and Home Insurance Co* [1990] 2 Lloyd's Rep. 265, CA; DAC Report para.55.
- 295 *Halki Shipping Corp v Sopex Oils Ltd* [1998] 1 W.L.R. 726; *Wealands v CLC Contractors Ltd* [1999] 2 Lloyd's Rep. 739; *Collins (Contractors) Ltd v Baltic Quay Management (1994) Ltd* [2004] EWCA Civ 1757, [2005] Build. L.R. 63.
- 296 *Ellis Mechanical Services Ltd v Wates Construction Ltd* [1978] 1 Lloyd's Rep. 33. Contrast *Associated Bulk Carriers Ltd v Koch Shipping Inc* [1978] 1 Lloyd's Rep. 24.
- 297 *Texaco Ltd v Eurogulf Shipping Ltd* [1987] 2 Lloyd's Rep. 541.
- 298 But in *Glencore Trading Ltd v Agros Trading Ltd* [1999] 2 Lloyd's Rep. 410, Clarke LJ said, 422, “I do not accept that a dispute cannot continue to be a dispute once the claim has been admitted”. See also *Getwick Engineers Ltd v Pilecon Engineering Ltd* [2002] 1020 HKCV 1 at [23]; *Tri-MG Intra Asia Airlines v Norse Air Charters Ltd* [2009] SGHC 13, [2009] 1 Lloyd's Rep. 258 at [58] and above, para.34-030.
- 299 See below, para.34-107.
- 300 See (1997) 13 Arbitration International 403, 424; cf. (1998) 64 Arbitration (No.1, Supplement) 48.
- 301 This section is based on s.5 of the 1950 Act. It is mandatory.
- 302 subs.(2) deals with the effect of dismissal of the application on a “Scott v Avery” clause: see above, para.34-047.
- 303 This section re-enacted s.26 of the Civil Jurisdiction and Judgments Act 1982, but with the omission of subs.(2) of that section. It is mandatory.
- 304 i.e. enforceable in England.

## Section 4. - Commencement of Arbitral Proceedings

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 34 - Arbitration<sup>1</sup>

### Section 4. - Commencement of Arbitral Proceedings

#### Conditions as to time

- 34-075 The parties to a contract may lawfully agree that arbitral proceedings must be commenced, and the claimant's arbitrator appointed, within a shorter time than that allowed by the [Limitation Act 1980](#), and that if this provision is not complied with the claim shall be deemed to be waived and absolutely barred.<sup>305</sup> Such a clause is not contrary to public policy as tending to oust the jurisdiction of the court, however short the time may be.<sup>306</sup> Yet a clause of this nature will be narrowly construed<sup>307</sup> and it may even be that a party who commits a fundamental breach of contract will be unable to take advantage of the clause when sued in the ordinary courts.<sup>308</sup> But if the other party claims arbitration in such a case, he cannot do so after the time has expired<sup>309</sup> unless the court exercises its statutory power to extend the time. A claim will be barred by an arbitrator's award deciding that the claim is out of time,<sup>310</sup> but not by an arbitrator declining jurisdiction.<sup>311</sup>

#### Power of court to extend time for beginning arbitral proceedings

- 34-076 [Section 12 of the 1996 Act](#) confers on the court power to extend a contractual time limit which would otherwise bar the claim. Where an arbitration agreement to refer future disputes to arbitration provides that a claim shall be barred, or the claimant's right extinguished, unless the claimant takes within a time fixed by the agreement some step to begin arbitral proceedings (or to begin other dispute resolution procedures which must be exhausted before arbitral proceedings can be begun), the court may by order extend the time for taking that step.<sup>312</sup> An application for such an order can be made only after a claim has arisen and after exhausting any available arbitral process for obtaining an extension of time.<sup>313</sup> Previously, under [s.27 of the 1950 Act](#), the court had a wide discretion to extend time "if of opinion that in the circumstances of the case undue

hardship would otherwise be caused". But, under s.12(3), a much narrower test is to be applied.<sup>314</sup> The court can make an order only if satisfied:

- (a)that the circumstances are such as were outside the reasonable contemplation of the parties when they agreed the provision in question, and that it would be just to extend the time, or
- (b)that the conduct of one party makes it unjust to hold the other party to the strict terms of the provision in question.

It is to be noted that subs.3(a) places no limit on the circumstances referred to and that all the circumstances in which the application for an extension arises are potentially relevant,<sup>315</sup> provided that they caused or at least significantly contributed to the failure to observe the time bar.<sup>316</sup> But the court can have regard only to such circumstances as were "outside the reasonable contemplation of the parties when they agreed the provision in question" and this may involve consideration of the relevant transaction, of ordinary practices within that type of transaction and with the reasonable expectation of parties involved in such a transaction.<sup>317</sup> It has also been said that the circumstances must be such that, if they had been drawn to the attention of the parties when they agreed the provision, they would at the very least have contemplated that the time-bar might not apply.<sup>318</sup> The fact that a party failed to read or comprehend the time limitation clause in the contract, or the fact that a party made a mistake as to the operation of the clause both in regard to making a claim and appointing an arbitrator, has been held not to be something which was outside the reasonable contemplation of the parties.<sup>319</sup> The ground set out in subs.3(b) would appear to require at least that the failure to comply with the time bar is attributable to the conduct of the party relying on the clause.<sup>320</sup>

34-077 An order extending time is therefore likely to be the exception rather than the rule. It is arguable that time limitation clauses are a beneficial feature in commercial contracts, since they enable the parties to draw a line beneath transactions at a much earlier stage than limitation statutes allow, and the underlying philosophy of the 1996 Act is to respect party autonomy. Nevertheless, a clause barring a claim unless arbitral proceedings or other dispute resolution procedures are begun within a short period of time can operate very harshly in some situations, for example, in "string" contracts where the buyer resells the goods and defects therein do not become apparent until time has expired. In consumer contracts, clauses imposing a time limit for the commencement of arbitral proceedings may well be regarded as unfair and so not binding on the consumer under the Unfair Terms in Consumer Contracts Regulations 1999<sup>321</sup> or (for contracts made after 1 October 2014) the Consumer Rights Act 2015 Pt 2.<sup>322</sup>

34-078 If the conditions are satisfied for the making of an order, the court may extend the period and on such terms as it thinks fit, and may do so whether or not the time previously fixed (by agreement or by a previous order) has expired.<sup>323</sup> The permission of the court is required for any appeal from a decision of the court under s.12.<sup>324</sup> The applicant will normally have to pay the costs of any s.12 application.

- 34-079 The court's power to extend time for beginning arbitral proceedings applies, not only where the effect of a failure to comply with the stipulated time limit is merely to deprive a claimant of the right to go to arbitration, but also where non-compliance bars or extinguishes the claim itself.<sup>325</sup> But no such power exists if the clause provides that a claim is to be barred or extinguished unless notified to the other party within a limited period of time, except where such notification is a step to begin arbitral proceedings.<sup>326</sup> Nor can such a power be exercised where a statutory time bar applies, e.g. that provided for in the Hague-Visby Rules.<sup>327</sup>
- 34-080 Section 12 is a mandatory provision.<sup>328</sup> Under the corresponding provision in the 1950 Act it was held that the power to extend time could be exercised where the law applicable to the contract containing the arbitration clause (including the time bar) was English law, even though some other law might govern the subsequent arbitration procedure.<sup>329</sup> The effect of the 1996 Act, however, is that the power to extend time can be exercised only where either (a) the seat of the arbitration is in England or (b) no seat has been designated or determined and the court is satisfied that it is appropriate to do so by reason of a connection with England (though such a connection could be that the arbitration agreement was governed by English law or that it is very likely that, once a seat is designated, the seat will be in England).<sup>330</sup>

## Commencement of arbitral proceedings

- 34-081 The parties are free to agree when arbitral proceedings are to be regarded as commenced for the purposes of Pt I of the 1996 Act and for the purpose of the Limitation Acts.<sup>331</sup> If there is no such agreement, then s.14<sup>332</sup> provides that arbitral proceedings are commenced in respect of a matter<sup>333</sup> as follows:
- (i)where the arbitrator is named or designated in the arbitration agreement, when one party serves on the other party or parties a notice in writing requiring him or them to submit that matter to the person so named or designated<sup>334</sup>;
  - (ii)where the arbitrator or arbitrators are to be appointed by the parties, when one party serves on the other party or parties a notice in writing requiring him or them to appoint an arbitrator or to agree to the appointment of an arbitrator in respect of that matter<sup>335</sup>;
  - (iii)where the arbitrator or arbitrators are to be appointed by a person other than a party to the proceedings, when one party gives notice in writing to that person requesting him to make the appointment in respect of that matter.<sup>336</sup>

## Service of notices and other documents

- 34-082 The parties are free to agree on the manner of service of any notice or other document.<sup>337</sup> If and to the extent that there is no such agreement, s.76 deals with service.<sup>338</sup> In particular, subs.(3) of that section provides that a notice or other document may be served on a person “by any effective means”. A notice may be sent by email, but it must be despatched to what is, in fact, the email address of the intended recipient and must not be rejected by the system.<sup>339</sup> Notice may be given to a party if it is sent to another person who is actually or ostensibly authorised to accept such service on behalf of that party.<sup>340</sup>

## Footnotes

- 1 For a more detailed account of arbitration, and practice and procedure, the reader should consult: Merkin, Arbitration Law (2007); Merkin and Flannery, Arbitration Act 1996, 5th edn (2014); Russell on Arbitration, 24th edn (2015); Tweeddale and Tweeddale, Arbitration of Commercial Disputes, 2nd edn (2012); Harris, Planterose and Tecks, Arbitration Act 1996, 5th edn (2014); Mustill and Boyd, Commercial Arbitration, 2nd edn (1989) and Supplement (2001); Redfern and Hunter, Law and Practice of International Arbitration, 5th edn (2009); Park, Arbitration of International Business Disputes, 2nd edn (2012).
- 305 *Atlantic Shipping Co Ltd v Louis Dreyfus & Co [1922] 2 A.C. 250*. See Mustill and Boyd, Commercial Arbitration, at p.201. A claim may be barred even though the cause of action has not yet arisen when the time limit expired: *The Himmerland [1965] 2 Lloyd's Rep. 353, 360*; *Union of India v EB Aaby's Rederi A/S [1975] A.C. 797, 810, 813, 817–818*; *Comdel Commodities Ltd v Siporex Trade SA (No.2) [1989] 2 Lloyd's Rep. 13 affirmed [1991] 1 A.C. 148*; cf. *The M Eregli [1981] 2 Lloyd's Rep. 169, 173*. See (2009) 75 Arbitration (4) 481. Failure to observe a time limit for arbitration will bar litigation after the time limit has expired: *Wholecrop Marketing Ltd v Wolds Produce Ltd [2013] EWHC 2079 (Ch)*.
- 306 *Texaco Ltd v Eurogulf Shipping Ltd [1987] 2 Lloyd's Rep. 541*.
- 307 *Board of Trade v Steel Bros & Co Ltd [1952] 1 Lloyd's Rep. 87*; *Alan v El Nasr Export and Import Co [1972] 2 Q.B. 189, [1971] 1 Lloyd's Rep. 401*; *Bunge SA v Deutsche Conti-Handelsgesellschaft mbH (No.2) [1980] 1 Lloyd's Rep. 352*; *Ch Daudruy van Cauwenberghe & Fils SA v Tropical Products Sales SA [1986] 1 Lloyd's Rep. 535*. cf. *Wholecrop Marketing Ltd v Wolds Produce Ltd [2013] EWHC 2079 (Ch)*.
- 308 *Ford & Co Ltd v Cie Furness [1922] 2 K.B. 797, 802*; *Smeaton Hanscomb & Co Ltd v Sassoon I. Setty, Son & Co (No.1) [1953] 1 W.L.R. 1468, 1471*. But contrast *Woolf v Collis Removal Service [1948] 1 K.B. 11* and see above, Vol.I, para.17-011.
- 309 *Ford & Co Ltd v Cie Furness [1922] 2 K.B. 797*.
- 310 *Ayscough v Sheed, Thomson & Co Ltd (1924) 40 T.L.R. 707 HL*.

- 311 *Pinnock Brothers v Lewis and Peat Ltd [1923] 1 K.B. 690.*
- 312 s.12(1).
- 313 s.12(2). See PD 62.
- 314 DAC Report paras 62–75.
- 315 *Vosnoc Ltd v Trans Global Projects Ltd [1998] 1 W.L.R. 101, 112*. See also *Haven Insurance Co Ltd v EUI Ltd [2018] EWCA Civ 2494, [2019] Lloyd's Rep. I.R. 128* at [46]–[48].
- 316 *Monella v Pizza Express (Restaurants) Ltd [2003] EWHC 2966 (Ch), [2004] 12 E.G. 172.*
- 317 *Cathiship SA v Allanasons Ltd [1998] 2 Lloyd's Rep. 511.*
- 318 *Harbour & General Works Ltd v Environmental Agency [2000] 1 W.L.R 950, 960; Korbetis v Transgrain Shipping BV [2005] EWHC 1345 (QB); SOS Corporacion Alimentaria SA v Inerco Trade SA [2010] EWHC 162 (Comm), [2010] 2 Lloyd's Rep. 345* at [54]; *Fimbank Plc v KCH Shipping Co Ltd [2020] EWHC 1765 (Comm), [2020] 2 Lloyd's Rep. 511* at [77]–[83].
- 319 *Harbour & General Works Ltd v Environmental Agency [2000] 1 W.L.R 950; Grimaldi Compagnia di Navigazione Spa v Sekihyo Lines Ltd [1999] 1 W.L.R. 708; Fox & Widley v Guram [1998] 3 E.G. 142; Thyssen Inc v Calypso Shipping Corp SA [2002] 2 Lloyd's Rep. 243, 248; Monella v Pizza Express (Restaurants) Ltd [2003] EWHC 299 (Ch), [2004] E.G. 172; SOS Corporacion Alimentaire SA V Inerco Trade SA [2010] EWHC 162 (Comm), [2010] 2 Lloyd's Rep. 345* (extension refused). cf. *Vosnoc Ltd v Trans Global Projects Ltd [1998] 1 W.L.R. 101; Union Trans-Pacific Co Ltd v Orient Shipping Rotterdam BV [2002] EWHC 1451 (Comm)* (extension granted). See (2009) 75 Arbitration (4) 481, 483.
- 320 *Fox & Widley v Guram [1998] 3 E.G. 142; Grimaldi Compagnia di Navigazione Spa v Sekihyo Lines Ltd [1999] 1 W.L.R. 708* at 725; *Cathiship SA v Allanasons Ltd [1998] 2 Lloyd's Rep. 511* at 522; *Harbour & General Works Ltd v Environmental Agency [2002] 1 Lloyd's Rep. 65, 72, [2000] 1 W.L.R. 950; Thyssen Inc v Calypso Shipping Corp SA [2002] 2 Lloyd's Rep. 243* at 248; *Lantic Sugar Ltd v Baffin Investments Ltd [2009] EWHC 3325 (Comm), [2010] 2 Lloyd's Rep. 141; William McIlroy Swindon Ltd v Quinn Insurance Ltd [2010] EWHC 2448 (TCC), [2011] B.L.R. 136* at [104], [108]; *Anglian Water Services Ltd v Laing O'Rourke Utilities Ltd [2010] EWHC 1529 (TCC), [2011] 1 All E.R. (Comm) 1143; Expofrut SA v Melville Services Inc [2015] EWHC 1950 (Comm), [2015] 2 C.L.C. 218* at [12]–[14]; *National Bank of Fujairah v Times Trading Corp [2020] EWHC 1983 (Comm), [2020] 2 Lloyd's Rep. 211* at [28]–[32].
- 321 SI 1999/2083.
- 322 As to replacement of the Regulations by the 2015 Act, see below, para.40-006.
- 323 s.12(4).
- 324 s.12(6). But see below, para.34-186.
- 325 *Consolidated Investment and Contracting Co v Saponaria Shipping Co Ltd [1978] 2 Lloyd's Rep. 167; Tradax Export SA v Italcarbo Societa di Navigazione SpA [1983] 1 Lloyd's Rep. 514; Jadranika Slobodna Plovidba v Oleagine SA [1984] 1 W.L.R. 300; The Medusa [1986] 2 Lloyd's Rep. 328; The Stephanos [1989] 1 Lloyd's Rep. 506.*
- 326 *Smeaton Hanscomb & Co Ltd v Sassoon I Setty, Son & Co (No.1) [1953] 1 W.L.R. 1468; Metalimex Foreign Trade Corp v Eugenie Maritime Co Ltd [1962] 1 Lloyd's Rep. 378; Babanaft International Co SA v Avant Petroleum Inc [1982] 1 W.L.R. 871; Crown Estate*

- Commissioners v John Mowlem & Co [1994] 10 Const. L.J. 311; Metalfer Corp v Pan Ocean Shipping Co Ltd [1998] 2 Lloyd's Rep. 632.*
- 327 *Kenya Railways v Antares Co Pte Ltd [1987] 1 Lloyd's Rep. 424.* Contrast *Nea Agrex SA v Baltic Shipping Co Ltd [1976] Q.B. 933; Consolidated Investment & Contracting Co v Saponaria Shipping Co Ltd [1978] 2 Lloyd's Rep. 167* (Hague Rules incorporated by contract). cf. *Freedom General Shipping SA v Tokai Shipping Co Ltd [1982] 1 Lloyd's Rep. 73; Government of Sierra Leone v Marmaro Shipping Co Ltd [1989] 2 Lloyd's Rep. 130; Mann (1987) 103 L.Q.R. 523; Vol.I, para.31-116.* See also s.12(5) of the 1996 Act.
- 328 s.4(1) and Sch.1.
- 329 *International Tank and Pipe SAK v Kuwait Aviation Fuelling Co KSC [1975] Q.B. 224.* Contrast *CM Van Stillevoldt BV v El Carriers Inc [1983] 1 W.L.R. 207; Mitsubishi Corp v Castletown Navigation Ltd [1989] 2 Lloyd's Rep. 383* (foreign applicable law).
- 330 s.2(4).
- 331 s.14(1). See *Transpetrol Ltd v Ekali Shipping Co Ltd [1989] 1 Lloyd's Rep. 62; Taylor Woodrow Construction v RMD Kwikform Ltd [2008] EWHC 825 (TCC), [2008] 2 Lloyd's Rep. 345; Vol.I, para.31-126.*
- 332 This section replaces s.34(3) of the Limitation Act 1980 and reflects to some extent art.21 of the Model law. Since the wording of subss.(3) and (4) is similar to that of s.34(3) of the 1980 Act, decisions on the latter may be relevant: see the 27th edn of this book, Vol.I, para.18-087 (note). But In *Seabridge Shipping AB v AC Orssleff's Eftf's A/S [1999] 2 Lloyd's Rep. 685, 690*, Thomas J expressed the view that s.14 should be interpreted "broadly and flexibly" and without reference to any pre-1996 Act decision. See also Moore-Bick J in *Atlanska Plovidba v Consignaciones Asturianas SA [2004] EWHC 1273 (Comm), [2004] 2 Lloyd's Rep. 109* at [17]; *Easybiz Investments v Sinograin [2010] EWHC 2565 (Comm), [2011] 1 Lloyd's Rep. 688* at [11] (single notice in respect of disputes arising under 10 separate contracts); *Finmoon Ltd v Baltic Reefers Management Ltd [2012] EWHC 920 (Comm); Agarwal Coal Corp (S) Pte Ltd v Harmony Innovation Shipping Pte Ltd [2017] EWHC 3556 (Comm)* (whether notice sent to two companies resulted in a single tripartite arbitration or two separate arbitrations); *Tweeddale (2002) 68 Arbitration 238.* But see *Lantic Sugar Ltd v Baffin Investments Ltd [2009] EWHC 3325 (Comm), [2010] 2 Lloyd's Rep. 141.*
- 333 "Matter" include both disputes and claims: DAC Report para.76. cf. *Cruden Construction Ltd v Commission for New Towns [1995] 2 Lloyd's Rep. 387.*
- 334 s.14(3).
- 335 s.14(4). See *Seabridge Shipping AB v AC Orssleff's Eftf's A/S [1999] 2 Lloyd's Rep. 685* (fax sent to proposed arbitrator and copied to respondents sufficed); *Bulk and Metal Transport UK LLP v Voc Bulk Ultra Handymax Pool LLC [2009] EWHC 288 (Comm), [2009] 1 Lloyd's Rep. 418* (message stating that arbitration would be commenced failing payment sufficed). Contrast *Taylor Woodrow Construction v RMD Quikform Ltd [2008] EWHC 825 (TCC), [2008] 2 Lloyd's Rep. 345* (notice threatening arbitration if demands not met did not suffice); *Glencore International AG v PT Tera Logistic Indonesia [2016] EWHC 82 (Comm), [2016] 1 Lloyd's Rep. 527* (arbitral proceedings were held to have been commenced in respect of counterclaims by reason of the reference to "claims" and "all disputes arising under the contract" in the arbitration notices).

- 336 s.14(5).
- 337 s.76(1). See also [s.77](#) (powers of court).
- 338 ss.76(3)–(6). Contrast CPR Pt 6. See *Lantic Sugar Ltd v Baffin Investments Ltd [2009] EWHC 3325 (Comm), [2010] 2 Lloyd's Rep. 141*.
- 339 *Bernuth Lines Ltd v High Seas Shipping Ltd [2005] EWHC 3020 (Comm), [2006] 1 Lloyd's Rep. 537* at [28]–[29].
- 340 *Glencore Agriculture BV v Conqueror Holdings Ltd [2017] EWHC 2893 (Comm), [2018] 1 Lloyd's Rep. 233*.

## Section 5. - The Arbitral Tribunal

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Section 5. - The Arbitral Tribunal

### The arbitral tribunal

- 34-083 The constitution of the arbitral tribunal is primarily a matter for the parties to decide. They are free to agree on the number of arbitrators to form the tribunal and whether there is to be a chairman or an umpire.<sup>341</sup> Unless otherwise agreed by the parties, an agreement that the number of arbitrators shall be two or any other even number is to be understood as requiring the appointment of an additional arbitrator as chairman of the tribunal.<sup>342</sup> If there is no agreement as to the number of arbitrators, the tribunal is to consist of a sole arbitrator.<sup>343</sup>

### Appointment of arbitrators

- 34-084 No particular form is required for the appointment of an arbitrator, unless the arbitration agreement so requires. As a general rule, however, an arbitrator is fully “appointed” only when (a) the designated person is told of his nomination and is asked whether he is willing to act; (b) he consents so to act; and (c) his name and appointment are communicated to the other side.<sup>344</sup>

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### Procedures for appointment when parties do not agree

- 34-085

The 1996 Act contains provisions which, in the absence of agreement between the parties, establish procedures for the appointment of arbitrators and which are designed to ensure that the arbitration agreement will not be inoperative merely because one party refuses to make an appointment or if the procedure for the appointment of the arbitral tribunal fails. The parties are free to agree on the procedure for appointing the arbitrator or arbitrators, including the procedure for the appointment of any chairman or umpire.<sup>345</sup> If or to the extent that there is no such agreement, the following provisions apply<sup>346</sup>:

- (i)if the tribunal is to consist of a sole arbitrator, the parties are jointly to appoint the arbitrator not later than 28 days after service of a request in writing by either party to do so<sup>347</sup>;
- (ii)if the tribunal is to consist of two arbitrators, each party is to appoint one arbitrator not later than 14 days after service of a request in writing by either party to do so<sup>348</sup>;
- (iii)if the tribunal is to consist of three arbitrators, each party is to appoint one arbitrator not later than 14 days after service of a request in writing by either party to do so, and the two so appointed are forthwith to appoint a third arbitrator as the chairman of the tribunal<sup>349</sup>;
- (iv)if the tribunal is to consist of two arbitrators and an umpire, each party is to appoint one arbitrator not later than 14 days after service of a request in writing by either party to do so, and the two so appointed may appoint an umpire at any time after they themselves are appointed and must do so before any substantive hearing or forthwith if they cannot agree on a matter relating to the arbitration.<sup>350</sup>

In any other case, resort is to be made to s.18 of the Act which provides for the case of a failure of the agreed appointment procedure.<sup>351</sup>

## Power in case of default to appoint sole arbitrator

- 34-086 The parties may, for example, have agreed that the reference is to be to two arbitrators, one to be appointed by each party, or that it shall be to three arbitrators, one to be appointed by each party and the third to be appointed by the two appointed by the parties or in some other manner specified in the agreement. Section 17 of the 1996 Act<sup>352</sup> provides a summary procedure which is available in case one party defaults in the appointment of his arbitrator. Unless the parties otherwise agree, where each of two parties to an arbitration agreement is to appoint an arbitrator and one party (“the party in default”) refuses to do so, or fails to do so within the time specified,<sup>353</sup> the other party, having duly appointed his arbitrator, may give notice in writing to the party in default that he proposes to appoint his arbitrator to act as sole arbitrator.<sup>354</sup> If the party in default does not within seven clear days<sup>355</sup> of that notice being given (a) make the required appointment; and (b) notify the other party that he has done so, the other party may appoint his arbitrator as sole arbitrator, in which case his award is binding on both parties as if he had been appointed by agreement.<sup>356</sup> Where a sole arbitrator has been thus appointed, the party in default may (upon notice to the appointing party) apply to the court which may set aside the appointment.<sup>357</sup> The Act does not

specify the grounds on which the court may so act, but no doubt the court would only set aside the appointment if satisfied that there was real likelihood that the person appointed could not, or would not, fairly determine the issues in the arbitration.

## Failure of appointment procedure

34-087 The parties are free to agree what is to happen in the event of a failure of the procedure for the appointment of the arbitral tribunal.<sup>358</sup> If and to the extent that there is no such agreement, the court may exercise the powers conferred upon it by s.18 of the Act upon the application of any party to the arbitration agreement (and notice to the other parties).<sup>359</sup> The section does not, however, define what constitutes “a failure of the procedure for the appointment of the arbitral tribunal”. But presumably this will embrace (*inter alia*) cases where a person designated as arbitrator or umpire refuses to act, or is incapable of acting, or dies<sup>360</sup>; where the parties or two arbitrators are required or at liberty to appoint an arbitrator or umpire and either cannot agree on the appointment or otherwise fail to appoint; and where an arbitrator or umpire is to be appointed by a third party (e.g. an arbitral institution) and the third party refuses or fails to make an appointment. The powers of the court under the section are<sup>361</sup>:

- (a)to give directions as to the making of any necessary appointments<sup>362</sup>;
- (b)to direct that the tribunal shall be constituted by such appointments (or any one or more of them) as have been made;
- (c)to revoke any appointments already made<sup>363</sup>; and
- (d)to make any necessary appointments itself.

An appointment made by the court under this section has effect as if made with the agreement of the parties.<sup>364</sup>

34-088 The powers conferred upon the court by s.18 are discretionary.<sup>365</sup> If, for example, an application is made for the court to appoint an arbitrator, then it would seem that the court could refuse to appoint on the ground of undue delay by the applicant if in the circumstances justice would not require the making of an appointment.<sup>366</sup> But the desirability of holding the parties to their agreement weighs strongly in favour of exercising the discretion.<sup>367</sup> The s.18 powers may be exercised not only where the seat of the arbitration is in England but also where no seat of the arbitration has been designated or determined and by reason of a connection with England the court is satisfied that it is appropriate to do so.<sup>368</sup>

## Qualifications of arbitrators

- 34-089 An arbitrator does not have to possess any or any particular qualifications to act as arbitrator, unless the arbitration agreement so requires. Where the appointed arbitrator does not possess the required qualifications, an objection that the arbitral tribunal is improperly constituted may be made under ss.31 and 32 of the 1996 Act.<sup>369</sup> The unqualified arbitrator may also be removed by the court under s.24,<sup>370</sup> or his award challenged under s.67.<sup>371</sup> In deciding whether to exercise, and in considering how to exercise, any of its powers under s.16 or s.18, the court is to have due regard to any agreement of the parties as to the qualifications required of the arbitrators.<sup>372</sup>

## Chairman

- 34-090 The Arbitration Act 1950 made no provision for the office of chairman. But s.20 of the 1996 Act provides for the role of chairman. The parties are free to agree what his functions shall be.<sup>373</sup> In the absence of agreement,<sup>374</sup> decisions, orders and awards are to be made by all or a majority of the arbitrators (including the chairman),<sup>375</sup> but the view of the chairman is to prevail in relation to a decision, order or award in respect of which there is neither unanimity nor a majority,<sup>376</sup> for example, if there are three arbitrators and each (including the chairman) has a different view on the amount of the award.

## Umpire

- 34-091 Traditionally, an umpire differs from a chairman in that he is not strictly one of the arbitrators but replaces the two party-appointed arbitrators in the event that they are unable to agree. Section 21 of the 1996 Act provides that, where the parties have agreed that there is to be an umpire, they are free to agree what his functions shall be, and in particular whether he is to attend the proceedings and when he is to replace the other arbitrators as the tribunal with power to make decisions, orders and awards.<sup>377</sup> If and to the extent that there is no agreement,<sup>378</sup> he is to attend the proceedings (though not take an active part in them) and be supplied with the same documents and materials as are supplied to the other arbitrators.<sup>379</sup> If and when the arbitrators cannot agree on a matter relating to the arbitration, they must forthwith give notice in writing to the parties and to the umpire, and he then replaces them as the tribunal and with power to make decisions, orders and awards as if he were sole arbitrator.<sup>380</sup> Should one or both of the arbitrators fail to give the necessary notice, any

party to the arbitral proceedings can apply to the court for an order that the umpire shall replace the other arbitrators.<sup>381</sup>

## No chairman or umpire

- 34-092 In the event that the parties agree not to have a chairman or umpire, they are free to agree how the tribunal is to make decisions, orders and awards. If there is no such agreement, they are to be made by all or a majority of the arbitrators.<sup>382</sup>

## Revocation of arbitrator's authority

- 34-093 The parties are free to agree in what circumstances the authority of an arbitrator may be revoked.<sup>383</sup> If and to the extent that there is no such agreement,<sup>384</sup> s.23 of the 1996 Act confirms the long-established rule that it is impossible for one party unilaterally to revoke the authority of an arbitrator.<sup>385</sup> The parties acting jointly may nevertheless do so,<sup>386</sup> but this must be agreed in writing unless the parties also agree (whether or not in writing) to terminate the arbitration agreement.<sup>387</sup> An arbitrator's authority may also be revoked by an arbitral or other institution or person vested by the parties with powers in that regard.<sup>388</sup>

## Death of arbitrator

- 34-094 The authority of an arbitrator is personal and ceases on death.<sup>389</sup> But, unless otherwise agreed by the parties, the death of a person by whom an arbitrator was appointed does not revoke the arbitrator's authority.<sup>390</sup>

## Court's power to revoke appointment

- 34-095 The power conferred on the court under the 1950 Act<sup>391</sup> to revoke the authority of an arbitrator or umpire where the dispute involved a charge of fraud was not preserved by the 1996 Act. But the court may revoke an appointment under s.18 (powers exercisable in case of failure of appointment procedure)<sup>392</sup> and may remove an arbitrator on the grounds specified in s.24.<sup>393</sup>

## Removal of arbitrator

- 34-096 The court has in certain circumstances the power to remove an arbitrator. This may be done, under [s.24 of the 1996 Act](#), upon the application of a party to the arbitral proceedings.<sup>394</sup> The grounds on which such an application may be made are any of the following:
- (a)that circumstances exist which give rise to justifiable doubts as to his impartiality<sup>395</sup>;
  - (b)that he does not possess the qualifications required by the arbitration agreement<sup>396</sup>;
  - (c)that he is physically or mentally incapable of conducting the proceedings or there are justifiable doubts as to his capacity to do so;
  - (d)that he has refused or failed:
    - (i)properly to conduct the proceedings<sup>397</sup>; or
    - (ii)to use all reasonable despatch in conducting the proceedings or making an award<sup>398</sup>;
- and that substantial injustice has been or will be caused to the applicant.
- 34-097 With respect to ground (a), [s.24](#) omits the reference in the Model Law to “independence” as well as “impartiality”: the Departmental Committee concluded that lack of independence, unless it gave rise to justifiable doubts about the impartiality of the arbitrator, was of no significance.<sup>399</sup> With respect to ground (d), the use by a party of this provision to delay or disrupt the arbitral proceedings is discouraged by the requirement that the conduct of the arbitrator must be such that “substantial injustice” has been or will be caused to the applicant,<sup>400</sup> and also by fact that the arbitral tribunal is further empowered to continue the arbitral proceedings while an application to the court is pending.<sup>401</sup> Moreover, [s.73\(1\)](#) provides that a party must object promptly to any impropriety or irregularity in the proceedings,<sup>402</sup> and [subs.\(2\) of s.24](#) provides that if there is an arbitral or other institution or person vested with the authority to remove an arbitrator, the court is not to exercise its power of removal unless it is satisfied that the applicant has first exhausted his right of recourse to that institution or person. The arbitrator concerned is entitled to appear and be heard by the court before any order is made.<sup>403</sup> If he is removed, this does not affect his immunity, but the court can adjust his entitlement to recover or retain fees or expenses.<sup>404</sup> The filling of the vacancy created is dealt with by [s.27](#).<sup>405</sup> [Section 24](#) is a mandatory provision.<sup>406</sup>

## Resignation of arbitrator

34-098

An arbitrator will be liable<sup>407</sup> if he resigns in breach of the express or implied terms of his engagement unless the parties agree to release him from his engagement or from liability. [Section 25 of the 1996 Act](#) enables him to apply to the court for relief from liability and for an order as to the recovery or retention of his fees and expenses.

## Filling of vacancy

34-099 Where an arbitrator ceases to hold office, the parties are free to agree whether and if so how the vacancy is to be filled, whether and if so to what extent the previous proceedings should stand, and what effect (if any) his ceasing to hold office has on any appointment made by him (alone or jointly).<sup>408</sup> If or to the extent that there is no such agreement,<sup>409</sup> then:

- (a)the provisions of [ss.16](#) and [18](#) apply in relation to the filling of the vacancy as in relation to an original appointment<sup>410</sup>;
- (b)the tribunal (when reconstituted) is to determine whether and if so to what extent the previous proceedings are to stand<sup>411</sup>; and
- (c)his ceasing to hold office does not affect any appointment by him (alone or jointly) of another arbitrator, in particular any appointment of a chairman or umpire.<sup>412</sup>

In contrast with the [Arbitration Act 1950](#),<sup>413</sup> the [1996 Act](#) does not give to the court any initial power to fill a vacancy caused by its removal of an arbitrator: the original appointment procedure is to be used.<sup>414</sup>

## Liability for arbitrators' fees and expenses

34-100 As a matter of general contract law, an arbitrator is entitled to be paid whatever has been agreed between him and any of the parties.<sup>415</sup> This is a several liability which is incurred by the party with whom the agreement was made. However, under [s.28 of the Act](#), all parties are jointly and severally liable to an arbitrator for his fees and expenses, but this joint and several liability is limited to "such reasonable fees and expenses (if any) as are appropriate in the circumstances".<sup>416</sup> The section further enables a party to apply to the court to adjust fees and expenses before they are paid,<sup>417</sup> and, if it is reasonable in the circumstances to do so, to order repayment of fees and expenses after the arbitrator has been paid.<sup>418</sup> The section nevertheless makes it clear that this power to make adjustments and to order repayment does not affect any contractual right of the arbitrator to his fees and expenses.<sup>419</sup> Nor does the section deal with the question which of the parties (as between themselves) are to pay the costs and expenses of the arbitration.<sup>420</sup> It is to be noted that arbitrators' expenses in this section include the fees and expenses of an expert, legal

adviser or assessor appointed by the tribunal for which the arbitrators are liable.<sup>421</sup> Section 28 is mandatory.<sup>422</sup>

- 34-101 Difficult problems may arise concerning the liability for fees and expenses of a person who successfully objects to or challenges the substantive jurisdiction of the tribunal.<sup>423</sup> Section 28 refers to a liability of “the parties” to pay the arbitrators’ fees and expenses. If a person has taken no part in the arbitral proceedings, and it is determined that the tribunal has no substantive jurisdiction, it is scarcely arguable that he should be liable for any part of those fees and expenses. But under s.30 the tribunal is empowered to rule on its own jurisdiction and a person may have participated in the proceedings, even though ultimately he establishes that the tribunal lacks jurisdiction. The Act does not answer the question whether such a person is to be considered a “party” for the purposes of liability under this section. If the tribunal rules that it has no jurisdiction, it is arguable that, in the absence of agreement,<sup>424</sup> the successful objector—even if he has participated—should not be liable to pay any part of the arbitrator’s fees and expenses as the tribunal has itself declared that the objector was never a party to any valid arbitral proceedings brought against him. However, it could be said that, by participating, the objector has impliedly agreed to pay the reasonable fees and expenses of the arbitrator in ruling on jurisdiction and that an arbitrator can “give value”<sup>425</sup> by providing a ruling on jurisdiction. If the tribunal rules that it has jurisdiction, but its award on this issue is set aside by the court under s.67, it might be argued that the case is stronger still for the recovery by an arbitrator under s.28 of his reasonable fees and expenses from a participating “party” because the award is binding until set aside by the court.<sup>426</sup>

## Footnotes

- 1 For a more detailed account of arbitration, and practice and procedure, the reader should consult: Merkin, Arbitration Law (2007); Merkin and Flannery, Arbitration Act 1996, 5th edn (2014); Russell on Arbitration, 24th edn (2015); Tweeddale and Tweeddale, Arbitration of Commercial Disputes, 2nd edn (2012); Harris, Planterose and Tecks, Arbitration Act 1996, 5th edn (2014); Mustill and Boyd, Commercial Arbitration, 2nd edn (1989) and Supplement (2001); Redfern and Hunter, Law and Practice of International Arbitration, 5th edn (2009); Park, Arbitration of International Business Disputes, 2nd edn (2012).

341 s.15(1).

342 s.15(2). For the chairman, see s.20; below, para.34-090.

343 s.15(3). See *Villa Denizcilik Sanayi Ve Ticaret AS v Longen SA* [1998] 1 Lloyd’s Rep. 195.

344 *Tradax SA v Volkswagenwerk AG* [1970] 1 Q.B. 537. See also *Toepfer v Cremer* [1975] 2 Lloyd’s Rep. 118; *Carras Shipping Co Ltd v Food Corp of India* [1979] 2 Lloyd’s Rep. 179; *Hannaford v Smallcombe*, *The Times*, 30 December 1993. cf. *Legumbres SACIFIA v Central de Cooperativas, etc. Ltda* [1986] 1 Lloyd’s Rep. 401; *Petredec Ltd v Tokumaru*

- Kaiun Co Ltd [1994] 1 Lloyd's Rep. 162; Robinson v Moody, The Times, 23 February 1994; Atlantska Plovidba v Consignaciones Asturianas SA [2004] EWHC 1273 (Comm), [2004] 2 Lloyd's Rep. 109* at [17]. A valid appointment does not require a binding contract to have been concluded between the appointing party and the arbitrator: *ARI v WXJ [2022] EWHC 1543 (Comm)* at [14]–[22].
- 345 s.16(1). Where there is a failure by one party to appoint an arbitrator and the arbitration agreement provides for the constitution of the arbitral tribunal in default of that appointment, the Court has no power to act under s.18: *Silver Dry Bulk Co Ltd v Homer Hulbert Maritime Co Ltd [2017] EWHC 44 (Comm)*, [2017] 1 Lloyd's Rep. 154 at [32]–[33].
- 346 s.16(2). For reckoning of periods of time, see s.78. The time limits may be extended by agreement, or by order of the court (s.79).
- 347 s.16(3). See *Villa Denizcilik Sanayi Ve Ticaret AS v Longen SA [1998] 1 Lloyd's Rep. 195*. If one party refuses to appoint, an application must be made to the court under s.18, para.34-087, below: *Mylcrist Builders Ltd v Buck [2008] EWHC 2172 (TCC)*, [2008] B.L.R. 611.
- 348 s.16(4).
- 349 s.16(5).
- 350 s.16(6).
- 351 s.16(7). See below, para.34-087.
- 352 This replaces, with changes, s.7(b) of the 1950 Act: see the DAC Report paras 83–86. Section 17 does not apply where the tribunal is to consist of a sole arbitrator but one party refuses to make a joint appointment under s.16(3). Resort must then be had to s.18: *Mylcrist Builders Ltd v Buck [2008] EWHC 2172 (TCC)*, [2008] Build. L.R. 611.
- 353 There is no reference in s.17(1), as there was in s.10(3)(b) of the Arbitration Act 1950, to “or, if no time is specified, within a reasonable time”. See s.16(4)(5).
- 354 s.17(1). cf. *Minernet SpA Milan v Luckyfield Shipping Corp SA [2004] EWHC 729 (Comm)*, [2004] 2 Lloyd's Rep. 348 (no need for notice where parties otherwise agree).
- 355 s.78(4)(5) and see s.79 (extension of time).
- 356 s.17(2). Each stage of the procedure under subss.(1) and (2) must be meticulously complied with.
- 357 s.17(3). But all that is set aside is the appointment as *sole* arbitrator. Permission of the court is required for any appeal from a decision of the court under s.17(3): s.17(4); but see below, para.34-186.
- 358 s.18(1). See *Medov Lines SpA v Traelandsfos A/S [1969] 2 Lloyd's Rep. 225*. There is no failure if an appointment is duly made under s.17 unless that appointment is set aside.
- 359 s.18(2); PD 62. In *Vale do Rio Doce Navegacao SA v Shanghai Bao Steel Ocean Shipping Co Ltd [2000] 2 Lloyd's Rep. 1* at [43]–[60], Thomas J suggested that, on an application under s.18, the court could not intervene to determine whether or not there is an arbitration agreement. Contrast *Sinochem International Oil (London) Co Ltd v Fortune Oil Co Ltd [2000] 1 Lloyd's Rep. 682*; *Midgulf International Ltd v Groupe Chimice Tunisien [2009] EWHC 1684 (Comm)*, [2009] 1 C.L.C. 1000, [2010] EWCA Civ 66. In *Noble Denton Middle East v Noble Denton International Ltd [2010] EWHC 2574 (Comm)*, [2011] 1 Lloyd's Rep. 387, Burton J held that s.18 was “simply a gateway” and that it was for the arbitrators,

and not the court, to decide on the validity of the arbitration clause if an arguable case was shown; *Man Enterprise SAL v Al-Waddam Hotel Ltd* [2013] EWHC 2356 (TCC), [2014] 1 Lloyd's Rep. 217; *Silver Dry Bulk Co Ltd v Homer Hulbert Maritime Co Ltd* [2017] EWHC 44 (Comm), [2017] 1 Lloyd's Rep. 154 at [25]–[29]. But cf. s.72. See also *Aeberli* (2005) 21 *Arbitration International* 253, 258 (on the use of s.72).

- 360 i.e. cases previously falling under ss.7, 10 of the Arbitration Act 1950.
- 361 s.18(3); *City & General (Holborn) Ltd v AYH Plc* [2005] EWHC 2494 (TCC), [2005] 2 Lloyd's Rep. 378.
- 362 *Charlbury McCouat International Ltd v PG Foils Ltd* [2010] EWHC 2050 (TCC), [2011] 1 Lloyd's Rep. 23 (LCIA to appoint).
- 363 See para.88 of the DAC Report.
- 364 s.18(4). Permission of the court is required for any appeal from a decision of the court under this section: s.18(5); but see below, para.34-186; *Johann MK Blumenthal GmbH & Co KG v Itochu Corp* [2012] EWCA Civ 996, [2013] 1 All E.R. (Comm) 504.
- 365 *Villa Denizcilik Sanayi Ve Ticaret AS v Longen SA* [1998] 1 Lloyd's Rep. 195; *Through Transport Mutual Insurance Assn (Euroasia) Ltd v New India Assurance Co Ltd (No.2)* [2005] EWHC 455 (Comm), [2005] 2 Lloyd's Rep. 378. See also *Enercon GmbH v Enercon (India) Ltd* [2012] EWHC 689 (Comm), [2012] 1 Lloyd's Rep. 519 (application stayed pending hearing by foreign court).
- 366 *Petredec Ltd v Tokumaru Kaiun Co Ltd* [1994] 1 Lloyd's Rep. 162; *Frota Oceanica Brasiliera SA v Steamship Mutual Underwriting Association (Bermuda) Ltd* [1996] 2 Lloyd's Rep. 461; *Secretary of State for Foreign and Commonwealth Office v Percy Thomas Partnership* (1998) 65 Con. L.R. 11; *West of England Ship Owners Mutual Protection and Indemnity Assn v Hellenic Industrial Development Bank SA* [1999] 1 Lloyd's Rep. 93 (on s.10 of the 1950 Act). cf. *Durtnell (R) & Sons Ltd v Secretary of State For Trade and Industry* [2001] 1 Lloyd's Rep. 275.
- 367 *Atlanska Plovidba v Consignaciones Asturianas SA* [2004] EWHC 1273 (Comm), [2004] 2 Lloyd's Rep. 109 at [24].
- 368 s.2(4). *Charlbury McCouat International Ltd v PG Foils Ltd* [2010] EWHC 2050 (TCC), [2011] 1 Lloyd's Rep. 23 (English law likely to apply to substance of dispute).
- 369 cf. *Pan Atlantic Group Inc v Hassneh Insurance Co of Israel Ltd* [1992] 2 Lloyd's Rep. 120.
- 370 1996 Act s.24(1)(b).
- 371 *Sumukan Ltd v Commonwealth Secretariat (No.2)* [2007] EWCA Civ 1148, [2008] 1 Lloyd's Rep. 40.
- 372 s.10. See *Villa Denizcilik Sanayi Ve Ticaret AS v Longen SA* [1998] 1 Lloyd's Rep. 195. In *Allianz Insurance Plc v Tonicstar Ltd* [2018] EWCA Civ 434, [2018] 1 Lloyd's Rep. 389, where the arbitration agreement provided that “the arbitration tribunal shall consist of persons with not less than ten years’ experience of insurance or reinsurance”, it was held that a Queen’s Counsel who has practised as a barrister specialising in the field of insurance and reinsurance for more than ten years satisfied this requirement.
- 373 s.20(1).
- 374 s.20(2).
- 375 s.20(3).

376 s.20(4).

377 s.21(1). Parties will have “agreed that there is to be an umpire” within the meaning of s.21(1) even though the umpire is to be appointed by the arbitrators, and even though his authority to act is contingent on disagreement: *Van der Giessen de-Noord Shipbuilding Division BV v Imtech Marine & Offshore BV* [2008] EWHC 2904 (Comm), [2009] 1 Lloyd’s Rep. 273 at [106].

378 s.21(2).

379 s.21(3). cf. *Fletamentos Maritimos SA v Effjohn International BV* [1995] 1 Lloyd’s Rep. 311; *Fletamentos Maritimos SA v Effjohn International BV* (No.2) [1997] 1 Lloyd’s Rep. 295, [1997] 1 Lloyd’s Rep. 644 (on 1950 Act).

380 s.21(4).

381 s.21(5). Permission of the court is required for any appeal from a decision of the court under this section: s.21(6). See PD 62; but see below, para.34-186.

382 s.22(1)(2).

383 s.23(1). Institutional rules may provide for challenges to and revocation of the appointment of an arbitrator, as, for example, art.10 of the LCIA rules: see *Walsh and Teitelbaum* (2011) 27 Arbitration International 283 (decisions of the LCIA Court).

384 s.23(2).

385 Arbitration Act 1950 s.1.

386 s.23(3)(a).

387 s.23(4).

388 s.23(3)(b).

389 s.26(1). This sub-section is mandatory.

390 s.26(2).

391 Arbitration Act 1950 s.24(2).

392 s.18(3)(c); see above, para.34-087.

393 Below, paras 34-096—34-097.

394 Upon notice to the other parties, to the arbitrator concerned and to any other arbitrator: s.24(1). See PD 62. Permission of the court is required for any appeal from a decision of the court under this section: s.24(6); but see below, para.34-185.

395 *Save and Prosper Pensions Ltd v Homebase Ltd* [2002] L. & T.R. 11 (arbitrator’s firm instructed in substantial property matter by associated company of one of the parties); *Sphere Drake Insurance v American Reliable Insurance Co* [2004] EWHC 796 (Comm) (arbitrator involved as consultant to certain key players in the market at centre of dispute); *ASM Shipping Ltd of India v TTMI Ltd of England* [2005] EWHC 2238 (Comm), [2006] 1 Lloyd’s Rep. 375, [2006] EWCA Civ 1341, [2007] 1 Lloyd’s Rep. 136 (arbitrator instructed as counsel in previous case against one of the parties); *Sierra Fishing Co Ltd v Mohamed* [2015] EWHC 140 (Comm), [2015] 1 Lloyd’s Rep. 514 (arbitrator’s business connections, involvement in negotiations and drafting of agreement, conduct of reference). cf. (where application to remove failed) *Andrews (t/a BA Constructors) v Bradshaw* [2000] B.L.R. 6 (irritation on part of arbitrator and receiving payment of fee from one party where the other refused to pay); *Laker Airways Inc v FLS Aerospace Ltd* [2000] 1 W.L.R. 113 (arbitrator in same chambers as

barrister representing one of parties, but see *Smith v Kvaerner Cementation Foundations Ltd* [2006] EWCA Civ 242, [2007] 1 W.L.R. 370 at [171]; *Rustal Trading Ltd v Gill & Duffus SA* [2000] 2 Lloyd's Rep. 14 (arbitrator involved in earlier dispute with party's consultant); *AT & T Corp v Saudi Arabian Cable Co* [2000] 1 Lloyd's Rep. 22, [2000] 2 Lloyd's Rep. 127, CA (arbitrator was non-executive director of rival bidder for project); *ASM Shipping Ltd v Harris* [2007] EWHC 1513 (Comm), [2008] 1 Lloyd's Rep. 61 (two arbitrators remain after recusal of third for alleged bias); *Goel v Amega Ltd* [2010] EWHC 2454 (Comm) (case management issues); *A v B* [2011] EWHC 2345 (Comm), [2011] 2 Lloyd's Rep. 591 (barrister arbitrator involved in case for solicitors for party); *Interprods Ltd v De La Rue International Ltd* [2014] EWHC 68 (Comm) (arbitrator after appointment was appointed arbitrator in two other cases where one party represented by solicitors for claimant: s.68(2)(a) application failed); *Cofely Ltd v Bingham* [2016] EWHC 240 (Comm), [2016] 2 All E.R. (Comm) 129 at [98]–[116] (arbitrator removed on the ground of apparent bias where 18 per cent of his appointments and 25 per cent of his arbitrator/adjudicator income over the previous three years had come from cases involving the defendant as a party or as a claims consultant and where the Chartered Institute of Arbitrators acceptance of nomination form calls for disclosure of “any involvement, however remote, with either party over the last five years”); *W Ltd v M Sdn Bhd* [2016] EWHC 422 (Comm), [2016] 1 Lloyd's Rep. 552 at [27]–[44] (the IBA Guidelines 2014 are of assistance to the Court, but they are not a statement of English law; the Court noted some “weaknesses” in the IBA Guidelines 2014). For the test to be applied in cases of alleged bias, see *Dimes v Proprietors of Grand Junction Canal* (1852) 3 H.L Cas. 759; *R. v Spencer* [1987] A.C. 128; *R. v Gough* [1993] A.C. 646; *R. v Bow Street Magistrate Ex. P Pinochet Ugarte (No.2)* [2002] 1 A.C. 119; *Laker Airways Inc v FLS Aerospace Ltd* [2000] 1 W.L.R. 113; *Locobail (UK) Ltd v Bayfield Property Ltd* [2000] Q.B. 451; *AT & T Corp v Saudi Arabian Cable Co* [2000] 1 Lloyd's Rep. 22, [2000] 2 Lloyd's Rep. 127; *Re Medicaments and Related Classes of Goods (No.2)* [2001] 1 W.L.R. 700; *Porter v Magill* [2001] UKHL 67, [2002] 2 A.C. 357 at [103]; *ASM Shipping Ltd of India v TTMI Ltd of England* [2005] EWHC 2238 (Comm), [2006] 1 Lloyd's Rep. 375, [2006] EWCA Civ 1341, [2007] 1 Lloyd's Rep. 136 at [39]; *Cofely Ltd v Bingham* [2016] EWHC 240 (Comm), [2016] 2 All E.R. (Comm) 129 at [72]; *H v L* [2017] EWHC 137 (Comm), [2017] 1 Lloyd's Rep. 553 at [16]; *Halliburton Co v Chubb Bermuda Insurance Ltd* [2020] UKSC 48, [2020] 3 W.L.R. 1474 at [64]–[69]; *Newcastle United Football Club Ltd v The Football Association Premier League Ltd* [2021] EWHC 349 (Comm). As to the duty to disclose the circumstances which might give rise to doubts as to an arbitrator's impartiality, and the arbitrator's duty of confidentiality, see *Dadoun v Biton* [2019] EWHC 3441 (Ch) at [37]–[40]; *PAO Tatneft v Ukraine* [2019] EWHC 3740 (Ch) at [82]–[100]; *Halliburton Co v Chubb Bermuda Insurance Ltd* [2020] UKSC 48, [2020] 3 W.L.R. 1474 at [74]–[105]. See IBA Guidelines on conflicts of interest in International Arbitration 2014; Chartered Institute of Arbitrators: Code of Professional and Ethical Conduct (2009); AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes (2004 revision); *Chung* (2011) 77 Arbitration 167; *Park* (2011) 27 Arbitration International 473. As to the validity of a rule in the Arbitrators' Code of Conduct of the International Cotton Association, see *Aldcroft v International Cotton Association Ltd* [2017] EWHC 642 (Comm), [2017] 1 Lloyd's Rep. 635.

- 396 See above, para.34-089.
- 397 See *Wicketts v Brine Builders [2001] CILL 1805* (autonomous conduct by arbitrator); *Norbrook Laboratories Ltd v Tank [2006] EWHC 1055 (Comm)*, [2006] 2 Lloyd's Rep. 485 (unilateral telephone contact with parties and direct contact with witnesses) and (on removal under s.23(1) of the 1950 Act): *Hagop Ardashlian v Unifert International SA [1984] 2 Lloyd's Rep. 84, 89*; *Modern Engineering (Bristol) Ltd v C Miskin & Son Ltd [1981] 1 Lloyd's Rep. 135* (issue of interim award without hearing submissions on raised point of law); *Town and City Properties (Development) Ltd v Wiltshire Southern Ltd (1989) 44 B.L.R. 109* (procedure akin to valuation adopted rather than arbitration); *Lovell Partnerships (Northern) Ltd v AW Construction Plc (1996) 81 Build. L.R. 83, 99* (test to be applied), cf. *Home of Homes Ltd v Hammersmith Fulham LBC [2003] EWHC 807, [2003] 92 Const. L.R. 48* (arbitrator takes leading counsel's opinion on issues of costs and jurisdiction). On the question of reliance of the arbitrator on his own knowledge and experience, see *Fox v Wellfair Ltd [1981] 2 Lloyd's Rep. 514*; *Warborough Investments Ltd v S Robinson & Sons (Holdings) Ltd [2003] EWCA Civ 751, [2003] 2 E.G.L.R. 149*; *Checkpoint Ltd v Strathclyde Pension Fund [2003] EWCA 751, [2003] 2 E.G.L.R. 149*; *St George's Investment Co Ltd v Gemini Consulting Ltd [2004] EWHC 2353 (Ch)*; *Claire & Co Ltd v Thames Water Utilities Ltd [2005] EWHC 1022, [2005] Build. L.R. 366*; *JD Wetherspoon Plc v Jay Mar Estates [2007] EWHC 856 (TCC), [2007] Build. L.R. 285*.
- 398 See (on removal under s.13(3) of the 1950 Act): *Pratt v Swanmore Builders Ltd [1980] 2 Lloyd's Rep. 504*.
- 399 DAC Report paras 101–104. But see above para.34-016 (note).
- 400 DAC Report para.105. See also below, para.34-165; *Norbrook Laboratories v Tank [2006] EWHC 1055 (Comm)*, [2006] 2 Lloyd's Rep. 485.
- 401 s.24(3). See (1998) 64 *Arbitration* 188.
- 402 See below, paras 34-166, 34-178; *Rustal Trading Ltd v Gill & Duffus SA [2000] 1 Lloyd's Rep. 14*; *Sinclair v Woods of Winchester Ltd [2005] EWHC 1631 (QB)*, [2005] 102 Const. L.R. 127; *ASM Shipping Ltd of India v TTMI Ltd [2005] EWHC 2238 (Comm)*, [2006] 1 Lloyd's Rep. 375, [2006] EWCA Civ 1341, [2007] 1 Lloyd's Rep. 136; *ASM Shipping Ltd v Harris [2007] EWHC 1513 (Comm)*, [2008] 1 Lloyd's Rep. 61; cf. *Sierra Fishing Co Ltd v Mohamed [2015] EWHC 140 (Comm)*, [2015] 1 Lloyd's Rep. 514.
- 403 s.24(5).
- 404 s.24(4).
- 405 See below, para.34-099.
- 406 s.4(1) and Sch.1.
- 407 He is not immune from such liability: s.29(3).
- 408 s.27(1).
- 409 s.27(2). See *Federal Insurance Co and Chubb Insurance Co of Europe SA v Transamerica Occidental Life Insurance Co [1999] 2 Lloyd's Rep. 286*.
- 410 s.27(3).
- 411 This does not affect any right of a party to challenge those proceedings on any ground which had arisen before the arbitrator ceased to hold office: s.27(4).
- 412 s.27(5).

- 413 Arbitration Act 1950 s.25(1).
- 414 DAC Report para.117. See above, para.[34-085](#) ([s.16](#)).
- 415 See DAC Report para.120; Mustill and Boyd at pp.233; Chartered Institute of Arbitrators: Guidelines for arbitrators as to how to formulate their terms of remuneration (2011). For the difficulties that may arise, see *K/S Norjarl A/S v Hyundai Heavy Industries Ltd [1992] Q.B. 863* (commitment fee demanded); *Turner v Stevenage BC [1998] Ch. 28* (request for interim fee).
- 416 s.28(1). See also s.28(6) (arbitrator who has ceased to act, and umpire).
- 417 s.28(2). See CPR r.62.6, PD 62.4. For an example of reduction of fees, see *Hussman (Europe) Ltd v Al Ameen Developments & Trade Co [2000] 2 Lloyd's Rep. 83*; *Agrimex Ltd v Tradigrain [2003] EWHC 1656 (Comm)*, [2003] 2 Lloyd's Rep. 537.
- 418 s.28(3). See CPR r.62.6 PD 62.4.
- 419 s.28(5).
- 420 s.28(5). See [ss.59–65](#); below, paras [34-149](#)—[34-156](#).
- 421 s.37(2).
- 422 [s.4\(1\)](#) and [Sch.1](#).
- 423 DAC Report para.126.
- 424 *Commonwealth Development Corp (UK) v Montague [2000] QCA 252* Queensland Court of Appeal; *Greenberg and Secomb (2002) 18 Arbitration International 125*.
- 425 *Systech International Ltd v PC Harrington Contractors Ltd [2012] EWCA Civ 1371*, [2013] 1 All E.R. (Comm) 1074 at [36].
- 426 *Systech International Ltd v PC Harrington Contractors Ltd [2012] EWCA Civ 1371*, [2013] 1 All E.R. (Comm) 1074 at [36].

## Section 6. - Jurisdiction of the Arbitral Tribunal

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Chapter 34 - Arbitration<sup>1</sup>

### Section 6. - Jurisdiction of the Arbitral Tribunal

#### Tribunal can rule on its own jurisdiction

- 34-102 English law has always taken the view that the arbitral tribunal cannot be the final adjudicator of its own jurisdiction. The final decision as to the substantive jurisdiction of the tribunal rests with the court.<sup>427</sup> However, there is no reason why the tribunal should not have the power, subject to review by the court, to rule on its own jurisdiction. Indeed, such a power (often referred to as the principle of “*kompetenz-kompetenz*”) has been generally recognised in other legal systems. It had also been recognised by English law before the 1996 Act,<sup>428</sup> but s.30 of the Act puts this on a statutory basis. Unless otherwise agreed by the parties, the arbitral tribunal may rule on its own substantive jurisdiction, that is, as to (a) whether there is a valid arbitration agreement; (b) whether the tribunal is properly constituted; and (c) what matters have been submitted to arbitration in accordance with the arbitration agreement.<sup>429</sup> Any such ruling may be challenged by any arbitral process of appeal or review or in accordance with the provisions of Pt I of the Act,<sup>430</sup> notably by an application under s.32<sup>431</sup> or by a challenge to the award under s.67<sup>432</sup> or at the enforcement stage under ss.66 and 103(2)(b).<sup>433</sup>

#### Objection to substantive jurisdiction of tribunal<sup>434</sup>

- 34-103 Section 31 of the 1996 Act (which is a mandatory provision<sup>435</sup>) limits the period within which an objection to the substantive jurisdiction of the arbitral tribunal can be raised and sets out the courses open to the tribunal if such an objection is made. An objection that the tribunal lacks jurisdiction at the outset of the proceedings must be raised by a party not later than the time he takes the first step in the proceedings to contest the merits of any matter<sup>436</sup> in relation to which he challenges the

tribunal's jurisdiction.<sup>437</sup> And any objection during the course of the arbitral proceedings that the tribunal is exceeding its jurisdiction must be made as soon as possible after the matter alleged to be beyond its jurisdiction is raised.<sup>438</sup> The tribunal may, however, admit an objection made later if it considers the delay justified.<sup>439</sup> If a party to arbitral proceedings takes part or continues to take part in the proceedings without duly objecting that the tribunal lacks substantive jurisdiction, he cannot raise that objection later, before the tribunal or the court, unless he shows that he did not then know and could not with reasonable diligence have discovered the grounds for the objection.<sup>440</sup> The prudent course for a party contemplating a jurisdictional challenge in a two-tier arbitration scheme is to advance such objections before the first tier arbitrators; if not, it may well be at risk of losing that right.<sup>441</sup>

- 34-104 Where an objection is duly taken to the tribunal's substantive jurisdiction and the tribunal has power to rule on its own jurisdiction, s.31(4) states that the tribunal may adopt one of two courses: first, it may rule on the matter in an award on jurisdiction; secondly, it may deal with the objection in its award on the merits. It may be presumed that at least the first of these alternatives is open to the tribunal if it rules that it lacks jurisdiction as well as if it rules that it has jurisdiction, although it is somewhat peculiar to categorise the declining of jurisdiction as an "award". If the parties agree which of these two courses the tribunal should take, the tribunal is to proceed accordingly. In either case the award may be challenged in court under s.67 of the Act.<sup>442</sup> But a third way of proceeding is also contemplated, albeit in limited circumstances. This is for an application (under s.32) to be made to the court by a party before any award.<sup>443</sup> In this situation, the tribunal may (and, if the parties agree, must) stay the arbitral proceedings whilst such an application is made.<sup>444</sup> It must, however, be borne in mind that a person who is alleged to be a party to arbitral proceedings but who takes no part in those proceedings because he considers that the tribunal lacks substantive jurisdiction cannot be required to take any positive steps to object to the jurisdiction of the tribunal. He may choose instead to challenge the jurisdiction of the tribunal by proceedings in court for a declaration or injunction or other appropriate relief under s.72<sup>445</sup> or to challenge any award made under s.67.<sup>446</sup> By contrast, a party asserting the existence of an arbitration agreement will not be able to seek a declaration from the Court that the arbitration exists other than pursuant to the procedures laid down in the **Arbitration Act 1996** (unless the declaration is sought in support of other relief, such as an anti-suit injunction).<sup>447</sup>

## Determination of preliminary point of jurisdiction

- 34-105 **U** Section 32 of the 1996 Act confers upon a party, in limited circumstances, the right to apply to the court to determine any question as to the substantive jurisdiction of the arbitral tribunal.

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**U** Such an application, if made at the outset of arbitral proceedings, may result in considerable savings of time and costs.

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**U** However, in view of the power given to the tribunal by [s.30](#) to rule on its own jurisdiction, the Departmental Advisory Committee expressed the opinion that such an application was intended to be made in exceptional cases only.

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**U** The application cannot be considered unless either it is made with the agreement in writing of all the other parties to the proceedings, or it is made with the permission of the tribunal and the court is satisfied (a) that the determination of the question is likely to produce substantial savings in costs; (b) that the application was made without delay; and (c) that there is good reason why the matter should be decided by the court.

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**U** However, the procedure under [s.32](#) is unlikely to be appropriate in circumstances where [s.72](#) is engaged.

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**U** Unless otherwise agreed by the parties, the tribunal may continue the arbitral proceedings and make an award while an application to the court is pending.

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**U**

34-106 Restrictions are placed by [subss.\(5\)](#) and [\(6\)](#) of [s.32](#) on the right of appeal. Unless the court gives permission, no appeal lies from a decision of the court whether the conditions referred to above have been met.<sup>454</sup> So far as the decision of the court on the question of jurisdiction is concerned, this is treated as a judgment of the court for the purposes of an appeal. But no appeal lies without the permission of the court which will not be given unless the court considers that the question involves a point of law which is one of general importance or is one which for some other special reason should be considered by the Court of Appeal.<sup>455</sup> It would appear that no appeal lies against a refusal to give permission. [Section 32](#) is mandatory.<sup>456</sup>

## Footnotes

1 For a more detailed account of arbitration, and practice and procedure, the reader should consult: Merkin, Arbitration Law (2007); Merkin and Flannery, Arbitration Act 1996, 5th edn (2014); Russell on Arbitration, 24th edn (2015); Tweeddale and Tweeddale, Arbitration

- of Commercial Disputes, 2nd edn (2012); Harris, Planterose and Tecks, Arbitration Act 1996, 5th edn (2014); Mustill and Boyd, Commercial Arbitration, 2nd edn (1989) and Supplement (2001); Redfern and Hunter, Law and Practice of International Arbitration, 5th edn (2009); Park, Arbitration of International Business Disputes, 2nd edn (2012).
- 427 *May v Mills* (1914) 30 T.L.R. 287; *Produce Brokers Co Ltd v Olympia Oil and Cake Co Ltd* [1916] 1 A.C. 314, 327; *Heyman v Darwins Ltd* [1942] A.C. 356, 393; *Brown v Genossenschaft Oesterreichischer Waldbesitzer R GmbH* [1954] 1 Q.B. 8; *Dalmia Dairy Industries Ltd v National Bank of Pakistan* [1978] 2 Lloyd's Rep. 223, 285–293; *Willcock v Pickfords Removals Ltd* [1979] 1 Lloyd's Rep. 244, 245; *Peoples Insurance Co of China v Vysanthi Shipping Co Ltd* [2003] EWHC 1655 (Comm), [2003] 2 Lloyd's Rep. 617 at [25]; *Dallah Real Estate & Tourism Co v Ministry of Religious Affairs of the Government of Pakistan* [2010] UKSC 46, [2011] 1 A.C. 763 at [26], [86], [96], [104], [148].
- 428 *Golodetz v Schrier* (1947) 80 Ll.L. Rep. 647, 650; *Brown v Genossenschaft Oesterreichischer Waldbesitzer R GmbH* [1954] 1 Q.B. 8; *Lucanda Exportadora SARL v Wahbe Tamari & Sons* [1967] 2 Lloyd's Rep. 353, 364; *Dallah Real Estate & Tourism Co v Ministry of Religious Affairs of the Government of Pakistan* [2010] UKSC 46, [2011] 1 A.C. 763 at [25], [93].
- 429 s.30(1). See the *Chartered Institute of Arbitrators: Guidelines for Arbitrators dealing with Jurisdictional Problems* (2011) 77 Arbitration 220; *Vee Networks Ltd v Econet Wireless International Ltd* [2004] EWHC 2909 (Comm), [2005] 1 Lloyd's Rep. 192 at [22]; *UR Power GmbH v Kuok Oils and Grains Pte Ltd* [2009] EWHC 1940 (Comm), [2009] 2 Lloyd's Rep. 495; *Dallah Real Estate & Tourism Co v Ministry of Religious Affairs of the Government of Pakistan* [2010] UKSC 46, [2011] 1 A.C. 763 at [25], [79], [93]–[95]; *Assaubayev v Michael Wilson and Partners Ltd* [2014] EWHC 821 (QB). But see the cases cited above, para.34-068 (note) (court may nevertheless be the first to decide). In *C v D1* [2015] EWHC 2126 (Comm) at [135] the Court said that s.30 is likely to contain an exhaustive definition of jurisdictional matters. In *Cockett Marine Oil DMCC v ING Bank NV* [2019] EWHC 1533 (Comm) at [53], [59], the Court held that an issue whether an assignee could claim the benefit of an arbitration agreement was an issue as to whether there was a valid arbitration agreement.
- 430 s.30(2).
- 431 See below, para.34-105.
- 432 See below, para.34-159.
- 433 *Dallah Real Estate & Tourism Co v Ministry of Religious Affairs of the Government of Pakistan* [2010] UKSC 46, [2011] 1 A.C. 763.
- 434 *Aeberli* (2005) 21 Arbitration International 253, 264.
- 435 s.4(1) and Sch.1.
- 436 *Vee Networks Ltd v Econet Wireless International Ltd* [2004] EWHC 2909 (Comm), [2005] 1 Lloyd's Rep. 192 at [65]; cf. *Athletic Union of Constantinople v National Basketball Association* [2002] EWCA Civ 830, [2002] 1 Lloyd's Rep. 305 at [39]. *Gulf Import & Export Co v Bunge SA* [2007] EWHC 2667 (Comm), [2008] 1 Lloyd's Rep. 316 at [47]; *Republic of Serbia v Image Sat International NV* [2009] EWHC 2853 (Comm), [2010] 1 Lloyd's Rep. 324 at [107]–[110]. See *Yang* (2004) 70 Arbitration 279.
- 437 s.31(1). A party is not precluded from raising such an objection by the fact that he has appointed or participated in the appointment of an arbitrator.

- 438 s.31(2).
- 439 s.31(3). cf. *Republic of Serbia v Image Sat International NV* [2009] EWHC 2583 (Comm), [2010] 1 Lloyd's Rep. 324 at [110].
- 440 s.73(1); see below, para.34-178; *Hussman (Europe) Ltd v Al Amen Development & Trade Co* [2002] 2 Lloyd's Rep. 83, 91; *Athletic Union of Constantinople v National Basketball Association* [2002] EWCA Civ 830, [2002] 1 Lloyd's Rep. 305 at [20]-[27]; *JSC Zestafoni G Nikoladz Ferroalloy Plant v Ronly Holdings Ltd* [2004] EWHC 245 (Comm), [2004] 2 Lloyd's Rep. 335 at [64]; *Westland Helicopters Ltd v Sheikh Salah-al-Hejailan (No.1)* [2004] EWHC 1625 (Comm), [2004] 2 Lloyd's Rep. 523; *Vee Networks Ltd v Econet Wireless International Ltd* [2004] EWHC 2909 (Comm), [2005] 1 Lloyd's Rep. 192 at [66]; *Frontier Agriculture Ltd v Bratt Bros* [2015] EWCA Civ 611, [2015] 2 Lloyd's Rep. 500; *A v B* [2016] EWHC 3003 (Comm), [2017] 1 W.L.R. 2030 at [50]-[63]. But if the arbitrator determines that he lacks jurisdiction and a party challenges that determination, s.73 is inapplicable since that party is not making any of the objections to which s.73 applies; *LG Caltex Gas Co Ltd v China National Petroleum Corp* [2002] EWCA Civ 788, [2002] 1 W.L.R. 1892.
- 441 *UK Power GmbH v Kuok Oils and Grains Pte Ltd* [2009] EWHC 1940 (Comm), [2009] 2 Lloyd's Rep. 495 at [32].
- 442 See below, para.34-158. But cf. *Aoot Kalmneft v Glencore International AG* [2002] 1 Lloyd's Rep. 128, 138-139 (decision of tribunal on what course to take under s.31(4) cannot be challenged under s.67).
- 443 See below, para.34-105.
- 444 s.31(5). See (1998) 64 Arbitration 188.
- 445 See below, para.34-159; *Caparo Group Ltd v Fagor Arrasato Sociedad Cooperativa* [2000] A.D.R. L.J. 24; *Law Debenture Trust Corp v Elekrim Finance BV* [2005] EWHC 1412 (Ch), [2005] 2 Lloyd's Rep. 755; *Broda Agro Trade (Cyprus) Ltd v Alfred C Toepfer International GmbH* [2010] EWCA Civ 110, [2011] 1 Lloyd's Rep. 243.
- 446 See below, para.34-158.
- 447 *HC Trading Malta Ltd v Tradeland Commodities SL* [2016] EWHC 1279 (Comm), [2016] 1 W.L.R. 3120 at [16]-[20], [40].
- ④448 s.32(1).
- ④449 *Azov Shipping Co v Baltic Shipping Co* [1999] 2 Lloyd's Rep. 159, 161. cf. *Aeberli* (2005) 21 Arbitration International 253, 273. An application cannot be made after the arbitrator has made his award: *Five Oceans Salvage Ltd v Wenzhou Timber Group Co* [2011] EWHC 3282 (Comm), [2012] 1 Lloyd's Rep. 289.
- ④450 DAC Report para.147. Yet the court has power to determine, without restriction, the same issue upon an application for a stay: see above, para.34-068.
- ④451 s.32(2); *Belgravia Property Co Ltd v S & R (London) Ltd* [2001] B.L.R. 424; *Esso Exploration & Production UK Ltd v Electricity Supply Board* [2004] EWHC 723 (Comm), [2004] 1 All E.R. (Comm) 926; *Film Finance Inc v Royal Bank of Scotland* [2007] EWHC

195 (Comm), [2007] 1 Lloyd's Rep. 382; *Viscous Global Investment Ltd v Palladium Navigation Corp* [2014] EWHC 2654 (Comm), [2014] 2 Lloyd's Rep. 600; *Toyota Tsusho Sugar Trading Ltd v Prolat SRL* [2014] EWHC 3649 (Comm), [2015] 1 Lloyd's Rep. 344. Unless made with the agreement of the parties, the application must also state the grounds on which it is said that the matter should be decided by the court: s.32(3). See *ABB Lummus Global Ltd v Keppel Fels Ltd* [1999] 2 Lloyd's Rep. 24; *Azov Shipping Co v Baltic Shipping Co* [1999] 2 Lloyd's Rep. 159 at [161]; CPR PD 62.9.

④52 *Armada Ship Management (S) Pte Ltd v Schiste Oil and Gas Nigeria Ltd* [2021] EWHC 1094 (Comm), [2022] 1 All E.R. (Comm) 1091 at [41]–[52].

④53 s.32(4). See (1998) 64 Arbitration 188.

454 s.32(5).

455 s.32(6); but see para.34-186, below.

456 s.4(1) and Sch.1.

## Section 7. - The Arbitral Proceedings

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Chapter 34 - Arbitration<sup>1</sup>

Section 7. - The Arbitral Proceedings

### Conduct of the reference

- 34-107 Section 33 of the 1996 Act sets out the general duty of the arbitral tribunal in the conduct of the reference. The tribunal is to act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent,<sup>457</sup> and is to adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined.<sup>458</sup> Whether the means provided are reasonable and whether the procedures are fair are to be objectively determined, but they are not unduly demanding standards. A procedure may be fair even if it is not perfect.<sup>459</sup> The tribunal must comply with this general duty in conducting the arbitral proceedings, in its decisions on matters of procedure and evidence and in the exercise of all other powers conferred upon it.<sup>460</sup> The duty applies equally to all arbitrators no matter by whom they are appointed, whether by a party, by co-arbitrators or by an arbitral institution.<sup>461</sup> This is a mandatory provision.<sup>462</sup> Subject to the overriding requirements of fairness, impartiality and even-handedness, it is intended to encourage the tribunal to adapt its procedures to suit the particular case and not slavishly to follow court or other set procedures if these are inappropriate.<sup>463</sup>
- 34-108 The generality of the wording of s.33 might, nevertheless, be thought likely to tempt unsuccessful parties to challenge procedural decisions taken by the tribunal, or the award, on the ground that the tribunal has failed to observe one or more of the duties stipulated by the section, especially since the Departmental Advisory Committee suggested that a proceeding which departed from those duties could not “properly be described as an arbitration”.<sup>464</sup> However, the sanctions for breach of duty are narrowly circumscribed. They are, first, that the court should remove the arbitrator under s.24 (but this is subject to the limitations imposed by that section)<sup>465</sup>; secondly, that the court should remit, set aside or invalidate the award under s.68 on the ground of “serious irregularity”.

But an irregularity is only “serious” if the court considers that it has caused or will cause substantial injustice to the applicant.<sup>466</sup> Experience has shown that the courts will not uphold challenges based on breaches of s.33 which are insubstantial.<sup>467</sup>

## Procedural and evidential matters

- 34-109 The arbitral tribunal has a general power to control the manner in which proceedings are conducted. Section 34(1) of the 1996 Act makes this clear by providing that it is for the tribunal to decide all procedural and evidential matters, subject to the right of the parties to agree any matter. There could be a potential conflict between the mandatory duty of the tribunal under s.33 and the principle of party autonomy contained in s.34,<sup>468</sup> for example, if the parties agreed to adopt a procedure, e.g. extended disclosure, which involved unnecessary delay or expense contrary to s.33(1)(b). But such a conflict is likely to be more theoretical than real. In practice, the parties will be free to agree on any procedural or evidential matter, for example, by agreeing to apply the procedural rules of a particular arbitral institution. In the absence of any effective agreement between the parties in respect of such a matter, the tribunal decides how best to proceed in the circumstances of the case.<sup>469</sup>
- 34-110 Section 34(2) gives an illustrative and non-exhaustive list of the procedural and evidential matters referred to. These include:
- (a)“when and where any part of the proceedings is to be held”—so empowering the tribunal to decide, for example, when meetings are to be held, or that meetings are to be held elsewhere than at the seat of arbitration<sup>470</sup>;
  - (b)“the language or languages to be used in the proceedings and whether translations of any relevant documents are to be supplied”<sup>471</sup>;
  - (c)“whether any and if so what form of written statements of claim and defences are to be used, when these should be supplied and the extent to which such statements can be later amended”—so empowering the tribunal to determine the form of pleadings (if any), whether to order particulars, and to allow and disallow amendments<sup>472</sup>;
  - (d)“whether any and if so which documents or classes of documents should be disclosed between and produced by the parties and at what stage”—so empowering the tribunal to apply or depart from the rules relating to disclosure and inspection applied in court proceedings<sup>473</sup>;
  - (e)“whether any and if so what questions should be put to and answered by the respective parties and when and in what form this should be done”—so empowering the tribunal to control the oral and written questioning of the parties<sup>474</sup>;
  - (f)“whether to apply strict rules of evidence (or any other rules) as to the admissibility, relevance or weight of any material (oral, written or other) sought to be tendered on any

matters of fact or opinion, and the time, manner and form in which such material should be exchanged and presented”—so empowering the tribunal to dispense with technical rules of evidence and, as an incidental result, to put an end to any arguments that it is a question of law whether there is material to support a finding of fact<sup>475</sup>;

(g)“whether and to what extent the tribunal should itself take the initiative in ascertaining the facts and the law”—so empowering the tribunal to discard the rules applicable to an adversarial procedure and adopt an inquisitorial approach, by, for example, itself procuring evidence<sup>476</sup>;

(h)“whether and to what extent there should be oral or written evidence or submissions”—so, for example, allowing the tribunal to decide the case on the basis of documents only or to render an award after a very short oral hearing.<sup>477</sup>

**Subsection (3) of s.34** further allows the tribunal to fix time limits for any directions it gives and to extend time limits fixed.<sup>478</sup> It can fix the dates of hearings and does not necessarily act unfairly if it refuses an adjournment requested by one of the parties.<sup>479</sup> The tribunal has the power to change its mind about any order made (though it is not desirable for it to do so) and to revise or reverse an earlier decision.<sup>480</sup>

## Consolidation of proceedings and concurrent hearings

34-111 The parties are free to agree that their arbitral proceedings are to be consolidated with others or that concurrent hearings shall be held.<sup>481</sup> But all parties to all such proceedings must so agree. Unless the parties agree to confer such power on the tribunal, for example, by adopting forms of contract<sup>482</sup> or institutional rules which provide for consolidation or concurrent hearings,<sup>483</sup> neither the arbitral tribunal nor the court has that power.<sup>484</sup> This can constitute a considerable drawback to arbitration as a method of dispute resolution where a number of parties are involved, particularly in relation to construction and engineering projects.<sup>485</sup> But it seems to follow inevitably from the fact that, unless the parties otherwise agree, only their own disputes arising out of their own agreement can be referred to the agreed tribunal.<sup>486</sup> A fortiori there is no power in the tribunal or in the court to order that a person who has never agreed to arbitration should be joined as a party to the proceedings. However, a party who has never agreed to arbitration, but who seeks to enforce a substantive right conferred on him by the **Contracts (Rights of Third Parties) Act 1999** will be treated as a party to an arbitration agreement to which the term conferring the right is subject.<sup>487</sup>

## Legal or other representation

34-112

A party to arbitral proceedings may be represented in the proceedings by a lawyer or other person chosen by him.<sup>488</sup> This right is conferred by s.36 of the 1996 Act, but the parties are free to agree otherwise and the rules of some arbitral institutions preclude legal representation at first-tier hearings. The section does not entitle a party to insist that he be represented by a particular person and to delay the proceedings on the ground of the non-availability of that person.<sup>489</sup>

## **Power to appoint experts, etc.** <sup>490</sup>

- 34-113 The arbitral tribunal is empowered to appoint experts or legal advisers to report to it and the parties, or to appoint assessors to assist it on technical matters, and it may allow such persons to attend the proceedings.<sup>491</sup> The parties must be given a reasonable opportunity to comment on any information, opinion or advice offered by them.<sup>492</sup> This power does not require the positive agreement of the parties, but the parties may otherwise agree and it is in any event subject to the general duty of the tribunal set out in s.33. The fees and expenses of an expert, etc. appointed by the tribunal for which the arbitrators are liable are expenses of the arbitrators for which (assuming they are reasonable) the parties are jointly and severally liable.<sup>493</sup>

## **General powers exercisable by tribunal**

- 34-114 One of the major objectives of the 1996 Act was to enlarge the powers of the arbitral tribunal in the conduct of the reference and to reduce the occasions on which a party would have to apply to the court to intervene in the proceedings. Section 38 of the Act provides that the parties are free to agree on the powers exercisable by the tribunal for the purposes of and in relation to the proceedings.<sup>494</sup> But it then sets out a number of powers which the tribunal has unless otherwise agreed.<sup>495</sup>

## **Security for costs**

- 34-115 Subsection (3) empowers the tribunal to order a claimant to provide security for the costs of the arbitration.<sup>496</sup> This was a major change from the previous law where only the court could order security for costs. The power is no longer vested in the court<sup>497</sup> but only in the tribunal. It is discretionary, as is the power conferred upon the court by the provisions of the CPR dealing with security for costs. But it does not seem that the tribunal is bound to exercise its discretion in the same manner as the court under the CPR<sup>498</sup> and, indeed, in contrast to the CPR, it is expressly

provided that the residence or incorporation of the claimant outside the United Kingdom is not to be a ground for the exercise of the power.<sup>499</sup> When the power was vested in the court it was held that, where an arbitration takes place in England under the rules of the International Chamber of Commerce, an order should not ordinarily be made that the claimant give security for costs.<sup>500</sup> The mere fact, however, that an arbitration was international did not render inappropriate an order for security, especially if the arbitration was of a type regularly conducted in London and the contract was governed by English law.<sup>501</sup>

## Other directions

- 34-116 The section<sup>502</sup> also empowers the tribunal to give directions in relation to property which is the subject of the proceedings owned by or in the possession of a party,<sup>503</sup> to direct that a party or witness shall be examined on oath or affirmation<sup>504</sup> and to give directions to a party for the preservation of any evidence in his custody or control.<sup>505</sup>

## Provisional relief with agreement of parties

- 34-117 An arbitral tribunal is entitled under [s.47 of the 1996 Act](#) to make interim awards or awards on different issues in the course of the proceedings. Such awards, however, are to be distinguished from orders for provisional relief, for example, a provisional order for the payment of money<sup>506</sup> which is subject to reversal or adjustment when a decision has been reached on the underlying merits of the dispute. [Section 39](#) provides that the parties are free to agree that the tribunal shall have power to order on a provisional basis any relief which it would have power to grant in a final award.<sup>507</sup> But, unless the parties agree to confer such a power on the tribunal, it has no such power.<sup>508</sup> Conferment of the power to order conservatory measures, for example, or to grant interim injunctive relief, will sometimes be found in institutional rules adopted by the parties in the arbitration agreement and so be available to the tribunal.<sup>509</sup>

## Duties of parties

- 34-118 [Section 40 of the 1996 Act](#) imposes a general duty on the parties to do all things necessary for the expeditious conduct of the arbitral proceedings. This includes prompt compliance with decisions, orders and directions of the arbitral tribunal and taking promptly any steps to obtain a decision of the court on a preliminary question of jurisdiction or law.<sup>510</sup> [Section 40](#) is a mandatory

provision.<sup>511</sup> It does not, however, create duties which are owed by the parties as implied terms of the arbitration agreement the breach of which has contractual consequences (e.g. repudiation of the agreement), nor does the [1996 Act](#) give the court any express power to intervene with breaches of the duties imposed by the section, the remedies for such breaches being set out in [ss.41, 42](#).<sup>512</sup>

## Default

- 34-119 It is open to the parties to agree what shall be the powers of the tribunal in the event of a party's failure to do something necessary for the proper and expeditious conduct of the arbitration.<sup>513</sup> The rules of arbitral institutions often contain provisions which empower the tribunal to take action in cases of default. But, unless otherwise agreed, [s.41 of the 1996 Act](#) confers upon the tribunal certain specific powers which may be exercised in case of a party's default.<sup>514</sup>

## Want of prosecution

- 34-120 An arbitrator has, at common law, no inherent power to dismiss a claim for want of prosecution,<sup>515</sup> nor had the court power to do so under the [1950 Act](#) or otherwise.<sup>516</sup> However, [subs.\(3\) of s.41](#) re-enacts<sup>517</sup> [s.13A of the 1950 Act](#) and enables the arbitral tribunal to make an award dismissing a claim on the ground of want of prosecution.<sup>518</sup> Unless otherwise agreed by the parties,<sup>519</sup> the conditions which must be satisfied for the making of such an award reflect the case law at the date of the Act<sup>520</sup> relating to the powers of a court to dismiss an action for want of prosecution. These conditions are that there has been inordinate and inexcusable delay on the part of the claimant in pursuing his claim and that the delay (a) gives rise, or is likely to give rise, to a substantial risk that it is not possible to have a fair resolution of the issues in that claim; or (b) has caused, or is likely to cause, serious prejudice to the respondent.<sup>521</sup> It is, however, an error of law for an arbitrator to dismiss a claim for want of prosecution before the expiration of the limitation period, save in exceptional circumstances.<sup>522</sup>

## Absence of party or failure to submit evidence<sup>523</sup>

- 34-121 [Subsection \(4\) of s.41](#) empowers the tribunal to proceed in the absence of a party at an oral hearing or if a party fails after due notice to submit written evidence or make written submissions.

## Peremptory orders <sup>524</sup>

- 34-122 If without showing sufficient cause a party fails to comply with any order or directions of the arbitral tribunal, the tribunal may make a peremptory order to the same effect as the preceding order which was not complied with, prescribing a time limit for compliance.<sup>525</sup> It is advisable that any such order should expressly state that it is peremptory, the time limit for compliance and the intended sanction to be imposed. Subsections (6) and (7) of s.41 set out the various powers of the tribunal in the event of non-compliance by a party with that peremptory order.<sup>526</sup> These are that the tribunal may: exclude allegations or material which was the subject matter of the order<sup>527</sup>; draw adverse inferences from the non-compliance<sup>528</sup>; proceed to an award on the basis of the materials provided to the tribunal<sup>529</sup>; and make an order as to the costs of the arbitration incurred as a result of the non-compliance.<sup>530</sup> But the powers conferred do not include a power simply to make an award against the defaulting party. They do, however, include, in the case of non-compliance with a peremptory order to provide security for costs, the power to make an award dismissing the claim.<sup>531</sup>
- 34-123 Powers are also conferred upon the court by s.42 to enforce a peremptory order of the tribunal.<sup>532</sup> But this is envisaged to be a last resort.<sup>533</sup> An application to the court can only be made where the parties have so agreed or the tribunal permits a party to apply or makes the application itself.<sup>534</sup> The court must also be satisfied that there has been a default in complying with the peremptory order within the time prescribed in the order (or, if no time was prescribed, within a reasonable time)<sup>535</sup> and that the applicant has exhausted any available arbitral process in respect of failure to comply with the order.<sup>536</sup> The power of the court is discretionary but the court is not required in every case to satisfy itself that the case is a proper one for the order which is sought by reviewing the decision made by the tribunal and considering whether the tribunal ought to have made the order in question.<sup>537</sup> There may, however, be circumstances where the court might decide not to make the order.<sup>538</sup>

## Footnotes

<sup>1</sup> For a more detailed account of arbitration, and practice and procedure, the reader should consult: Merkin, Arbitration Law (2007); Merkin and Flannery, Arbitration Act 1996, 5th edn (2014); Russell on Arbitration, 24th edn (2015); Tweeddale and Tweeddale, Arbitration of Commercial Disputes, 2nd edn (2012); Harris, Planterose and Tecks, Arbitration Act 1996, 5th edn (2014); Mustill and Boyd, Commercial Arbitration, 2nd edn (1989) and Supplement

- (2001); Redfern and Hunter, *Law and Practice of International Arbitration*, 5th edn (2009); Park, *Arbitration of International Business Disputes*, 2nd edn (2012).
- 457 s.33(1)(a). In *Reliance Industries Ltd v Union of India [2018] EWHC 822 (Comm), [2018] 1 Lloyd's Rep. 562* at [25] it was held that the requirement in the UNCITRAL Rules, art.15(1), that each party should have a “full” opportunity of presenting its case, rather than a “reasonable” opportunity as required by s.33(1)(a), did not impose a higher burden on the arbitral tribunal. It was observed that the different wording was introduced in s.33(1)(a) by the DAC (para.165) because the word “full” might have reflected a difference in timing.
- 458 s.33(1)(b); *SCM Financial Overseas Ltd v Raga Establishment Ltd [2018] EWHC 1008 (Comm), [2018] 2 Lloyd's Rep. 99* at [60].
- 459 *SCM Financial Overseas Ltd v Raga Establishment Ltd [2018] EWHC 1008 (Comm), [2018] 2 Lloyd's Rep. 99* at [58].
- 460 s.33(2).
- 461 *Halliburton Co v Chubb Bermuda Insurance Ltd [2020] UKSC 48, [2020] 3 W.L.R. 1474* at [63].
- 462 s.4(1) and Sch.1.
- 463 DAC Report para.151; *Margulead v Exide Technologies [2004] EWHC 1019 (Comm), [2005] 1 Lloyd's Rep. 324* (claimant not allowed last word).
- 464 DAC Report para.150.
- 465 See above, paras 34-096—34-097.
- 466 See below, para.34-165.
- 467 See below, paras 34-163—34-166, and DAC Report para.151.
- 468 cf. DAC Report paras 154–163. See also DAC Report para.175 (s.40).
- 469 For international arbitrations, see the IBA Evidence Rules 2010.
- 470 See *Hunter (1997) 13 Arbitration International 345* at 347.
- 471 (1997) 13 *Arbitration International* 345 at 347.
- 472 (1997) 13 *Arbitration International* 345 at 349.
- 473 (1997) 13 *Arbitration International* 345.
- 474 (1997) 13 *Arbitration International* 345 at 350.
- 475 (1997) 13 *Arbitration International* 345 at 351.
- 476 (1997) 13 *Arbitration International* 345 at 354 (subject to allowing the parties to comment on the evidence).
- 477 (1997) 13 *Arbitration International* 345 at 357; *O'Donoghue v Enterprise Inns Plc [2008] EWHC 2273 (Ch)*.
- 478 (1997) 13 *Arbitration International* 345.
- 479 *Konkola Copper Mines Plc v U&M Mining Zambia Ltd [2014] EWHC 2374 (Comm), [2014] 2 Lloyd's Rep. 649* (“show cause” order).
- 480 *Charles McWillie & Co (Shipping) Ltd v Ocean Laser Shipping Ltd [1999] 1 Lloyd's Rep. 225, 248.*
- 481 s.35(1). See Chartered Institute of Arbitrators: Guidelines for Arbitrators on how to approach issues relating to multi-party arbitrations.

- 482 See *Redland Aggregates Ltd v Shepherd Hill Civil Engineering Ltd* [2002] 1 W.L.R. 1621 *HL* (FCEC Standard Form of Subcontract); *Dredging and Construction Ltd v Delta Civil Engineering Ltd* [2002] C.L.C. 213 (FCEC form of contract); *Belgravia Property Co Ltd v S & R (London) Ltd* [2001] B.L.R. 424 (JCT form of contract); *City and General (Holborn) Ltd v AYH Plc* [2006] B.L.R. 55 (JCT form of contract).
- 483 e.g. CIArb Rules art.73. See *Knowles* (1996) 62 *Arbitration* 191; *Hanotiau* (1998) 14 *Arbitration International* 369; *Hardy* (2000) 66 *Arbitration* 15; *Platte* (2002) 18 *Arbitration International* 67; *Dillon and Limbert* (2006) 9 *Int. A.L. Rev.* 53; *Cremades and Madalena* (2008) 24 *Arbitration International* 507.
- 484 s.35(2). See *Halliburton Co v Chubb Bermuda Insurance Ltd* [2020] UKSC 48, [2020] 3 W.L.R. 1474 at [57].
- 485 There may also be difficulties in the case of “string” or “back-to-back” contracts in other spheres. See also *Sacor Maritima SA v Repsol Petroleo SA* [1998] 1 *Lloyd's Rep.* 518; and *Aquator Shipping Ltd v Kleimar NV* [1998] 2 *Lloyd's Rep.* 379 (head charter and sub-charter).
- 486 DAC Report para.179. See also above, para.34-050 (confidentiality).
- 487 See above, para.34-044.
- 488 s.36. See IBA Guidelines on Party Representation in International Arbitration 2013; *Piper Double Glazing Ltd v DC Contracts* [1994] 1 All E.R. 177 (costs incurred by unqualified person).
- 489 DAC Report para.184.
- 490 See the *Chartered Institute of Arbitrators: Guidelines on the use of tribunal appointed experts, legal advisers and assessors*: 70 *Arbitration* 45–50.
- 491 s.37(1)(a).
- 492 s.37(1)(b); *Hussman (Europe) Ltd v Al Ameen Development and Trade Co* [2002] 2 *Lloyd's Rep.* 83, 94.
- 493 s.37(2). See also s.28; above, para.34-100. This is a mandatory provision.
- 494 s.38(1).
- 495 s.38(2).
- 496 See Chartered Institute of Arbitrators: Guideline on Security for Costs.
- 497 But see s.70(6); below, para.34-179.
- 498 CPR r.25.13. See (1997) 63 *Arbitration* 166 (guidelines); *Reid* (2002) 152 N.L.J. 1426; *Altaras* (2002) 69 *Arbitration* 81; (2007) 73 *Arbitration* 191; *De Battista* (2010) 76 *Arbitration* 421.
- 499 s.38(3).
- 500 *Bank Mellat v Helliniki Techniki SA* [1984] Q.B. 291. But contrast *SA Coppée Lavalin NV v Ken-Ren Chemicals and Fertilisers Ltd* [1995] 1 A.C. 38.
- 501 *K/S A/S Bani v Korea Shipbuilding and Engineering Corp* [1987] 2 *Lloyd's Rep.* 445; *Flender Werft AG v Aegean Maritime Ltd* [1990] 2 *Lloyd's Rep.* 27, 29; *Regia Autonoma de Electricitate Revel v Gulf Petroleum International Ltd* [1996] 1 *Lloyd's Rep.* 67.
- 502 s.38(4). See (1998) 64 *Arbitration* 84 (guidelines), 180; *Oyre* (1999) 65 *Arbitration* 113 (interim relief); CPR r.25.1; *Emmot v Michael Wilson & Partners Ltd (No.2)* [2009] EWHC 1 (Comm), [2009] 1 *Lloyd's Rep.* 233 at [63].
- 503 Under s.12(6)(g) of the Arbitration Act 1950, this power was previously reserved to the court.

- 504 This confirms s.12(1)–(3) of the 1950 Act.
- 505 Under s.12(6)(e), (g) of the 1950 Act, this power was previously reserved to the court.
- 506 s.39(2)(a).
- 507 s.39(1); cf. *Kastner v Jason* [2004] EWCA Civ 1599, [2005] 1 Lloyd's Rep. 397 at [14]–[19] (freezing order). See also s.39(3) (to be taken into account in the final award); and CPR Pt 25.
- 508 s.39(4).
- 509 *Thomas* (1997) 13 Arbitration International 405; (1998) 64 Arbitration 17 (guidelines).
- 510 ss.32, 45; above, para.34-105; below, para.34-127.
- 511 s.4(1) and Sch.1. For a possible conflict with s.34(1), see DAC Report para.175.
- 512 *Elektrim SA v Vivendi Universal SA* [2007] EWHC 11 (Comm), [2007] 1 Lloyd's Rep. 693 at [123]–[131].
- 513 s.41(1).
- 514 s.41(2).
- 515 *Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corp Ltd* [1981] A.C. 909.
- 516 *Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corp Ltd* [1981] A.C. 909.
- 517 But with slight changes of language in s.41(3)(a).
- 518 *Birkett v James* [1978] A.C. 297; *Department of Transport v Chris Smaller (Transport) Ltd* [1989] A.C. 1197; *L'Office Cherifien des Phosphates v Yamashita—Shinnihon Steamship Co* [1994] 1 A.C. 486. See also *Trill v Sacher* [1993] 1 W.L.R. 1379; *Roe buck v Mungavin* [1994] 2 A.C. 224; *Davies* (1997) 63 Arbitration 286; Chartered Institute of Arbitrators: Guidelines for Arbitrators on Proceeding and Making Awards in Default of Party Participation (2011).
- 519 *Al Hadha Trading Co v Tradigrain SA* [2002] 2 Lloyd's Rep. 512, 522 (GAFTA arbitration).
- 520 See the changes to case management subsequently brought about by the Civil Procedure Rules: *Securum Finance Ltd v Ashton* [2001] Ch. 291.
- 521 *TAG Wealth Management v West* [2008] EWHC 1466 (Comm), [2008] 2 Lloyd's Rep. 699. However, if the parties have contracted for a shorter limitation period, the arbitral tribunal can exercise this power before the expiry of the limitation period under the Limitation Act 1980: *Dera Commercial Estate v Derya Inc* [2018] EWHC 1673 (Comm), [2019] 1 Lloyd's Rep. 57, [63]–[73].
- 522 *James Lazenby & Co v McNicholas Construction Co Ltd* [1995] 1 W.L.R. 615. But see *Securum Finance Ltd v Ashton* [2001] Ch. 291.
- 523 See Chartered Institute of Arbitrators: Guidelines for Arbitrators on Proceeding and Making Awards in Default of Party Participation (2011).
- 524 See Chartered Institute of Arbitrators: Guidelines for Arbitrators on how to approach an application for a Peremptory and “Unless” Orders and related matters.
- 525 s.41(5); *Emmott v Michael Wilson & Partners Ltd (No.2)* [2009] EWHC 1 (Comm), [2009] 1 Lloyd's Rep. 233.
- 526 There is no obligation on the arbitral tribunal to exercise these powers: *Enterprise Insurance Co Plc v U-Drive Solutions (Gibraltar) Ltd* [2016] EWHC 1301 (QB) at [47]–[59].
- 527 s.41(7)(a).

528 s.41(7)(b).

529 s.41(7)(c).

530 s.41(7)(d).

531 s.41(6).

532 Unless otherwise agreed by the parties: s.42(1); *Pearl Petroleum Co Ltd v Kurdistan Regional Government of Iraq* [2015] EWHC 3361 (Comm), [2016] 4 W.L.R. 2 at [17]–[27]. See also Sch.2 para.4 (exercise of powers by judge-arbitrator) and the Scheme for Construction Contracts (England and Wales) Regulations 1998 (SI 1998/649); *Macob Civil Engineering Ltd v Morrison Construction Ltd* [1999] Build. L.R. 93; para.34-200, below.

533 DAC Report para.212.

534 s.42(2).

535 s.42(4).

536 s.42(3). See also CPR PD 62. The permission of the court is required for any appeal from a decision of the court under this section: s.42(5); but see below, para.34-186.

537 *Emmott v Michael Wilson & Partners Ltd (No.2)* [2009] EWHC 1 (Comm), [2009] 1 Lloyd's Rep. 233 at [59].

538 See *Emmott v Michael Wilson & Partners Ltd (No.2)* [2009] EWHC 1 (Comm), [2009] 1 Lloyd's Rep. 233, where Teare J identified a number of such circumstances at [59]–[64]. cf. *Patley Wood Farm LLP v Brake & Brake* [2013] EWHC 4035 (Ch) at [52]. See *Dundas* (2013) 80 Arbitration (2) 196.

## Section 8. - Powers of the Court

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Chapter 34 - Arbitration<sup>1</sup>

Section 8. - Powers of the Court

### Court powers in support of arbitral proceedings

34-124 There is no inherent jurisdiction in the court to supervise arbitrations.<sup>539</sup> But the aid of the court may be invoked to assist the arbitral process. [Section 43 of the 1996 Act](#)<sup>540</sup> provides that a party to arbitral proceedings may use the same court procedures as are available in relation to legal proceedings<sup>541</sup> to secure the attendance before the tribunal of a witness in order to give oral testimony or to produce documents or other material evidence, i.e. to obtain a witness summons.<sup>542</sup> But this may only be done with the permission of the tribunal or the agreement of the other parties.<sup>543</sup> Moreover, these particular court procedures may only be used if the witness is in the United Kingdom and the arbitral proceedings are being conducted in England.<sup>544</sup>

34-125 [Section 44 of the Act](#) also confers upon the court, unless otherwise agreed between the parties,<sup>545</sup> the same powers on certain matters in relation to arbitral proceedings as it has in relation to legal proceedings.<sup>546</sup> These are: the taking and preservation of evidence, making orders in relation to property, the sale of any goods, and the granting of an interim injunction or the appointment of a receiver.<sup>547</sup> However, these powers may only be used when the tribunal or arbitral institution is unable to act or to act effectively.<sup>548</sup> This limitation is entirely consistent with one of the aims of the Act, which is to restrict the power of the court to intervene in the arbitral process. Exercise of the power should not usurp the function of the arbitrators.<sup>549</sup> If the case is one of urgency, the court may, on the application of a party or proposed party to the arbitral proceedings, make such orders as it considers necessary for the purpose of preserving evidence or assets,<sup>550</sup> for instance, it may make a search order or grant a freezing injunction.<sup>551</sup> It may also grant an anti-suit injunction<sup>552</sup> as the right to have disputes referred to arbitration is an “asset”.<sup>553</sup> But if the case is not one of urgency or if the order sought is not necessary for the purpose of preserving evidence or assets,<sup>554</sup>

then the court can act only upon an application of a party to the arbitral proceedings made with the permission of the tribunal or the agreement in writing of the other parties.<sup>555</sup> Similarly, if the court has made an urgent order but the matter ceases to be urgent, the court does not retain jurisdiction to deal with the continuation or variation of the order unless the tribunal or the parties have agreed that the court may so act.<sup>556</sup> It has been held that orders under s.44 cannot be made against non-parties to the arbitration agreement,<sup>557</sup> save that the court can order the taking of evidence from witnesses who are not parties to the arbitration agreement pursuant to s.44(2)(a).<sup>558</sup>

- 34-126 The powers of the court under ss.43 and 44 may be exercised even if the seat of the arbitration is outside England or no seat has been designated or determined, but the court may refuse to exercise any such power if, in its opinion, the fact that the seat is outside England, or that when designated or determined the seat is likely to be outside England, makes it inappropriate to do so.<sup>559</sup>

## Determination of preliminary point of law by the court

- 34-127 Section 2 of the Arbitration Act 1979 enabled a party to an arbitration to apply to the court to determine a question of law arising in the course of the reference. This “Consultative Case” procedure was useful in certain instances since it enabled a definitive answer to be obtained from the court at an early stage of the arbitral proceedings. Section 45 of the 1996 Act confers a similar power on the court to determine any question of law<sup>560</sup> arising in the course of the proceedings, but the court must be satisfied that the question of law substantially affects the rights of one or more of the parties.<sup>561</sup> Further, in order not to interfere unduly in the arbitral process, the conditions subject to which the court is empowered to consider such an application are also limited: the application must be made with the agreement of all the other parties to the proceedings or with the permission of the tribunal, and, in the latter case, the court must be satisfied that the determination of the question is likely to produce substantial savings in costs<sup>562</sup> and that the application is made without delay.<sup>563</sup> Unless otherwise agreed by the parties, the arbitral tribunal may continue the arbitral proceedings and make an award while an application to the court is pending.<sup>564</sup>
- 34-128 It is open to the parties, by agreement, to exclude the court’s jurisdiction under this section<sup>565</sup> and an agreement to dispense with reasons for the tribunal’s award is to be considered as such an exclusion agreement.<sup>566</sup>
- 34-129 No appeal lies to the Court of Appeal from a decision as to whether or not the conditions have been met to enable the court to consider the application unless the court gives permission to appeal.<sup>567</sup> The decision of the court on the question of law itself is to be treated as a judgment of the court for

the purposes of an appeal. But no appeal to the Court of Appeal lies without the permission of the court, which is not to be given unless the court considers that the question is one of general public importance or is one which for some other special reason ought to be considered by the Court of Appeal.<sup>568</sup> It would appear that no appeal lies against a refusal of the court to give permission to appeal.

## Power of court to extend time limits

34-130 Section 79 of the 1996 Act confers upon the court a general power to extend any time limit agreed by the parties or specified in any provision of Pt I of the Act having effect in default of such agreement<sup>569</sup> (with the exception of the time limit for beginning arbitral proceedings dealt with in s.12)<sup>570</sup> but only after any available arbitral process has been exhausted and only if a substantial injustice would otherwise be done.<sup>571</sup> An application for an extension should be made as soon as reasonably possible after the party seeking relief ought to appreciate that it is required.<sup>572</sup>

## Anti-arbitration injunction

34-131 The court has power under s.72(1) of the Act<sup>573</sup> and under s.37 of the Senior Courts Act 1981<sup>574</sup> to restrain by injunction a party, or an arbitrator, from pursuing an arbitration.<sup>575</sup> But it has been said that “Part I of the Act contemplates that once matters are referred to arbitration it is the arbitral tribunal that will generally deal with issues of their jurisdiction and the procedure in the arbitration up to the date of the award”<sup>576</sup> and it is therefore seldom—save in exceptional cases—that any injunction will be granted.<sup>577</sup> An unsuccessful application under s.72 does not preclude a party from subsequently participating in the arbitration.<sup>578</sup>

## Footnotes

- 1 For a more detailed account of arbitration, and practice and procedure, the reader should consult: Merkin, Arbitration Law (2007); Merkin and Flannery, Arbitration Act 1996, 5th edn (2014); Russell on Arbitration, 24th edn (2015); Tweeddale and Tweeddale, Arbitration of Commercial Disputes, 2nd edn (2012); Harris, Planterose and Tecks, Arbitration Act 1996, 5th edn (2014); Mustill and Boyd, Commercial Arbitration, 2nd edn (1989) and Supplement (2001); Redfern and Hunter, Law and Practice of International Arbitration, 5th edn (2009); Park, Arbitration of International Business Disputes, 2nd edn (2012).

- 539 *Exormisis Shipping SA v Oonsoo* [1975] 1 Lloyd's Rep. 432, 434; *Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corp Ltd* [1981] A.C. 909, 979; *K/S A/S Bill Biakh v Hyundai Corp* [1988] 1 Lloyd's Rep. 187, 189; *Kirkawa Corp v Gatoil Overseas Inc* [1990] 1 Lloyd's Rep. 154, 157; *Charles McWillie & Co (Shipping) Ltd v Ocean Laser Shipping Ltd* [1999] 1 Lloyd's Rep. 225, 248. cf. *Japan Line Ltd v Aggeliki Charis Compañía Maritima SA* [1980] 1 Lloyd's Rep. 288, 292.
- 540 s.43(1). Section 43 derives from s.12(4) and (5) of the Arbitration Act 1950. It is mandatory. See also Sch.2 para.4 (exercise of power by judge-arbitrator).
- 541 CPR PD 62.
- 542 For the need to identify the documents, see *Assimina Maritime Ltd v Pakistan Shipping Corp* [2004] EWHC 3005 (Comm), [2005] 1 Lloyd's Rep. 525; *Tajik Aluminium Plant v Hydro Aluminium AS* [2005] EWCA Civ 1218, [2006] 1 Lloyd's Rep. 155 (witness summons requiring production of documents); *Silver Dry Bulk Co Ltd v Homer Hulbert Maritime Co Ltd* [2017] EWHC 44 (Comm), [2017] 1 Lloyd's Rep. 154 at [39]–[46] (witness summons for production of documents). But see previous case and *BNP Paribas v Deloitte and Touche LLP* [2003] EWHC 2874 (Comm), [2004] 1 Lloyd's Rep. 233 (no power to order disclosure by non-party); *EDO Corp v Ultra Electronics Ltd* [2009] EWHC 682 (Ch), [2009] 2 Lloyd's Rep. 349 (no power to order pre-action disclosure).
- 543 s.43(2).
- 544 s.43(3), i.e. England and Wales, or (as the case may be) Northern Ireland. However, the arbitration need not have its seat in England and Wales; it is sufficient if the witness is present in England and the tribunal conducts the examination while in England or by video-link whilst abroad: *A v C* [2020] EWHC 258 (Comm), [2020] Bus. L.R. 426 at [29]–[30]; rev'd on other grounds [2020] EWCA Civ 409.
- 545 The arbitration clause may, on its true construction, exclude the power of the court to grant ancillary relief (*Mantovani v Carapelli* [1980] 1 Lloyd's Rep. 375), though such a construction will be rare: see *The Lisboa* [1980] 2 Lloyd's Rep. 546; *Petronin SA v Sechav Marine Ltd* [1995] 1 Lloyd's Rep. 603, 613; *Ultisol Transport Contractors Ltd v Bouygues Offshore SA (No.1)* [1996] 2 Lloyd's Rep. 140, 144, reversed on other grounds [1998] 2 Lloyd's Rep. 461; *Re Qs Estate* [1999] 1 Lloyd's Rep. 931; *SAB Miller Africa BV v East African Breweries Ltd* [2009] EWCA Civ 1564, [2010] 2 Lloyd's Rep. 422 at [8]. But see *B v S* [2011] EWHC 691, [2011] 2 Lloyd's Rep. 18 (FOSFA conditions).
- 546 s.44(1). *Hiscox Underwriting Ltd v Dickson Manchester & Co Ltd* [2004] EWHC 479, [2004] 2 Lloyd's Rep. 438 (interim order for disclosure); *Assimina Maritime Ltd v Pakistan Shipping Corp* [2004] EWHC 3005 (Comm), [2005] 1 Lloyd's Rep. 525 (no power to order disclosure by non-party but power to order preservation of documents by non-party); *Lauritzencool AB v Lady Navigation Inc* [2005] EWCA Civ 579, [2005] 2 Lloyd's Rep. 63 (interim injunction restraining activity outside the contract pending arbitration); *Cetelem SA v Roust Holdings Ltd* [2005] EWCA Civ 618, [2005] 2 Lloyd's Rep. 494 (injunction to deliver contractual documentation before arbitration commenced); *SAB Miller Africa BV v East African Breweries Ltd* [2009] EWCA Civ 1564, [2010] 2 Lloyd's Rep. 442 (injunction to restrain breach of contract pending establishment of tribunal). See also s.44(6) Sch.2 para.4 (exercise of power by judge–arbitrator) and CPR PD 62. The permission of the court is

- required for any appeal under s.44: s.44(7) (but see below, para.34-186); *SAB Miller Africa BV v East African Breweries Ltd* [2009] EWCA Civ 1564, [2010] 2 Lloyd's Rep. 422.
- 547 s.44(2). See *Thomas* (1997) 13 Arbitration International 105. cf. *Tsakos Shipping & Trading SA v Orizon Tanker Co Ltd* [1998] C.L.C. 1003 (order for inspection and tests set aside); *Commerce and Industry Co of Canada v Certain Underwriters of Lloyd's of London* [2002] 1 W.L.R. 1323 (application for examination of witnesses to provide depositions in New York arbitration refused); *Econet Wireless Ltd v Vee Networks Ltd* [2006] EWHC 1568 (Comm), [2006] 2 Lloyd's Rep. 428 (application for injunction to restrain sale of shares refused); *Permasteelisa Japan KK v Bouyguesstroi* [2007] EWHC 3508 (TCC) (application for injunction to restrain calls on performance bonds refused); *Travelers Insurance Co Ltd v Countrywide Surveyors Ltd* [2010] EWHC 2455 (TCC), [2011] 1 All E.R. (Comm) 631 (order for pre-action disclosure refused); *Silver Dry Bulk Co Ltd v Homer Hulbert Maritime Co Ltd* [2017] EWHC 44 (Comm), [2017] 1 Lloyd's Rep. 154 at [47]–[53] (order for letters of request to a foreign court refused); *Dainford Navigation Inc v PDVSA Petroleo SA* [2017] EWHC 2150 (Comm), [2017] 2 Lloyd's Rep. 409 (order for sale of goods the subject of the proceedings). For the power of the court under s.37 of the Senior Courts Act 1981 to intervene outside the 1996 Act, see *Hiscox Underwriting Ltd v Dickson Manchester & Co* [2004] EWHC 479, [2004] 2 Lloyd's Rep. 438; *Cetelem SA v Roust Holdings Ltd* [2005] EWCA Civ 618, [2005] 2 Lloyd's Rep. 494 at [74]; *Weissfisch v Julius* [2006] EWCA Civ 218, [2006] 1 Lloyd's Rep. 716 at [33]; *Elektrim SA v Vivendi Universal SA (No.2)* [2007] EWHC 571 (Comm), [2007] 2 Lloyd's Rep. 8; *Starlight Shipping Co v Tai Ping Insurance Co Ltd* [2007] EWHC 1893 (Comm), [2008] 1 Lloyd's Rep. 230; *Republic of Kazakhstan v Istil Group Inc (No.2)* [2007] EWHC 2729 (Comm), [2008] 1 Lloyd's Rep. 382; *Sheffield United Football Club Ltd v West Ham United Football Club Plc* [2008] EWHC 2855 (Comm), [2009] 1 Lloyd's Rep. 167 at [31]–[32]; *British Telecommunications Plc v SAE Group Inc* [2009] EWHC 252 (TCC), [2009] B.L.R. 231 (CPR Pt 8); *SAB Miller Africa BV v East African Breweries Ltd* [2009] EWCA Civ 1564, [2010] 2 Lloyd's Rep. 422; *REC Wafer Norway AS v Moser Baer Photo Voltaic Ltd* [2010] EWHC 2581 (Comm), [2011] 1 Lloyd's Rep. 410; *Enercon GmbH v Enercon (India) Ltd* [2012] EWHC 689 (Comm), [2012] 1 Lloyd's Rep. 519 at [68]; *AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC* [2013] UKSC 35, [2013] 1 W.L.R. 1889 at [48]; *Barnwell Enterprises Ltd v ECP Africa FII Investments LLC* [2013] EWHC 2517 (Comm), [2014] 1 Lloyd's Rep. 171. See also in relation to s.33(2) of the 1981 Act: *Travelers Insurance Co Ltd v Countrywide Surveyors Ltd* [2010] EWHC 2455 (TCC), [2011] 1 All E.R. (Comm) 631; *Mi-Space (UK) Ltd v Lend Lease Construction (EMEA) Ltd* [2013] EWHC 2001 (TCC), [2013] B.L.R. 600. For the power of the court under s.25(3) of the Civil Jurisdiction and Judgments Act 1982 and the restraints imposed by the ICSID Convention and sovereign immunity, see *ETI Euro Telecom International NV v Republic of Bolivia* [2008] EWCA Civ 880, [2008] 2 Lloyd's Rep. 421.
- 548 s.44(5); *Pacific Maritime Asia Ltd v Holystone Overseas Ltd* [2007] EWHC 2319 (Comm), [2008] 1 Lloyd's Rep. 371 (arbitrator's order would not be sufficiently effective); *Hiscox Underwriting Ltd v Dickson Manchester & Co Ltd* [2004] EWHC 479, [2004] 2 Lloyd's Rep. 438 (arbitrator newly appointed and unfamiliar with case and so, in effect, unable

- to act). Contrast *Econet Wireless Ltd v Vee Networks Ltd* [2006] EWHC 1568 (Comm), [2006] 2 Lloyd's Rep. 428 (England not appropriate forum); *Patley Wood Farm LLP v Brake and Brake* [2014] EWHC 4192 (Ch) (arbitrator's directions not workable). See also *Sheffield United Football Club Ltd v West Ham United Football Club Ltd* [2008] EWHC 2855 (Comm), [2009] 1 Lloyd's Rep. 167 (actions likely to be taken by parties would lead to an identical impasse).
- 549 *ZIM Integrated Shipping Services Ltd v European Containers ICS* [2013] EWHC 3581 (Comm).
- 550 s.44(3); *Cetelem SA v Roust Holdings Ltd* [2005] EWCA Civ 618, [2005] 2 Lloyd's Rep. 494; *National Insurance and Guarantee Group Ltd v M Young Legal Services Ltd* [2004] EWHC 2972 (QB), [2005] 2 Lloyd's Rep. 46; *Starlight Shipping Co v Tai Ping Insurance Co Ltd* [2007] EWHC 1893 (Comm), [2008] 1 Lloyd's Rep. 230; *Pacific Maritime Asia Ltd v Holystone Overseas Ltd* [2007] EWHC 2319 (Comm), [2008] 1 Lloyd's Rep. 371; *Sheffield United Football Club Ltd v West Ham United Football Club Ltd* [2008] EWHC 2855 (Comm), [2009] 1 Lloyd's Rep. 167; *BNP Paribas SA v Open Joint Stock Company Russian Machines* [2011] EWHC 308 (Comm), [2012] 1 Lloyd's Rep. 61 (even against non-party); *Euroil Ltd v Cameroon Offshore Petroleum SARL* [2014] EWHC 52 (Comm); *Schillings International LLP v Scott* [2019] EWHC 1335 (Ch) (no urgency); *Daelim Corp v Bonita Co Ltd* [2020] EWHC 697 (Comm), [2021] 1 Lloyd's Rep. 37. See also *Telenor East Holdings II AS v Altumo Holdings and Investments Ltd* [2011] EWHC 735 (Comm) (on meaning of "necessary" in s.44(3)). Unless there is an existing or intended arbitration there is no "party or proposed party": *AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC* [2010] EWHC 772 (Comm), [2010] 2 Lloyd's Rep. 493 at [20] (affirmed [2011] EWCA Civ 647).
- 551 *Re Q's Estate* [1999] 1 Lloyd's Rep. 931; *Cogentra AG v Sixteen Thirteen Marine SA* [2008] EWHC 1615 (Comm), [2008] 2 Lloyd's Rep. 602; *Emmott v Michael Wilson & Partners Ltd (No.2)* [2009] EWHC 1 (Comm), [2009] 1 Lloyd's Rep. 233 at [83].
- 552 See para.34-052, above.
- 553 *Cetelem SA v Roust Holdings Ltd* [2005] EWCA Civ 618, [2005] 2 Lloyd's Rep. 494 at [57]; *Starlight Shipping Co v Tai Ping Insurance Co Ltd* [2007] EWHC 1893 (Comm), [2008] 1 Lloyd's Rep. 230 at [21]; *Sheffield United Football Club Ltd v West Ham United Football Club Ltd* [2008] EWHC 2855 (Comm), [2009] 1 Lloyd's Rep. 167 at [32]; *BNP Paribas SA v Open Joint Stock Company Russian Machines* [2011] EWHC 308 (Comm), [2012] 1 Lloyd's Rep. 61.
- 554 *Cetelem SA v Roust Holdings Ltd* [2005] EWCA Civ 618, [2005] 2 Lloyd's Rep. 494 at [47]; *Mobil Cerro Negro Ltd v Petroleos Venezuela SA* [2008] EWHC 532, [2008] 1 Lloyd's Rep. 684; *Travelers Insurance Co Ltd v Countrywide Surveyors Ltd* [2010] EWHC 2455 (TCC), [2011] 1 All E.R. (Comm) 631. In *Cetelem SA v Roust Holdings Ltd* [2005] EWCA Civ 618, [2005] 2 Lloyd's Rep. 494, it was stated that a contractual right or chose in action was an "asset" (at [57], [62]); *Euroil Ltd v Cameroon Offshore Petroleum SARL* [2014] EWHC 52 (Comm). But discretion to make an order is more likely to be exercised where the asset is a conventional asset: *ZIM Integrated Shipping Services Ltd v European Containers ICS* [2013]

- EWHC 3581 (Com); Euroil Ltd v Cameroon Offshore Petroleum SARL [2014] EWHC 52 (Comm) at [18]–[20].*
- 555 s.44(4); *Petroleum Investigation Co Ltd v Kantupan Holdings Co Ltd [2002] 1 All E.R. (Comm) 124; Assimina Maritime Ltd v Pakistan Shipping Corp [2004] EWHC 3005 (Comm), [2005] 1 Lloyd's Rep. 525.*
- 556 *VTB Commodities Trading DAC v JSC Antipinsky Refinery [2020] EWHC 72 (Comm), [2020] 1 W.L.R. 1227 at [36]–[39], [44].*
- 557 *DTEK Trading SA v Morozov [2017] EWHC 94 (Comm), [2017] 1 Lloyd's Rep. 126; Trans-Oil International SA v Savoy Trading LLP [2020] EWHC 57 (Comm) at [35]–[45]; A v C [2020] EWHC 258 (Comm), [2020] Bus. L.R. 426 at [34]; [2020] EWCA Civ 409 at [54]–[55].*
- 558 *A v C [2020] EWCA Civ 409 at [35]–[47], [58]–[74].*
- 559 s.2(3); *Mobil Cerro Negro Ltd v Petroleos Venezuela SA [2008] EWHC 532, [2008] 1 Lloyd's Rep. 684* (but see s.43(3); *A v C [2020] EWHC 258 (Comm), [2020] Bus. L.R. 426 at [29]–[30]*; rev'd on other grounds *[2020] EWCA Civ 409*). cf. *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd [1993] A.C. 334; Econet Wireless Ltd v Vee Networks Ltd [2006] EWHC 1568 (Comm), [2006] 2 Lloyd's Rep. 428*. The court has power to order “provisional, including protective measures” under art.35 of Regulation (EU) 1215/2012 (Brussels *bis*) even though the courts of another contracting state have jurisdiction as to the substance of the matter; see above para.34-053. cf. *Van Uden Maritime BV v Kommanditgesellschaft in Firma Decoline (C-391/95) EU:C:1998:543; [1999] Q.B. 1225, ECJ*.
- 560 See (on s.2 of the 1950 Act) *Chapman v Charlwood Alliance Properties (1981) 260 E.G. 1041*.
- 561 s.45(1). See (on ss.1, 2 of the 1950 Act) *Manders (Property) Estates v Magnet House Properties (1989) 42 E.G. 111; Urban Small Space v Burford Investments Co (1990) 28 E.G. 116*. For the form of the application, see s.45(3) and PD 62.9.
- 562 *Secretary of State for Defence v Turner Estate Solutions Ltd [2015] EWHC 1150 (TCC), [2015] Build. L.R. 448.*
- 563 1996 Act s.45(2). See *Taylor Woodrow Holdings Ltd v Barnes & Elliott Ltd [2006] EWHC 1693 (TCC), [2006] Build. L.R. 376* (court retains discretion even though parties agree).
- 564 s.45(4).
- 565 s.45(1). See also s.69(1) and below, para.34-136. In the case of a domestic arbitration agreement, s.87 provides that any such exclusion agreement must be made after the commencement of arbitral proceedings. But s.87 is unlikely to be brought into force: see above, para.34-005. The specific exceptions listed in s.4 of the Arbitration Act 1950 were not retained.
- 566 s.45(1).
- 567 s.45(5). But see below, para.34-186.
- 568 s.45(6).
- 569 s.79 does not apply to a time limit specified in Pt 1 of the Act but not in default of agreement between the parties: *Aoot Kalmneft v Glencore International AG [2002] 1 Lloyd's Rep. 128, 135*.
- 570 See above, para.34-076.

- 571 s.79(3); *Minermet SpA Milan v Luckyfield Shipping Corp SA* [2004] EWHC 729 (Comm), [2004] 2 Lloyd's Rep. 348; *Pirtek (UK) Ltd v Deanswood Ltd* [2005] EWHC 2301 (Comm), [2005] 2 Lloyd's Rep. 728 at [44], [46]; *Gold Coast Ltd v Naval Gijon SA* [2006] EWHC 1044 (Comm), [2006] 2 Lloyd's Rep. 400; *Rotenberg v Sucafina SA* [2011] EWHC 901 (Comm), [2011] 2 Lloyd's Rep. 159; *Xstrata Coal Queensland Pty Ltd v Benxi Iron & Steel (Group) International Economic & Trading Co Ltd* [2016] EWHC 2022 (Comm), [2017] 1 All E.R. (Comm) 299. The application may be made a party or by the arbitral tribunal: s.79(2), PD62. On the extent of this power, see s.79(4), (5). The permission of the court is required for any appeal from a decision of the court under this section: s.79(6); but see below, para.34-185.
- 572 *Equatorial Traders Ltd v Louis Dreyfus Trading Ltd* [2002] 2 Lloyd's Rep. 638, 642.
- 573 See below, para.34-158.
- 574 See above, para.34-125 (note).
- 575 *Zaporozhye Production Society v Ashly Ltd* [2002] EWHC 1410 (Comm); *Arab National Bank v El-Abdali* [2004] EWHC 238 (Comm), [2005] 1 Lloyd's Rep. 541; *Weissfisch v Julius* [2006] EWCA Civ 218, [2006] 1 Lloyd's Rep. 716; *Intermet FZCO v Ansol Ltd* [2007] EWHC 226 (Comm); *Elektrim SA v Vivendi Universal SA (No.2)* [2007] EWHC 571 (Comm), [2007] 2 Lloyd's Rep. 8; *Albon v Naza Motor Trading Sdn Berhad (No.4)* [2007] EWCA Civ 1124, [2008] 1 Lloyd's Rep. 1; *Republic of Kazakhstan v Istil Group Inc (No.2)* [2007] EWHC 2729 (Comm), [2008] 1 Lloyd's Rep. 382; *Excalibur Ventures LLC v Texas Keystone Inc* [2011] EWHC 1624 (Comm), [2011] 2 Lloyd's Rep. 289; *Golden Ocean Group Ltd v Humpuss Intermodal Transportasi TBK Ltd* [2013] EWHC 1240 (Comm), [2013] 2 All E.R. (Comm) 1025; *Dunning* (2008) 74 Arbitration 254. See also *British Telecommunications Plc v SAE Group Inc* [2009] EWHC 252 (TCC), [2009] B.L.R. 231 (declaration). As to the Court's exceptional power to restrain by injunction a foreign-seated arbitration outside the EU, see *Sabbagh v Khoury* [2019] EWCA Civ 1219.
- 576 *Elektrim SA v Vivendi Universal SA (No.2)* [2007] EWHC 571 (Comm), [2007] 2 Lloyd's Rep. 8; at [70]. See also *Fiona Trust and Holding Corp v Privalov* [2007] EWCA Civ 20, [2007] 2 Lloyd's Rep. 267 at [40] (affirmed sub nom. *Premium Nafta Products Ltd v Fili Shipping Co Ltd* [2007] UKHL 40, [2008] 1 Lloyd's Rep. 254). Contrast *British Telecommunications Plc v SAE Group Inc* [2009] EWHC 252 (TCC), [2009] B.L.R. 231; *Excalibur Ventures LLC v Texas Keystone Inc* [2011] EWHC 1624 (Comm), [2011] 2 Lloyd's Rep. 289.
- 577 See also the limitations imposed by CPR 6.20(5) and *Albon v Naza Motor Trading Sdn Berhad (No.4)* [2007] EWCA Civ 1124, [2008] 1 Lloyd's Rep. 1 (at first instance) [2007] EWHC 1879 (Ch), [2007] 2 Lloyd's Rep. 420; *J Jarvis v Blue Circle Dartford Estates* [2007] EWHC 1262 (TCC), [2007] Build. L.R. 439 ("very sparingly"); *Claxton Engineering Services Ltd v TXM Olaj-es Gazkutato KFT* [2010] EWHC 345 (Comm), [2011] 1 Lloyd's Rep. 510 ("only ... in exceptional circumstances"); *Excalibur Ventures LLC v Texas Keystone Inc* [2011] EWHC 1624 (Comm), [2011] 2 Lloyd's Rep. 289 at [54], [56] ("in exceptional circumstances and with caution"); *Nomihold Securities Inc v Mobile Telesystems Finance SA* [2012] EWHC 130 (Comm), [2012] 1 Lloyd's Rep. 442 at [55]; *Sabbagh v Khoury* [2018] EWHC 1330 (Comm). Contrast *British Telecommunications Plc v SAE Group Inc* [2009] EWHC 252 (TCC), [2009] B.L.R. 231 (declaration). See also *Golden Ocean Group Ltd v*

- Humpuss Intermodal Transportasi TBK Ltd [2013] EWHC 1240 (Comm), [2013] 2 All E.R. (Comm) 1025* (Singapore arbitration put on hold pending determination of jurisdiction issue by English court); *AmTrust Europe Ltd v Trust Risk Group SpA [2015] EWHC 1927 (Comm), [2015] 2 Lloyd's Rep. 231.*
- 578 *Hackwood Ltd v Areen Design Services Ltd [2005] EWHC 2322 (TCC), (2006) 22 Const. L.J. 68.*

## Section 9. - The Award

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Section 9. - The Award<sup>579</sup>

### Arbitrator's award: legal or other criteria

- 34-132 Before the enactment of the [1996 Act](#), it was very doubtful whether an arbitration agreement which expressly authorised an arbitrator to decide ex aequo et bono or as amiable compositeur or otherwise free from the constraints of law<sup>580</sup> was a valid arbitration agreement in English law, or whether an award so made would be enforceable in England as a valid award.<sup>581</sup> But, if the parties so agree, [s.46\(1\)\(b\) of the Act](#) now authorises—and indeed requires—the arbitral tribunal to decide the dispute in accordance with such considerations as are agreed by the parties or determined by the tribunal. “Equity clauses” or arbitration ex aequo et bono, amiable composition or, indeed, any other type of clause which permits the tribunal to decide in accordance with general considerations of fairness and justice will, if so agreed by the parties, therefore be upheld, although it should be noted that the parties are then in effect excluding any right of appeal to the courts as there will be no “question of law” to appeal. The same provision in the Act will also give validity to clauses which stipulate, for example, that the tribunal is to apply a non-national system of law,<sup>582</sup> the *lex mercatoria* or “general principles of law”.
- 34-133 In the absence of any such agreement, however:

“... the duty of an arbitrator is to decide the questions submitted to him according to the legal rights of the parties, and not according to what he may consider fair and reasonable under the circumstances”.<sup>583</sup>

The arbitral tribunal must therefore apply some fixed and recognisable system of law, whether English or foreign.<sup>584</sup> It cannot make a new contract for the parties,<sup>585</sup> but it must give effect to the usages of the trade applicable to the transaction if so required by the law which governs

the contract.<sup>586</sup> It has jurisdiction to decide and is bound to give effect to all legal and equitable defences, including the Statute of Limitations<sup>587</sup> and the fact that the contract was illegal.<sup>588</sup>

## Conflict of laws

- 34-134 The tribunal must decide the dispute in accordance with the law chosen by the parties as applicable to the substance of the dispute.<sup>589</sup> An express choice of law clause must therefore, unless the parties otherwise agree, be upheld. In the absence of any such choice or agreement, the tribunal is required to apply “the law determined by the conflict of laws rules which it considers applicable”.<sup>590</sup> The arbitral tribunal therefore has a discretion as to which conflict of laws rules it will apply and, though the seat of the arbitration is in England, is not bound to apply English conflict rules.<sup>591</sup> It cannot, however, unless otherwise agreed,<sup>592</sup> proceed directly to apply whatever substantive law it considers appropriate, but must arrive at the appropriate law by the application of conflict of law rules.

## Interim awards

- 34-135 As in the case of the **1950 Act**,<sup>593</sup> s.47 of the **1996 Act** enables the arbitral tribunal to make an interim award unless otherwise agreed by the parties.<sup>594</sup> The expression “interim award” is, however, something of a misnomer,<sup>595</sup> since such an award is in fact final on the matters dealt with in the award. More accurately, therefore, s.47 states that the tribunal “may make more than one award at different times on different aspects of the matters to be determined”<sup>596</sup> and that it may, in particular, make an award relating to an issue affecting the whole claim or to a part only of the claims or cross-claims submitted to it for decision.<sup>597</sup> Under the **1950 Act** it was held that an arbitrator had a complete discretion whether or not to make an interim award as opposed to dealing with the matter in a final award and that he might impose any proper condition which he thought fit on the making of the interim award.<sup>598</sup> There is little doubt that the **1996 Act** will be construed no less widely and that, in practice, arbitrators should feel encouraged to use the power to make interim awards in order to separate out issues for early determination. However, if the tribunal makes an interim award, it must specify in its award the issue, or the claim or part of a claim, which is the subject matter of the award.<sup>599</sup> An interim award will (subject to any appeal or other proper challenge) constitute a permanent final decision as to the matters dealt with and determined by it.<sup>600</sup>

## Remedies

- 34-136 The parties are free to agree on the powers exercisable by the arbitral tribunal as regards remedies<sup>601</sup> and could therefore, by agreement, empower the tribunal to grant forms of relief that are not available to the courts.<sup>602</sup> They are also free to agree that the tribunal is not to have the power to grant certain forms of relief.<sup>603</sup> Unless otherwise agreed by the parties, the tribunal may order the payment of a sum of money in any currency,<sup>604</sup> whether the claim is for a debt or damages, and it should award damages in the currency which best expresses the claimant's loss.<sup>605</sup> It may also grant declaratory relief,<sup>606</sup> including a declaration that one party is entitled to be indemnified by the other. There is further conferred upon the tribunal the same powers as the court to grant injunctive relief,<sup>607</sup> to order specific performance of a contract (other than a contract relating to land),<sup>608</sup> and to order the rectification, setting aside or cancellation of a deed or other document.<sup>609</sup>

## Interest

- 34-137 The parties are free to agree on the powers of the tribunal as regards the award of interest.<sup>610</sup> Section 49 of the 1996 Act provides that, subject to the contrary agreement of the parties,<sup>611</sup> the tribunal may award simple or compound interest at such rates and with such rests as it considers meets the justice of the case in respect of periods both before and after the award.<sup>612</sup> But a party seeking award of "post-award" interest must ask for it.<sup>613</sup> Although the power to award interest is (unless excluded or modified by agreement) discretionary, interest should ordinarily be awarded in a commercial arbitration.<sup>614</sup> The tribunal's powers to award interest include compound interest.<sup>615</sup> However, compound interest should only be ordered on a compensatory, and not on a punitive, basis.<sup>616</sup> If an arbitrator misdirects himself in his award as to the principles on which his discretion ought to be exercised, this would, it seems, be a question of law which could be made the subject of an appeal to the court.<sup>617</sup> But otherwise the exercise of his discretion will not be open to appeal or challenge.<sup>618</sup> These powers are in addition to any other power of the tribunal to award interest, e.g. under institutional rules or contract or statute.<sup>619</sup>

## Extension of time for making award

- 34-138

There is no statutory time limit placed on the arbitral tribunal within which it must make an award. But the arbitration agreement or institutional rules may impose such a time limit. Unless otherwise agreed by the parties, the court then has power to extend that time limit subject to two qualifications: first, arbitral procedures for obtaining an extension must be exhausted before recourse to the court, and, secondly, the court must be satisfied that substantial injustice would be done if the time were not extended.<sup>620</sup>

## Settlement in form of agreed award

34-139 Section 51 of the 1996 Act enables an agreed settlement of the dispute to be given the status of an arbitral award which can then be enforced as such. Unless the parties otherwise agree, such an award need not contain any reasons,<sup>621</sup> nor need it be stated in the award that it is an agreed award. However, the tribunal can refuse to make the award<sup>622</sup> and might well decline to do so if, for example, it was in terms which were designed to mislead third parties, such as HM Revenue and Customs, or if it dealt with matters not arbitrable under the applicable law. An arbitrator may still retain jurisdiction notwithstanding a settlement if there is a dispute as to how far the settlement extended.<sup>623</sup>

## Form of award

34-140 The parties are free to agree on the form of an award.<sup>624</sup> If or to the extent that there is no agreement,<sup>625</sup> the award must be in writing signed by all the arbitrators or all those assenting to the award<sup>626</sup>; it must contain the reasons for the award<sup>627</sup>; and it must state the seat of the arbitration and the date when the award is made.<sup>628</sup> Failure to comply with these requirements of form is a ground for challenge to the award,<sup>629</sup> but only if it has caused or will cause substantial injustice to the applicant.<sup>630</sup> Where there is a reference to the decision of three arbitrators, all the arbitrators, acting together, must fairly consider all the issues in the case prior to the award.<sup>631</sup> But they may sign the award separately<sup>632</sup> and, if it is a majority award, there is no need for the majority to meet with the dissenting arbitrator to discuss with him the re-drafting of their award.<sup>633</sup> The majority may allow a dissenting opinion to be attached to the reasons of the majority<sup>634</sup> but, unless the parties agree or institutional rules otherwise provide, a dissenting arbitrator has no right to insist on his opinion being incorporated in the award.<sup>635</sup>

## Place of award

- 34-141 In *Hiscox v Outhwaite*<sup>636</sup> the House of Lords held that the place of signature determined where an award was made. But s.53 of the 1996 Act reverses that decision in part<sup>637</sup> by providing that the award shall be treated as made at the seat of the arbitration (if in England) regardless of where it was signed despatched or delivered to the parties.

## Date of award

- 34-142 The arbitral tribunal is to decide what is the date of the award.<sup>638</sup> But, if it does not do so, the date of the award is to be taken to be the date on which it is signed by the arbitrator or, where more than one arbitrator signs, by the last of them. The date of the award is important, in particular because the time limit for challenge or appeal runs from the date of the award.<sup>639</sup> Where the award is corrected<sup>640</sup> time runs from the date on which the correction is published.<sup>641</sup>

## Notification of and power to withhold award

- 34-143 Subject to contrary agreement, the award must be notified to the parties without delay after the award is made by service on them of copies of the award.<sup>642</sup> However, the tribunal may refuse to deliver an award to the parties except upon full payment of the fees and expenses of the arbitrators.<sup>643</sup> If it refuses on that ground to deliver an award, then, in the absence of any available arbitral process for appeal or review of the amount demanded, a party may apply to the court for an order that the tribunal shall deliver the award pending determination by the court of the amount properly payable.<sup>644</sup> This is a mandatory provision.<sup>645</sup>

## Correction of award or additional award: the “slip rule”

- 34-144 Section 57 of the 1996 Act allows the arbitral tribunal to correct an award so as to remove any clerical mistake or error arising from an accidental slip or omission or clarify or remove any ambiguity in the award<sup>646</sup> or to make an additional award in respect of any claim (including a claim for interest or costs) which was presented to the tribunal but was not dealt with in the award.<sup>647</sup> This may be done by the tribunal on its own initiative or on the application of a party,<sup>648</sup> but only

within certain time limits.<sup>649</sup> However, the arbitral tribunal is not permitted to exercise this power to correct an award as a result of oversights or errors in the production of evidence or argument before the tribunal or a misunderstanding of the evidence.<sup>650</sup> The parties are nevertheless free to agree that the tribunal shall have further or different powers to correct an award or make an additional award outside the terms of s.57.<sup>651</sup>

## Effect of award

- 34-145 The rules of a trade association may, for example, provide for a process of appeal or review from the award of an arbitrator to an appellate arbitral tribunal. But subject to this and to any other contrary agreement of the parties, and subject to the powers of the court in relation to the award which are set out in Pt I of the 1996 Act, an award made by the tribunal pursuant to an arbitration agreement is final and binding both on the parties and on any persons claiming through or under them.

<sup>652</sup>



## Award as a defence

- 34-146 Except where it is expressly provided to the contrary in the arbitration agreement, or the award is an interim award only, a valid award of damages duly made in pursuance of a submission to arbitration operates between the parties as a bar to any further action in personam<sup>653</sup> by the claimant in respect of the matters referred.<sup>654</sup> This is so even though the damages payable under the award have not been paid,<sup>655</sup> the claimant's remedy being to enforce the award. In contrast an award for payment of a debt does not operate as a bar to further action for the original debt,<sup>656</sup> although the parties are bound by the award as to the amount due.<sup>657</sup>

- 34-147 An award will preclude a claimant from commencing a second arbitration against the same party to recover further damages arising from the same cause of action which was the subject of the award.<sup>658</sup> The rule that damages resulting from one and the same cause of action must be assessed and recovered once for all in the same proceedings applies in principle to arbitration<sup>659</sup> as it does to actions.<sup>660</sup> But this rule may be displaced if there is an arbitral practice to the contrary in a particular trade<sup>661</sup> or if certain matters only have been included in the terms of reference in the first arbitration<sup>662</sup> or if the first award is merely declaratory of the claimant's rights.<sup>663</sup> Successive

arbitrations may, however, be commenced in respect of different causes of action, even though these arise out of the same contract.<sup>664</sup>

- 34-148 A party may be estopped from raising a second time a cause of action which has been conclusively determined by a valid award in previous arbitration proceedings between the same parties or their privies,<sup>665</sup> or an issue raised and determined in such proceedings which it was necessary to determine for the purpose of those proceedings.<sup>666</sup> Moreover the court has an inherent jurisdiction to strike out as an abuse of its process a claim based on factual issues which had been raised, or should with reasonable diligence have been raised, in previous arbitration proceedings that have been adjudicated upon by the arbitral tribunal in those proceedings,<sup>667</sup> and it is possible that a court could restrain a party from asserting such a claim in subsequent arbitration proceedings.<sup>668</sup>

## Footnotes

- 1 For a more detailed account of arbitration, and practice and procedure, the reader should consult: Merkin, Arbitration Law (2007); Merkin and Flannery, Arbitration Act 1996, 5th edn (2014); Russell on Arbitration, 24th edn (2015); Tweeddale and Tweeddale, Arbitration of Commercial Disputes, 2nd edn (2012); Harris, Planterose and Tecks, Arbitration Act 1996, 5th edn (2014); Mustill and Boyd, Commercial Arbitration, 2nd edn (1989) and Supplement (2001); Redfern and Hunter, Law and Practice of International Arbitration, 5th edn (2009); Park, Arbitration of International Business Disputes, 2nd edn (2012).
- 579 See Chartered Institute of Arbitrators: Guidelines for Arbitrators on the Formalities for Drafting an Arbitral Award.
- 580 cf. *Deutsche Schachbau-und-Tiefbohr Gesellschaft mbH v R'As al-Khaimah National Oil Co [1990] 1 A.C. 295.*
- 581 *Home and Overseas Insurance (UK) Ltd v Mentor Insurance Co (UK) Ltd [1990] 1 W.L.R. 153, 161, 166.* See also *Czarnikow v Roth Schmidt & Co [1922] 2 K.B. 478; Orion Compañía Espanola de Seguros v Belfort Maatschappij voor Algemeine Versekringen [1962] 2 Lloyd's Rep. 257, 264; Home Insurance Co v Administratia Asigurarilor de Stat [1983] 2 Lloyd's Rep. 674, 677.*
- 582 *Halpern v Halpern [2007] EWCA Civ 291, [2007] 2 Lloyd's Rep. 56* at [38]; *Musawi v RE International (UK) Ltd [2007] EWHC 2981 (Ch), [2008] 1 Lloyd's Rep. 326* at [82].
- 583 *David Taylor & Son Ltd v Barnett Trading Co [1953] 1 W.L.R. 562, 568.*
- 584 *Orion Compañía Espanola de Seguros v Belfort Maatschappij voor Algemeine Versekringen [1962] 2 Lloyd's Rep. 257; Musawi v RE International (UK) Ltd [2007] EWHC 2981 (Ch), [2008] 1 Lloyd's Rep. 326* at [22], [23]. See the criticisms of *Shackleton (1997) 13 Arbitration International 375.*
- 585 *Hooper & Co v Balfour, Williamson & Co (1890) 62 L.T. 646; Jager v Tolme and Runge [1916] 1 K.B. 939, 953, 957, 961.*

- 586 DAC Report para.222.
- 587 *Board of Trade v Cayzer, Irvine & Co* [1927] A.C. 610, 614; *Naamlooze, etc. Vulcaan v A/S Ludwig Mowinckels Rederi* (1938) 43 Com. Cas. 252 HL; *Leif Hoegh & Co A/S v Petrolsea Inc* [1992] 1 Lloyd's Rep. 45.
- 588 *David Taylor & Son Ltd v Barnett Trading Co* [1953] 1 W.L.R. 562. cf. *Harbour Assurance Co (UK) Ltd v Kansa General International Insurance Co Ltd* [1993] Q.B. 701.
- 589 s.46(1)(a) and (2) (no renvoi); *Peterson Farms Inc v C & M Farming Ltd* [2004] EWHC 121 (Comm), [2004] 1 Lloyd's Rep. 603 at [46]. Contrast (invalid choice of law) *Accentuate Ltd v Asigra Inc* [2009] EWHC 2655 (QB), [2009] 2 Lloyd's Rep. 599. In *Hussman (Europe) Ltd v Al Ameen Development & Trade Co* [2000] 2 Lloyd's Rep. 83 at [42], Thomas J stated that s.46(1)(a) does not require an arbitral tribunal sitting in London, where the applicable law is other than the law of England and Wales, to obtain general evidence and guidance in relation to that foreign law. If not raised by the parties, the tribunal is free to decide on the presumption that the applicable law is the same as the law of England and Wales. An error in the application of the chosen law does not involve a lack of substantive jurisdiction for the purposes of s.67; *B v A* [2010] EWHC 1626 (Comm), [2010] 2 Lloyd's Rep. 681 at [29].
- 590 s.46(3). See *Wortmann* (1998) 14 Arbitration International 97.
- 591 DAC Report para.225.
- 592 Such an agreement may be made by the adoption of institutional rules, e.g. the ICC rules.
- 593 s.14.
- 594 cf. *Rotenberg v Sucafina SA* [2012] EWCA Civ 637 (rules of the Coffee Trade Federation not such an agreement).
- 595 *Rotenberg v Sucafina SA* [2011] EWHC 901 (Comm), [2011] 2 Lloyd's Rep. 159 at [42] where Eder J suggests instead "Partial Award pursuant to s.47 of the 1996 Act" (affirmed [2012] EWCA Civ 637).
- 596 s.47(1); *Sea Trade Maritime Corp v Hellenic War Risks Assn (Bermuda) Ltd* [2006] EWHC 578 (Comm), [2006] 1 Lloyd's Rep. 397 (subsequent award on costs).
- 597 s.47(2).
- 598 See *Japan Line v Aggeliki Charis Compañía Maritime SA* [1980] 1 Lloyd's Rep. 288; *SL Sethia Liners v Naviagro Maritime Corp* [1981] 1 Lloyd's Rep. 18; *Leon Corp v Atlantic Lines and Navigation Co Inc* [1985] 2 Lloyd's Rep. 470, 476; *Exmar BV v National Iranian Tanker Co* [1992] 1 Lloyd's Rep. 169; *Modern Trading Co Ltd v Swale Building and Construction Ltd* (1990) 24 Con. L.R. 59. cf. *Minerals & Metals Trading Corp of India Ltd v Encounter Bay Shipping Co Ltd* [1988] 1 Lloyd's Rep. 51.
- 599 s.47(3).
- 600 ss.47, 58; *Rotenberg v Sucafina SA* [2012] EWCA Civ 637.
- 601 s.48(1), e.g. contribution (*Wealands v CLC Contractors Ltd* [1998] C.L.C. 808).
- 602 DAC Report para.234. But these may be difficult to enforce: see below, para.34-187.
- 603 *Vertex Data Science Ltd v Powergen Retail Ltd* [2006] EWHC 1340 (Comm), [2006] 2 Lloyd's Rep. 591.
- 604 s.48(4). But in *Lesotho Highlands Development Authority v Impregilo SpA* [2005] UKHL 43, [2006] 1 A.C. 221, there was a difference of opinion as to the ambit of this subs. at [22]-[23], [42], [49], [55] and [56].

- 605 *Services Europe Atlantique Sud (SEAS) v Stockholms Rederiaktiebolag* [1979] A.C. 685.
- 606 s.48(3).
- 607 s.48(5)(a); Senior Courts Act 1981 s.37; *Bath and North East Somerset DC v Mowlem* [2004] EWCA Civ 115, [2004] C.I.L.L. 2081; *Debattista* (2010) 76 Arbitration 421. But see *Kastner v Jason* [2004] EWCA Civ 1599, [2005] 1 Lloyd's Rep. 397 at [16]–[19] (freezing injunction).
- 608 s.48(5)(b): CPR Pt 24 24PD-001. See *Tilia Sonera Ab v Hilcourt (Docklands) Ltd* [2003] EWHC 3540 (Ch); *McCaughan v Belwood Homes Ltd* [2011] Arb. L.R. 53 (N.I.); *Gemmell* (2010) 76 Arbitration 467; *Sterling v Rand* [2019] EWHC 1034 (Ch).
- 609 s.48(5)(c).
- 610 s.49(1).
- 611 s.49(2), e.g. in the principal contract: cf. *Lesotho Highlands Development Authority v Impregilo SpA* [2005] UKHL 43, [2006] 1 A.C. 221 (provisions of foreign law applicable to the contract not such an agreement).
- 612 s.49(3), (4), (5). See Chartered Institute of Arbitrators: Guidelines for Arbitrators on how to approach the making of awards on interest; *Altaras* (2004) 70 Arbitration 108.
- 613 *Walker v Rowe* [2000] 1 Lloyd's Rep. 116, 121; *Sonatrach v Statoil Natural Gas LLC* [2014] EWHC 875 (Comm), [2014] 2 Lloyd's Rep. 252. See also below, para.34-187 (note).
- 614 *Re Badger* (1819) 2 B. & Ald. 691; *Edwards v GW Ry* (1851) 11 C.B. 588; *Chandris v Isbrandtsen Moller Co Inc* [1951] 1 K.B. 240; *Panchaud Frères SA v Pagnan & Fratelli* [1974] 1 Lloyd's Rep. 394; *P J Van der Zijden Wildhandel NV v Tucker & Cross Ltd* [1976] 1 Lloyd's Rep. 341; *Nea Tyhi Maritime Co Ltd v Compagnie Grainiere SA* [1978] 1 Lloyd's Rep. 16; *Thos P Gonzalez Corp v FR Waring (International) (Pty) Ltd* [1978] 1 Lloyd's Rep. 494, [1980] 2 Lloyd's Rep. 160; *Warinco AG v Andre et Cie SA* [1979] 2 Lloyd's Rep. 298; *Tehno-Impex v Gebr van Weerde-Scheepvaart Kantoor BV* [1981] Q.B. 648.
- 615 See Vol.I, para.29-304.
- 616 *National Bank of Greece SA v Pinios Shipping Co (No.1)* [1990] 1 A.C. 637.
- 617 Under s.69; below, para.34-136.
- 618 *Amec Building Ltd v Cadmus Investment Co Ltd* (1997) 51 Con. L.R. 105; *Lesotho Highlands Development Authority v Impregilo SpA* [2005] UKHL 43, [2006] 1 A.C. 221. Contrast *Westland Helicopters Ltd v Sheikh Salah' al-Hejailan (No.1)* [2004] EWHC 1625, [2004] 2 Lloyd's 523 (lack of jurisdiction).
- 619 s.49(6); see Vol.I, para.29-286.
- 620 s.50. See CPR PD 62. Permission of the court is required for any appeal under this section; s.50(5); but see below para.34-186.
- 621 s.52(4).
- 622 s.51(2).
- 623 *Dawes v Treasure & Son Ltd* [2010] EWHC 3218 (TCC), [2011] Bus. L.R. 676; *Sun United Maritime Ltd v Kestell Marine Inc* [2014] EWHC 1476 (Comm), [2014] 2 Lloyd's Rep. 386; *Ahmed* (2011) 77 Arbitration 369.
- 624 s.52(1).
- 625 s.52(2).

- 626 s.52(3).
- 627 s.52(4) (Unless it is an agreed award or the parties have agreed to dispense with reasons). See *Al Hadha Trading Co v Tradigrain SA* [2002] 2 *Lloyd's Rep.* 512 (GAFTA arbitration rules: absolute discretion conferred by rules to admit or refuse to admit a claim did not dispense with need to give reasons for exercise of discretion). cf. *Tame Shipping Ltd v Easy Navigation Ltd* [2004] EWHC 1862 (Comm), [2004] 2 *Lloyd's Rep.* 626 (reasons can be set out in separate “confidential” document: see below, para.34-167). See also *Bremer Handelsgesellschaft mbH v Westzucker GmbH (No.2)* [1981] 2 *Lloyd's Rep.* 130, 132–133 (sufficient for arbitrator to explain how he reached his conclusion). cf. *Compton Beauchamp Estates Ltd v Spence* [2013] EWHC 1101 (Ch), [2013] 20 E.G. 107 (C.S.) at [41]–[52], [79] (adequacy of reasons).
- 628 s.52(5).
- 629 s.68(2)(h).
- 630 s.68(2); below, para.34-165.
- 631 *European Grain & Shipping Ltd v R Johnston* [1983] Q.B. 520; *Bank Mellat v GAA Development and Construction Co* [1988] 2 *Lloyd's Rep.* 44.
- 632 *European Grain & Shipping Ltd v R Johnston* [1983] Q.B. 520.
- 633 *Bank Mellat v GAA Development and Construction Co* [1988] 2 *Lloyd's Rep.* 44.
- 634 But see *F Ltd v M Ltd* [2009] EWHC 275 (TCC), [2009] 1 *Lloyd's Rep.* 537 (dissenting arbitrator’s opinion not relevant to challenge under s.68).
- 635 *Cargill International SA v Sociedad Iberica de Molturacion SA* [1998] 1 *Lloyd's Rep.* 489, 497, CA; cf. *Rees and Rohn* (2009) 25 *Arbitration International* 329.
- 636 [1992] 1 A.C. 562.
- 637 See also s.100(2)(b).
- 638 s.54. Unless otherwise agreed by the parties.
- 639 See below, paras 34-177, 34-189.
- 640 See below, para.34-145.
- 641 cf. *Al Hadha Trading Co v Tradigrain SA* [2002] 2 *Lloyd's Rep.* 512, 525.
- 642 s.55.
- 643 s.56. This is a mandatory provision.
- 644 s.56(2). See CPR r.62.6 PD 62. Permission of the court is required for any appeal: s.56(7); but see below, para.34-186.
- 645 s.4(1) and Sch.1.
- 646 s.57(3)(a). See *Gannet Shipping Ltd v Eastrade Commodities Inc* [2002] 1 *Lloyd's Rep.* 712; *Torch Offshore LLC v Cable Shipping Inc* [2004] EWHC 787 (Comm), [2004] 2 *Lloyd's Rep.* 446; *Sinclair v Woods of Winchester Ltd* [2005] EWHC 1631 (QB), (2005) 102 Const. L.R. 127; *Gold Coast Ltd v Naval Gijon SA* [2006] EWHC 1044 (Comm), [2006] 2 *Lloyd's Rep.* 400; *Bulk Ship Union SA v Clipper Bulk Shipping Ltd* [2012] EWHC 2595 (Comm), [2012] 2 *Lloyd's Rep.* 533 at [30]–[31]; *Union Marine Classification Services LLC v Comoros* [2015] EWHC 508 (Comm), [2015] 2 *Lloyd's Rep.* 49. But see *World Trade Corp v C Czarnikow Sugar Ltd* [2004] EWHC 2332 (Comm), [2005] 1 *Lloyd's Rep.* 422 at [8]. The ambit of this provision is, perhaps unexpectedly, wide: *Groundshire v VHE Construction* [2001] Build.

- L.R. 395; *Al Hadha Trading Co v Tradigrain SA* [2002] 2 *Lloyd's Rep.* 512, 526–527; *Torch Offshore LLC v Cable Shipping Inc* [2004] EWHC 787 (Comm), [2004] 2 *Lloyd's Rep.* 446 at [28] (request to supply missing reasons).
- 647 s.57(3)(b). But see *Torch Offshore LLC v Cable Shipping Inc* [2004] EWHC 787 (Comm), [2004] 2 *Lloyd's Rep.* 446 at [27] (“claim” only applies to a claim which has been presented to the tribunal but has not been dealt with as opposed to an issue which remains undetermined as part of a claim); *World Trade Corp v C Czarnikow Sugar Ltd* [2004] EWHC 2332 (Comm), [2005] 1 *Lloyd's Rep.* 422 at [14] (“claim” does not mean a submission in support of a relevant question of fact as opposed to a claim for relief such as would have to be pleaded); *Sea Trade Maritime Corp v Hellenic Mutual War Risks Assn (Bermuda) Ltd* [2006] EWHC 578 (Comm), [2006] 2 *Lloyd's Rep.* 147 (costs claim “dealt with” when costs reserved). See also *Pirtek (UK) Ltd v Deanswood Ltd* [2005] EWHC 2301 (Comm), [2005] 2 *Lloyd's Rep.* 728 (burden of proof); *Buyuk Camlica Shipping Trading and Industry Co Inc v Progress Bulk Carriers Ltd* [2010] EWHC 442 (Comm), [2011] B.L.R. D99; *Cadogan Maritime Inc v Turner Shipping Inc* [2013] EWHC 138 (Comm), [2013] 1 *Lloyd's Rep.* 630 at [42]–[50]; *Union Marine Classification Services LLC v Government of the Union of Comoros* [2016] EWCA Civ 239, [2016] 2 *Lloyd's Rep.* 193.
- 648 s.57(3). For the effect of a failure to apply, see s.70(2)(b) and *Gbangbola v Smith & Sherriff Ltd* [1998] 3 All E.R. 730; *Groundshire v VHE Construction; Torch Offshore LLC v Cable Shipping Inc* [2004] EWHC 787 (Comm), [2004] 2 *Lloyd's Rep.* 446 at [28], para.34-177, below.
- 649 These time limits are set out in subss.(4), (5), (6). See *Pirtek (UK) Ltd v Deanswood Ltd* [2005] EWHC 2301 (Comm), [2005] 2 *Lloyd's Rep.* 728, and (extension of time) s.79 and *Gold Coast Ltd v Naval Gijon SA* [2006] EWHC 1044 (Comm), [2006] 2 *Lloyd's Rep.* 400; *Xstrata Coal Queensland Pty Ltd v Benxi Iron & Steel (Group) International Economic & Trading Co Ltd* [2016] EWHC 2022 (Comm), [2017] 1 All E.R. (Comm) 299. But see *Surefire Systems Ltd v Guardian ECL Ltd* [2005] EWHC 1860 (TCC), [2005] B.L.R. 534; *Price v Carter I* [2010] EWHC 1451 (TCC), and para.34-177 (note), below.
- 650 *Ases Havacilik Servis ve Destek Hizmetleri AS v Delkor UK Ltd* [2012] EWHC 3518 (Comm), [2013] 1 *Lloyd's Rep.* 254; *No Curfew Ltd v Feiges Properties Ltd* [2018] EWHC 744 (Ch).
- 651 *Pirtek (UK) Ltd v Deanswood Ltd* [2005] EWHC 2301 (Comm), [2005] 2 *Lloyd's Rep.* 728 at [35].
- 652 s.58 (replacing s.16 of the Arbitration Act 1950). However, s.58 does not circumscribe the persons on whom the award is binding: *PJSC National Bank Trust v Mints* [2022] EWHC 871 (Comm), [2022] 1 W.L.R. 3099 at [26].
- 653 But not an action in rem, see *The Rena K* [1978] 1 *Lloyd's Rep.* 545, 560; *The Irina Zharkikh* [2001] 2 *Lloyd's Rep.* 319. But see *Republic of India v India Steamship Co Ltd* [1998] A.C. 878.
- 654 Unlike a judgment (see Vol.I, para.28-007), the cause of action does not technically merge in the award, but the effect is the same. cf. *Doleman & Sons v Ossett Corp* [1912] 3 K.B.

- 257** (award after action brought, where no application is made to stay the action or a stay is refused).
- 655 *Gascoyne v Edwards* (1826) 1 Y. & J. 19.
- 656 *Allen v Milner* (1831) 2 Cr. & J. 47; *Richard Adler v Sutos (Hellas) Maritime Corp* [1984] 1 *Lloyd's Rep.* 296.
- 657 *Cummings v Heard* (1869) L.R. 4 Q.B. 669, 673–674.
- 658 *Conquer v Boot* [1928] 2 K.B. 336.
- 659 *Dunn v Murray* (1829) 9 B. & C. 780; *Naamlooze, etc. Vulcaan v A/S Ludwig Mowinckels Rederi* (1938) 60 *Li.L. Rep.* 217, 223; *HE Daniels Ltd v Carmel Exporters and Importers Ltd* [1953] 2 Q.B. 242, 255; *Compagnie Granière SA v Fritz Kopp AG* [1978] 1 *Lloyd's Rep.* 511, 521; *Telfair Shipping Corp v Inersea Carriers SA* [1983] 2 *Lloyd's Rep.* 351, 353; *Ron Jones (Burton-on-Trent) Ltd v Hall* (2000) 2 T.C.L.R. 195.
- 660 See Vol.I, para.28-008.
- 661 *EE & Brian Smith* (1928) *Ltd v Wheatsheaf Mills Ltd* [1939] 2 K.B. 302; cf. *HE Daniels Ltd v Carmel Exporters and Importers Ltd* [1953] 2 Q.B. 242, 255.
- 662 *Purser & Co (Hillingdon) Ltd v Jackson* [1977] Q.B. 166; *Compagnie Granière SA v Fritz Kopp AG* [1978] 1 *Lloyd's Rep.* 351; *Excomm Ltd v Guan Guan Shipping (Pte) Ltd* [1987] 1 *Lloyd's Rep.* 330, 344.
- 663 *FJ Bloemen Pty Ltd v City of Gold Coast Council* [1973] A.C. 115, 126; *Compagnie Granière SA v Fritz Kopp AG* [1978] 1 *Lloyd's Rep.* 511 at 522.
- 664 *Brunsden v Humphrey* (1884) 14 Q.B.D. 141; *Telfair Shipping Corp v Inersea Carriers SA* [1983] 2 *Lloyd's Rep.* 351; *Siporex Trade SA v Comdel Commodities Ltd* [1986] 2 *Lloyd's Rep.* 428. But see *Dunn v Murray* (1829) 9 B. & C. 780.
- 665 *Ayscough v Sheed, Thomson & Co Ltd* (1924) 40 T.L.R. 707; *Aktiebolaget Legis v V Berg & Sons Ltd* [1964] 1 *Lloyd's Rep.* 203. Contrast *Sun Life Assurance Co of Canada v Lincoln National Life Insurance Co* [2004] EWCA Civ 1660, [2005] 1 *Lloyd's Rep.* 606 (no estoppel where arbitration between one of the parties and a stranger). cf. *Arts & Antiques Ltd v Richards* [2013] EWHC 336 (Comm), [2014] P.N.L.R. 10. In *Michael Wilson & Partners Ltd v Sinclair* [2017] EWCA Civ 3, [2017] 1 W.L.R. 2646 the Court of Appeal held that it would be a rare case where legal proceedings against a person who was not a party to an earlier arbitration would be struck out by reason of the award in that earlier arbitration.
- 666 *Fidelitas Shipping Co Ltd v V/O Exportchleb* [1960] 1 Q.B. 630, 640, 643; discussed in *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No.2)* [1967] 1 A.C. 853; *Associated Electric and Gas Insurance Services Ltd v European Reinsurance Co of Zurich* [2003] UKPC 11, [2003] 1 W.L.R. 1041. See Vol.I, para.28-011.
- 667 *Henderson v Henderson* (1843) 3 Hare 100, 114; *Fidelitas Shipping Co Ltd v V/O Exportchleb* [1960] 1 Q.B. 630 at 640; *Yat Tung Investment Co Ltd v Dao Heng Bank Ltd* [1975] A.C. 581, 590; *Dallal v Bank Mellat* [1986] Q.B. 441. See also *Johnson v Gore Wood & Co* [2002] 2 A.C. 1 and Vol.I, para.28-013. Contrast *Sun Life Assurance Co of Canada v Lincoln National Life Insurance Co* [2004] EWCA Civ 1660, [2005] 1 *Lloyd's Rep.* 606 at [54] (only between parties to the proceedings).

668 cf. *Associated Electric and Gas Insurance Services Ltd v European Reinsurance Co of Zurich* [2003] UKPC 11, [2003] 1 W.L.R. 1041 at [16].

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# Section 10. - Costs of the Arbitration

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Volume II - Specific Contracts

Chapter 34 - Arbitration<sup>1</sup>

Section 10. - Costs of the Arbitration

## Costs

- 34-149 Sections 59 to 65 of the 1996 Act provide a code dealing with how the costs of the arbitration should be allocated as between the parties. The “costs of the arbitration” are defined as the arbitrators’ fees and expenses, the fees and expenses of any arbitral institution concerned, and the legal or other costs of the parties.<sup>669</sup> Although it is open to the parties to provide how these costs are to be allocated, an agreement which has the effect that a party is to pay the whole or part of the costs of the arbitration in any event is only valid if made after the dispute in question has arisen.<sup>670</sup> This is a mandatory provision.<sup>671</sup> An agreement in the parties’ submission letter that they will share equally the arbitrators’ hourly charge does not imply that the costs of the arbitration between the parties are to be similarly allocated.<sup>672</sup>
- 34-150 The arbitral tribunal is empowered to make an award as to costs<sup>673</sup> and is required (unless the parties otherwise agree) to award costs on the principle that costs are to follow the event except where it appears to the tribunal that in the circumstances this is not appropriate.<sup>674</sup> The tribunal does not therefore have a complete and unfettered discretion over costs but must follow the general approach of the English courts.<sup>675</sup> The court will not interfere merely because it would have exercised that discretion differently.<sup>676</sup> Under the previous law, if the tribunal failed to exercise judicially<sup>677</sup> its discretion over costs in making its award, the aggrieved party could apply to the court for an order that the award, or that part of the award that deals with costs, be varied, remitted or set aside. But, following cases on the Arbitration Act 1979,<sup>678</sup> it would appear that an award as to costs can now ordinarily be challenged only through the medium of appeal to the court on a point of law under s.69 of the 1996 Act.<sup>679</sup> As a result, if there is an effective exclusion agreement,<sup>680</sup> no such appeal will lie, so that a bona fide error on the part of the arbitral tribunal in the matter of

costs will be irremediable.<sup>681</sup> An award will only be susceptible to challenge under s.67 or s.68 of the 1996 Act (which sections cannot be excluded)<sup>682</sup> where some other sufficient ground exists, such as a failure to deal at all with the issue of costs,<sup>683</sup> an excess of jurisdiction, or a serious irregularity in relation to costs,<sup>684</sup> but not simply on the ground of an alleged unjudicial exercise of the tribunal's discretion.<sup>685</sup>

- 34-151 **Section 63 of the 1996 Act** provides that the parties may agree what costs of the arbitration are recoverable.<sup>686</sup> If they do not do so,<sup>687</sup> the tribunal may determine by award the recoverable costs of the arbitration (i.e. assess the amount) on such basis as it thinks fit, but in so doing must specify the basis on which it has acted and the items of recoverable costs and the amount referable to each.<sup>688</sup> If the tribunal does not determine the recoverable costs, any party may apply to the court.<sup>689</sup> The tribunal therefore has the power, but not the obligation, to deal with the costs of the arbitration.<sup>690</sup> The usual practice is for the tribunal to determine in its award the fees and expenses of the arbitrators.<sup>691</sup> The determination of the recoverable legal or other costs of the parties is better left to the court.
- 34-152 If the tribunal rules that it lacks substantive jurisdiction with respect to the matter referred to it, or if the court determines, on an application under s.32<sup>692</sup> or s.67<sup>693</sup> of the Act, that the tribunal does not have substantive jurisdiction, it would appear to follow that any award made by the tribunal as to costs is a nullity, unless there can be inferred an ad hoc agreement empowering the tribunal to make such an award,<sup>694</sup> or unless it can be said that the party who initiates arbitration impliedly consents to an order for costs being made against him if the tribunal rules that it has no jurisdiction.<sup>695</sup> The costs incurred by a party in relation to the abortive or invalid arbitration proceedings are irrecoverable.<sup>696</sup>

## Basis of costs

- 34-153 Unless the tribunal or the court determines otherwise, costs will be awarded on a standard basis.<sup>697</sup>

## Fees and expenses

- 34-154 Only the reasonable fees and expenses of the arbitrators are recoverable and what fees and expenses are "reasonable" may, on the application of any party, be determined by the court.<sup>698</sup>

## Power to limit recoverable costs

- 34-155 Section 65 of the 1996 Act gives to the arbitral tribunal a new power not found in previous legislation: the power to limit in advance the amount of recoverable costs.<sup>699</sup> The tribunal can put a ceiling on costs. A party can incur costs in excess of this ceiling but the excess will then not be recoverable from the other party. The Departmental Advisory Committee considered that this power, properly used, could prove extremely valuable as an aid to reducing expenditure and would discourage those who wished to employ their financial muscle to intimidate their opponents.<sup>700</sup> But the power appears to be little used in practice.

## Sealed offers

- 34-156 A sealed offer by the respondent in arbitral proceedings is analogous to, but not identical with,<sup>701</sup> a Pt 36 payment.<sup>702</sup> If the claimant in the end has achieved no more than he would have achieved by accepting the offer, the continuance of the arbitration after that date has been a waste of time and money. Prima facie, the claimant should recover his costs up to the date of the offer and should be ordered to pay the respondent's costs after that date. If he has achieved more by going on, the respondent should pay the costs throughout.<sup>703</sup>

## Footnotes

- 1 For a more detailed account of arbitration, and practice and procedure, the reader should consult: Merkin, Arbitration Law (2007); Merkin and Flannery, Arbitration Act 1996, 5th edn (2014); Russell on Arbitration, 24th edn (2015); Tweeddale and Tweeddale, Arbitration of Commercial Disputes, 2nd edn (2012); Harris, Planterose and Tecks, Arbitration Act 1996, 5th edn (2014); Mustill and Boyd, Commercial Arbitration, 2nd edn (1989) and Supplement (2001); Redfern and Hunter, Law and Practice of International Arbitration, 5th edn (2009); Park, Arbitration of International Business Disputes, 2nd edn (2012).
- 669 s.59(1). See also s.59(2) (costs of taxation proceedings). In *Essar Oilfield Services Ltd v Norscot Rig Management Pvt Ltd [2016] EWHC 2361 (Comm), [2016] 2 Lloyd's Rep. 481* at [68]–[72], the Court held that “other costs” in s.59 can include the costs of obtaining litigation funding.
- 670 s.60. This is based on s.18(3) of the Arbitration Act 1950.
- 671 s.4(1) and Sch.1.
- 672 *Carter v Harold Simpson Associates [2004] UKPC 29, [2005] 1 W.L.R. 919.*

- 673 s.61(1) (subject to any agreement of the parties).
- 674 s.61(2).
- 675 CPR Pt 44. See the Chartered Institute of Arbitrators: Guideline for Arbitrators Making Orders Relating to the costs of the Arbitration. For statement of the principles involved, see *Malkinson v Trim* [2002] EWCA Civ 1273, [2003] 1 W.L.R. 463. See also *Henchie* (2004) 70 *Arbitration* 77.
- 676 *Rosen & Co Ltd v Dowley and Selby* [1943] 2 All E.R. 172, 174; *Smeaton Hanscomb & Co Ltd v Sassoon I Setty, Son & Co (No.2)* [1953] 1 W.L.R. 1481, 1483; *The Erich Schroeder* [1974] 1 Lloyd's Rep. 192, 194; *Blue Horizon Shipping Co SA v ED & F Man Ltd* [1980] 1 Lloyd's Rep. 17; *W Wilhemsen v Canadian Transport Co* [1980] 2 Lloyd's Rep. 204, 209; *Eleftheria Niki Compañía Naviera SA v Eastern Mediterranean Marine Ltd* [1980] 2 Lloyd's Rep. 252, 260; *President of India v Jadranska Slobodna Plovidba* [1992] 2 Lloyd's Rep. 274, 280; *Everglade Maritime Inc v Schiffahrtsgesellschaft Detlef Von Appen mbH* [1993] 1 W.L.R. 33, 39; affirmed [1993] Q.B. 780.
- 677 i.e. in the same manner as the High Court.
- 678 *Blexen Ltd v G Percy Trentham Ltd* (1990) 42 E.G. 133, CA; *King v Thomas McKenna Ltd* [1991] 2 Q.B. 480, 499; *President of India v Jadranska Slobodna Plovidba* [1992] 2 Lloyd's Rep. 274, 276–280; *Everglade Maritime Inc v Schiffahrtsgesellschaft Detlef Von Appen mbH* [1993] Q.B. 780; *Cohen v Baram* [1994] 2 Lloyd's Rep. 138.
- 679 *Sanghi Polyesters (India) v International Investor (KCFC) (Kuwait)* [2000] 1 Lloyd's Rep. 480, 485; *Transition Feeds LLP v Itochu Europe Plc* [2013] EWHC 3629 (Comm); *Sun United Maritime Ltd v Kasteli Marine Inc* [2014] EWHC 1476 (Comm). See below, para.34-136.
- 680 Below, para.34-173.
- 681 *King v Thomas McKenna Ltd* [1991] 2 Q.B. 480 at 499.
- 682 Below, paras 34-158, 34-163.
- 683 *Re Becker, Shillan & Co and Barry Brothers* [1921] 1 K.B. 391. But an application may be made under s.57(3)(b) (para.34-144, above); cf. *Sea Trade Maritime Corp v Hellenic Mutual War Risks Assn (Bermuda) Ltd* [2006] EWHC 578 (Comm), [2006] 2 Lloyd's Rep. 147 (costs reserved).
- 684 *Harrison v Thompson* [1989] 1 W.L.R. 1325; *King v Thomas McKenna Ltd* [1991] 2 Q.B. 480; *President of India v Jadranska Slobodna Plovidba* [1992] 2 Lloyd's Rep. 274 at 279, 280; *Gbangbola v Smith & Sherriff Ltd* [1998] 3 All E.R. 730; *Newfield Construction Ltd v Tomlinson* [2004] EWHC 3051 (TCC), (2004) 97 Const. L.R. 148. See also *Danae Air Transport SA v Air Canada* [2000] 1 W.L.R. 395 (mathematical error).
- 685 *Fence Gate Ltd v NEL Construction Ltd* (2002) 82 Const. L.R. 41; *Dundas* (2003) 69 *Arbitration* 90.
- 686 s.63(1). But see s.62.
- 687 s.63(2).
- 688 s.63(3). See *Rotary Watches Ltd v Rotary Watches (USA) Inc Unreported, noted* (2005) 71 *Arbitration* 172 (interim payment). cf. s.62.
- 689 s.63(4); PD.62. The court is defined in s.105 to mean the High Court or a county court. cf. Sch.2 para.9 (judge-arbitrator).

- 690 As under s.18(1) of the Arbitration Act 1950. cf. *M/S Alghanim Industries Inc v Skandia International Insurance Corp* [2001] 2 All E.R. (Comm) 30 (ARIAS arbitration rules).
- 691 Including fees and expenses of an expert, etc. under s.37(2). See *SN Kurkjian (Commodity Brokers) Ltd v Marketing Exchange for Africa Ltd* [1986] 2 Lloyd's Rep. 618 (taxation of fees of legal adviser), but cf. s.63(7).
- 692 See above, para.34-105.
- 693 See below, para.34-158.
- 694 *Commonwealth Development Corp (UK) v Montague* [2000] QCA 252 Queensland Court of Appeal; *Greenberg and Secomb* (2002) 18 Arbitration International 125.
- 695 This might also arguably be said to follow from s.30 of the Act: para.34-102, above.
- 696 *Crest Nicholson (Eastern) Ltd v Western* [2008] EWHC 1325 (TCC), [2008] Build. L.R. 426.
- 697 s.63(5); CPR r.44.4.
- 698 s.64, PD 62.
- 699 s.65. Unless otherwise agreed by the parties.
- 700 DAC Report para.272. See also *Bange* (2000) 11 Const. Law 23 and the Controlled Cost Arbitration Rules of the Chartered Institute of Arbitrators. cf. *Miller* (1999) 149 N.L.J. 530.
- 701 *Huron Liberian Co v Rheinoel GmbH* [1985] 2 Lloyd's Rep. 58n.
- 702 CPR Pt 36. See *Wood* (2008) 74 Arbitration 139.
- 703 *Tramountana Armadora SA v Atlantic Shipping Co SA* [1978] 1 Lloyd's Rep. 391, 398; *Everglade Maritime Inc v Schiffahrtsgesellschaft Detlef Von Appen MbH* [1993] Q.B. 780; *Lindner Ceilings Floors Partitions Plc v How Engineering Services Ltd* [2001] Build. L.R. 90. cf. *Cadmus Investment Ltd v Amec Building Ltd* [1997] C.L.Y. 270.

# Section 11. - Powers of the Court in Relation to the Award

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Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 34 - Arbitration<sup>1</sup>

Section 11. - Powers of the Court in Relation to the Award

## Introduction

- 34-157 The Court's powers to review an arbitration award are set out in ss.67–69 of the Arbitration Act 1996. An application under ss.67–69 must conform to the requirements of those provisions and the procedural requirements set out in s.70. The mere fact that the parties agree that the Court should hear a challenge or appeal against an award will not confer jurisdiction on the Court unless the requirements of the Act are satisfied.<sup>704</sup> In order that ss.67–69 may apply, there must have been an “award” made by the arbitral tribunal.<sup>705</sup> An “award” is a formal written record of the arbitral tribunal’s decision, in an arbitral reference made pursuant to an arbitration agreement,<sup>706</sup> which disposes of or resolves an issue or dispute between the parties.<sup>707</sup>

## Challenging the award: substantive jurisdiction

- 34-158 A party to arbitral proceedings may apply<sup>708</sup> to the court under s.67 of the 1996 Act<sup>709</sup> challenging any award of the arbitral tribunal as to its substantive jurisdiction<sup>710</sup> or for an order declaring an award made by the tribunal on the merits to be of no effect, in whole or in part, because the tribunal did not have substantive jurisdiction.<sup>711</sup> The jurisdiction of the tribunal must be distinguished from the admissibility of a claim, for example if the claim is referred to arbitration prematurely because the settlement and mediation procedures provided for in the arbitration agreement have not yet been concluded; s. 67 does not apply to issues of admissibility.<sup>712</sup>

**U** Such an application must normally be made within the 28 day time limit prescribed by s.70(3)<sup>713</sup> and is subject to certain restrictions.<sup>714</sup> Where the arbitral tribunal rules that it has substantive jurisdiction and a party to arbitral proceedings who could have questioned that ruling by an arbitral process of appeal or review, or by challenging the award, does not do so within the time allowed by the arbitration agreement or any provisions of Pt I of the Act, or at all, he may not object later to the tribunal's substantive jurisdiction on any ground which was the subject of that ruling.<sup>715</sup> On the hearing of the application the court may by order confirm the award, vary the award or set aside the award in whole or in part.<sup>716</sup> The hearing is to be treated as a full rehearing (including oral evidence) and not merely as a review and new evidence may therefore be adduced (subject to the Court's control).<sup>717</sup> Pending the hearing of the application the arbitral tribunal may continue the arbitral proceedings and make a further award if it wishes to do so.<sup>718</sup> Section 67 is a mandatory provision.<sup>719</sup>

34-159 The same right to challenge the award is given to a person alleged to be a party to arbitral proceedings but who takes no part in the proceedings.<sup>720</sup> Alternatively such a person may question whether there is a valid arbitration agreement, or whether the tribunal is properly constituted, or what matters have been properly submitted to arbitration in accordance with the arbitration agreement, by proceedings in court for a declaration or injunction or other appropriate relief.

<sup>721</sup>

34-160 A party to arbitral proceedings will lose the right to object that the tribunal lacks substantive jurisdiction if he fails to object timeously and thereafter takes part, or continues to take part, in the proceedings, unless he did not know and could not with reasonable diligence have discovered the grounds for the objection.<sup>722</sup> But even where this is not the case, then at common law if the parties appoint or accept the appointment of an arbitrator and thereafter take part in the arbitral proceedings without objection on the mistaken assumption that the tribunal has jurisdiction with respect to the whole or a part of the subject matter of the dispute, they may be held to have entered into an ad hoc agreement to submit their dispute to the jurisdiction of the tribunal,<sup>723</sup> unless that agreement can be said to be vitiated by a fundamental mistake.<sup>724</sup> In this latter situation, however, even if there is no or no valid ad hoc agreement, each may be estopped by convention<sup>725</sup> from alleging lack of jurisdiction on the part of the tribunal.<sup>726</sup>

34-161 The power conferred on the court by s.67 is exercisable only if the seat of arbitration is in England.<sup>727</sup> Where that is the case, the fact that the issue to be determined by the tribunal involves

an investment dispute between an investor and a sovereign state under the provisions of a treaty will not deprive the court of its supervisory jurisdiction under the Act.<sup>728</sup>

- 34-162 If an award is successfully challenged and set aside by the court, this does not mean that the functions of the arbitral tribunal are necessarily at an end. The tribunal may be revivified and proceed to make a second, valid award which is within its jurisdiction to make.<sup>729</sup> Section 67 does not enable a challenge to be made to a procedural order not amounting to an award.<sup>730</sup>

## Challenging the award: serious irregularity

- 34-163 Prior to the enactment of the [1996 Act](#) the High Court had an unqualified power to remit an award for the reconsideration of the arbitrator,<sup>731</sup> and it could set aside an award where the arbitrator had misconducted himself or the proceedings or the arbitration or award had been improperly procured.<sup>732</sup> “Misconduct” did not necessarily imply any reflection on the competence or integrity of the arbitrator: it covered irregularities or procedural unfairness which was not proper in relation to quasi-judicial proceedings.<sup>733</sup> The concept of misconduct was not retained in the [1996 Act](#). [Section 68](#) establishes a different regime which enables a party to arbitral proceedings to apply to the court challenging the award on the ground of serious irregularity affecting the tribunal, the proceedings or the award.<sup>734</sup> This is a mandatory provision.<sup>735</sup> The same right to challenge the award is given to a person alleged to be a party to arbitral proceedings but who takes no part in the proceedings.<sup>736</sup> It has, however, been pointed out that the law places a “high hurdle” in the way of an applicant under [s.68](#).<sup>737</sup>

- 34-164 For “serious irregularity” to have occurred there must, first, have been an irregularity of one or more of the following kinds

 <sup>738</sup>

 :

(a) failure by the tribunal to comply with [s.33 of the Act](#) (general duty of the tribunal)  
<sup>739</sup>

 ;

(b) the tribunal exceeding its powers (otherwise than by exceeding its substantive jurisdiction:  
see [s.67](#))  
<sup>740</sup>

 ;

(c)failure of the tribunal to conduct the proceedings in accordance with the procedure agreed by the parties

<sup>741</sup>



(d)failure by the tribunal to deal with all the issues that were put to it

<sup>742</sup>



(e)any arbitral or other institution or person vested by the parties with powers relating to the proceedings or the award exceeding its powers;

(f)uncertainty or ambiguity as to the effect of the award

<sup>743</sup>



(g)the award being obtained by fraud or the award or the way in which it was procured being contrary to public policy

<sup>744</sup>



(h)failure to comply with the requirements as to the form of the award

<sup>745</sup>



(i)any irregularity in the conduct of the proceedings or in the award which is admitted by the tribunal or by any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award.

<sup>746</sup>



It will be noted that the list of irregularities is a closed one. Some of the listed elements nevertheless have their origins in the previous law relating to misconduct, “procedural mishaps” and mistakes admitted by the arbitrator.

<sup>747</sup>



However, the award cannot be challenged on the ground that the tribunal has come to an erroneous decision, whether of fact or law, and whether or not its findings of fact are supported by evidence.

<sup>748</sup>



The focus is on due process, not the correctness of the decision reached by the tribunal.

<sup>749</sup>



In a two-tier arbitration, under which there is a right of appeal to an appeal board and the appeal board’s award supersedes that of the first tier arbitrator, it is submitted that the award cannot

be challenged on the ground of any irregularity in the conduct of the first tier proceedings if no irregularity is alleged in respect of the appeal.

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- 34-165 Secondly, the irregularity must be of a kind which the court considers has caused or will cause substantial injustice to the applicant.

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- U** In this respect, the DAC Report states that the section was:

“... really designed as a long stop, only available in extreme cases where the tribunal has gone so wrong in its conduct of the arbitration that justice calls out for it to be corrected”.

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It has been said that:

“... the element of substantial injustice does not depend on the arbitrator having come to the wrong conclusion as a matter of law or fact but whether he was caused by adopting inappropriate means to reach one conclusion whereas had he adopted appropriate means he might well have reached another conclusion favourable to the applicant.”

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On this view, it is necessary (and sufficient) for the applicant to show that, but for the irregularity, the tribunal might realistically have come to a significantly different conclusion

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although it is possible that a less stringent test might be adopted where the applicant has effectively been denied a fair opportunity to state his case.

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At any rate a substantial injustice will normally be inferred where it is shown that there was actual or apparent bias affecting the tribunal, on the ground that:

“... there can be no more serious or substantial injustice than having a tribunal which was not, ex hypothesi, impartial, determine the parties’ rights.”

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- 34-166 The application must normally be made within the 28-day time limit prescribed by s.70(3)<sup>757</sup> and is subject to certain restrictions.<sup>758</sup> A party may have lost the right to object to the irregularity if he failed to object timeously and thereafter took part, or continued to take part, in the proceedings, unless he did not know and could not with reasonable diligence have discovered the grounds for the objection.<sup>759</sup> If a serious irregularity is shown to have occurred, the court may remit the award to the arbitral tribunal for reconsideration, or it may set the award aside, or it may declare the award to be of no effect. It may exercise these powers in relation to the whole of the award or only part of it. The court is not to set the award aside or declare it to be of no effect unless it is satisfied that it would be inappropriate to remit the matters in question to the tribunal for reconsideration.<sup>760</sup> A party may be precluded from having an award remitted, set aside or declared to be of no effect if he has in fact taken the benefit of the award and so affirmed it.<sup>761</sup>
- 34-167 Where, by agreement of the parties,<sup>762</sup> the arbitral tribunal makes an award without stating its reasons for the award but sets out its reasons in a separate “confidential” document, this does not preclude the court from looking at those reasons for the purpose of an application under the section.<sup>763</sup>
- 34-168 The power conferred on the court by s.68 is exercisable only if the seat of arbitration is in England.<sup>764</sup> The section applies only to awards and not to interlocutory directions which are not made in the form of an award.<sup>765</sup>

## Appeal on point of law<sup>766</sup>

- 34-169 Section 69 of the 1996 Act restates in an amended form s.1 of the Arbitration Act 1979 and provides that, unless otherwise agreed by the parties,<sup>767</sup>
- U** a party to arbitral proceedings may appeal to the court on a question of law arising out of an award made in the proceedings.<sup>768</sup>

**U** It is to be emphasised that an appeal lies under s.69 only on a question of law. There is no room for any appeal under the section against the findings of fact in the award itself since these have to be accepted for the purpose of the appeal.

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**U** By s.82(1), “question of law” means, for a court in England and Wales a question of the law of England and Wales.

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**U** Such an appeal lies only with the agreement of all other parties to the proceedings

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**U** or with permission of the court.

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**U** By subs.(3) of the section, permission to appeal is not to be given unless the court is satisfied:

(a)that the determination of the question will substantially affect the rights of one or more of the parties

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**U** ;

(b)that the question is one which the tribunal was asked to determine

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**U** ;

(c)that on the basis of the findings of fact in the award:

(i)the decision of the tribunal on the question is obviously wrong,

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**U** or

(ii)the question is one of general public importance and the decision of the tribunal is at least open to serious doubt

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**U** ; and

(d)that, despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the court to determine the question.

The subsection reflects the limitations placed on the right of appeal under the 1979 Act by the House of Lords, notably in *Pioneer Shipping Ltd v BTP Tioxide Ltd (The Nema)*

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**U** and *Antaios Compânia Naviera SA v Salen Rederiana AB (The Antaios)*,

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**U** but further limits court intervention by requiring that it must be “just and proper in all the circumstances for the court to determine the question”.

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**U**

**34-170** The application for permission to appeal must identify the question of law to be determined and state the grounds on which it is alleged that permission to appeal should be granted.

**U**

**780** The court will normally determine the application for permission without a hearing.

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**U** As a general rule, the appeal must be brought within the 28 day time limit prescribed by s.70(3)

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**U** and is subject to certain restrictions.

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**U** Appeals are only permitted on a question of law “arising out of an award” and not in respect of extrinsic matters arising in the course of the arbitral proceedings.

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**U** The court will no doubt, as under the previous law, continue to set its face against entertaining questions of law framed in the form of a question whether there was sufficient, or any, evidence to support a particular finding of fact.

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**U** A respondent who wishes to argue that the award should be upheld on different or additional grounds should file a respondent’s notice at the time of the application for permission to appeal.

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**U** The court may make any permission which it gives conditional upon the appellant complying with such conditions as it considers appropriate, and in particular may order security for costs or that money payable under the award is to be brought into court or otherwise secured.

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**U** If the application is unsuccessful, it will normally be sufficient for the applicant to be told which of the tests in subs.(3) he has failed, and the judge need not go further and explain why the relevant test has been failed. But whether the tribunal’s decision was obviously wrong or open to serious doubt, if may be necessary, in a particular case, for the judge to give brief reasons to explain why the applicant has lost.

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**U** The court has jurisdiction under CPR r.3.1(7) or its inherent jurisdiction to set aside an order granting leave to appeal.

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- 34-171 On an appeal under s.69 the court may confirm, vary or set aside the award or remit the award to the tribunal for reconsideration in the light of the court's determination. It may exercise its powers of setting aside or remission as to the whole of the award or only part of it. The court cannot exercise its power to set aside an award unless it is satisfied that it would be inappropriate to remit the matters in question to the tribunal for reconsideration. 790

## Combined applications

- 34-172 Applications under s.68 (challenge on the ground of serious irregularity) and s.69 (for leave to appeal on a point of law) may be combined in one hearing 791 but they involve two quite distinct processes of judicial analysis. 792 In many cases determination of the s.69 application before that of the s.68 application may be logically preferable, but in each case it is a matter for the court whether the application for leave to appeal should be tried first. 793

## Right of appeal: exclusion agreements

- 34-173 Section 69, unlike ss.67 and 68, is not a mandatory provision and it is open to the parties by agreement to exclude the right of appeal. 794 In the case of a domestic arbitration agreement s.87 of the 1996 Act provides that any agreement to exclude the jurisdiction of the court under s.69 or under s.45 (determination of preliminary point of law) is not to be effective unless entered into after the commencement of the arbitral proceedings in which the award is made. But s.87 is not yet in force and is unlikely to be brought into force. 795 The special categories of disputes mentioned in s.4(1) of the 1979 Act where the efficacy of an exclusion agreement was limited have not been retained in the 1996 Act. The parties are therefore free to exclude the right of appeal either in the original arbitration agreement or by the adoption of institutional rules 796 which exclude that right. An agreement to dispense with reasons for the tribunal's award is to be considered an agreement to exclude the court's jurisdiction under s.69, 797 but not merely a provision that an award is to be "final and binding". 798 An exclusion agreement is not contrary to art.6 of the European Convention on Human Rights. 799

## Challenge or appeal: reasons for award

- 34-174 The arbitral tribunal is required to give reasons for the award unless the award is an agreed award or the parties have agreed to dispense with reasons.<sup>800</sup> But, in order that the procedures for challenge or appeal may be effective, s.70(4) of the 1996 Act empowers the court to compel the tribunal to give reasons or further reasons for its award.<sup>801</sup> If on an application or appeal it appears to the court that the award does not contain the tribunal's reasons or does not set out the tribunal's reasons in sufficient detail to enable the court properly to consider the application or appeal, the court may order the tribunal to state the reasons for the award in sufficient detail for that purpose. In relation to the similar power conferred upon the court under s.1(5) of the 1979 Act, it was held that this power should be exercised sparingly<sup>802</sup> and the same applies to s.70(4).<sup>803</sup> It is not sufficient that it would be helpful to the court to have such reasons<sup>804</sup> and it is probable that the court will have to be satisfied that, if an order were made, the application or appeal would be likely to succeed.<sup>805</sup> Otherwise there would be no point in ordering reasons or further reasons to be stated.

## Challenge or appeal: additional costs

- 34-175 Where the court makes the order, it may make such further order as it thinks fit with respect to any additional costs of the arbitration resulting from the order.<sup>806</sup>

## Challenge or appeal: facts on which decision based

- 34-176 The power to order the tribunal to state reasons for the award extends not only to "reasoning" but also to the relevant facts upon which its decision is based.<sup>807</sup> But the power cannot or should not be used to order the tribunal to set out the evidence on which it relied in order to reach its conclusion.<sup>808</sup> There is no power in the court, before an award is made, to order the tribunal to state reasons for pre-award rulings.<sup>809</sup>

## Challenge or appeal: restrictions and time limits

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An application or appeal may not be brought if the applicant or appellant has not first exhausted any available process of appeal or review and any available recourse under s.57 (correction of award or additional award).<sup>810</sup> Any application or appeal must be brought within 28 days of the date of the award or, if there has been any arbitral process of appeal or review, of the date when the applicant or appellant was notified of the result of that process.<sup>811</sup> This period may be extended by the court in accordance with rules of the court

<sup>812</sup>

**U** (though the criteria applicable to applications for such an extension may differ from those applicable under the CPR).<sup>813</sup>

- 34-178 The right to object to the tribunal's substantive jurisdiction will be lost if the challenge is not made timeously.<sup>814</sup> Also a party to arbitral proceedings will be held to have lost the right to object that the tribunal lacks substantive jurisdiction, or that the proceedings have been improperly conducted, or that there has been a failure to comply with the arbitration agreement or any provision of Pt I of the Act, or that there has been any other irregularity affecting the tribunal or the proceedings, if he failed to object timeously<sup>815</sup> and thereafter took part or continued to take part in the proceedings,<sup>816</sup> unless he shows that he did not then know and could not with reasonable diligence have discovered the grounds for the objection.<sup>817</sup> It is clear that it is unnecessary for him to have had actual knowledge of the grounds of objection in order for him to lose his right to challenge the award and in *Rustal Trading Ltd v Gill & Duffus SA*<sup>818</sup> Moore-Bick J stated "If the respondent can show that the applicant took part or continued to take part in the proceedings without objection after the grounds of objection had arisen, the burden passes to the applicant to show that he did not know, and could not with reasonable diligence have discovered those grounds at the time". He further expressed the view that it was unnecessary for the applicant to have taken a positive step in the proceedings: "... unless a party makes it clear that he is withdrawing from the proceedings, he continues to take part in them until they reach their conclusion, normally in the publication of a final award".

## Challenge or appeal: supplementary orders

- 34-179 The court may order the applicant or appellant to provide security for the costs of the application or appeal<sup>819</sup> and may order that any money payable under the award shall be brought into court or otherwise secured.<sup>820</sup> Further, the court may order that its judgment on an arbitration claim should be published, even though the arbitration procedure is itself confidential. In *Manchester City Football Club Ltd v The Football Association*, Males LJ said<sup>821</sup>:

“when considering whether a judgment on an arbitration claim should be published, with or without anonymisation, the court must weigh the factors militating in favour of publicity against the desirability of preserving the confidentiality of the original arbitration and its subject matter. In general, the imperative of open justice, involving as it does the possibility of public scrutiny as a means by which confidence in the courts can be maintained and the administration of justice can be made transparent, will require publication where this can be done without disclosing significant confidential information.”

## Challenge or appeal: effect of order of the court

- 34-180 Where the award is varied by the court, the variation has effect as part of the tribunal’s award.<sup>822</sup>
- 34-181 Where the award is remitted by the court to the tribunal for reconsideration, the tribunal must make a fresh award in respect of the matter remitted within three months of the date of the order or such longer or shorter period as the court directs.<sup>823</sup> The effect of the order is to revive the jurisdiction of the tribunal, but only insofar as is necessary to deal with the matter remitted.<sup>824</sup> Following a remission, the first award is suspended: once a second award is published, the first award becomes null.<sup>825</sup>
- 34-182 Where the award is set aside by the court or declared to be of no effect, the court may also order that any *Scott v Avery* clause<sup>826</sup> is to be of no effect.<sup>827</sup>

## Challenge or appeal: appeals to the Court of Appeal<sup>828</sup>

- 34-183 An appeal lies to the Court of Appeal from a decision of the court on an application under s.67 or s.68, but such an appeal lies only if the court gives permission.<sup>829</sup> Only the judge who hears that application can give permission to appeal: the Court of Appeal itself cannot do so.<sup>830</sup> Refusal by the court to give permission to appeal to the Court of Appeal is unappealable.<sup>831</sup>

34-184

The permission of the court is required for any appeal to the Court of Appeal from a decision of the court under s.69 to grant or refuse permission to appeal.<sup>832</sup> Such permission must be sought at the hearing at which the decision to be appealed was made, and not later.<sup>833</sup> It is probable that permission to appeal will only be granted in exceptional circumstances.<sup>834</sup> Refusal by the court to give permission to appeal to the Court of Appeal is unappealable.<sup>835</sup>

- 34-185** The decision of the court on an appeal under s.69 is to be treated as a judgment of the court for the purposes of a further appeal.<sup>836</sup> But no such appeal lies without the permission of the court, which will not be given unless the court considers that the question is one of general importance or is one which for some other special reason should be considered by the Court of Appeal.<sup>837</sup> No appeal lies to the Court of Appeal against a refusal by the court to give permission to appeal.<sup>838</sup>



- 34-186** In the circumstances referred to above, and in other cases<sup>839</sup> where the Act provides that no appeal lies to the Court of Appeal without permission of the first instance court, the Court of Appeal has held that it is nevertheless entitled in certain situations to entertain an appeal despite a refusal of permission to appeal. One such situation is where the first instance court has made an order which it was not within its jurisdiction or not empowered to make under the provision of the Act relied on.<sup>840</sup> Another situation is where the decision of that court is invalidated by misconduct<sup>841</sup> or by unfairness in the process of arriving at its decision.<sup>842</sup> This residuary appellate jurisdiction exists both apart from<sup>843</sup> and consistently with the European Convention on Human Rights.<sup>844</sup> It does not, however, enable an appeal to be brought without permission on the ground that the court's decision on the merits was erroneous or unfair.<sup>845</sup> Where, however, the court at first instance is exercising a jurisdiction or power other than under ss.24, 67 or 68 of the Arbitration Act 1996, the Court of Appeal may entertain an application for permission to appeal even if the court at first instance denies permission to appeal.<sup>846</sup>

## Enforcement of awards

- 34-187** By s.66 of the 1996 Act,<sup>847</sup> an award made by the tribunal pursuant to an arbitration agreement may, by permission of the court, be enforced in the same manner as a judgment or order of the

court to the same effect,<sup>848</sup> and where permission is so given, judgment may be entered in terms of the award.<sup>849</sup> These two steps are distinct

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**U**; the former permitting a party to use the court's enforcement mechanisms for the purpose of enforcing the award and the latter enabling a party to obtain a judgment of the court itself in terms of the award. Permission to enforce an award cannot be given where, or to the extent that, the person against whom it is sought to be enforced shows that the tribunal lacked substantive jurisdiction to make the award,<sup>851</sup> but any objection must be made timeously.<sup>852</sup> Otherwise, the court has a discretion whether or not to permit enforcement of the award. Permission should be given to enforce the award unless there is a real ground for doubting its validity.<sup>853</sup> But permission might be refused, for example, if the award dealt with matters which are not capable of settlement by arbitration,<sup>854</sup> or on the grounds of public policy,<sup>855</sup> or if it was not in a form in which it could be entered as a judgment.<sup>856</sup> An award made in a foreign currency may be enforced,<sup>857</sup> but not an award which specifically requires payment in a foreign country.<sup>858</sup> An award may be enforced under s.66 even though the seat of the arbitration is outside England or no seat has been designated or determined.<sup>859</sup> It would appear that the court will not make an order for security for costs against an award creditor in respect of an application to enforce.<sup>860</sup> But the court has power to stay enforcement and order security.<sup>861</sup>

34-188 An award may also be enforced by bringing an action on the award.<sup>862</sup> This will be the only method of enforcement available where the arbitration agreement was not in writing<sup>863</sup> or permission to enforce the award under s.66 is refused. In an action on the award the defendant cannot plead as a defence that the findings of the arbitral tribunal were wrong<sup>864</sup> or that the arbitral proceedings leading to the award were unfair, irregular or unsatisfactory.<sup>865</sup> His remedy is to appeal to the court on a question of law arising out of the award<sup>866</sup> or to apply to the court to set aside the award on the ground of serious irregularity,<sup>867</sup> but in either case within the time limits and subject to the restrictions prescribed.<sup>868</sup> He can, however, raise the defence that the arbitral tribunal acted without jurisdiction or exceeded its jurisdiction.<sup>869</sup>

34-189 A claim on an award is a claim for damages for the breach of an implied term in the submission to arbitration that any award would be fulfilled.<sup>870</sup> Therefore, a claimant wishing to enforce an award in English proceedings has to prove, not only the award, but also the submission to arbitration which gave the arbitral tribunal the power to make its award and which contained the implied term that the parties would fulfil any award made pursuant to the submission.<sup>871</sup> There is, however, no need to plead and prove the underlying dispute arising under the contract between the parties.<sup>872</sup> A claim to enforce an award made in relation to a dispute arising out of a charterparty is not within

the Admiralty Jurisdiction in rem as a claim “arising out of any agreement for the carriage of goods in a ship or to the use or hire of a ship” under s.20(2)(h) of the Senior Courts Act 1981.<sup>873</sup>

- 34-190 An order may be made under s.37(1) of the Senior Courts Act 1981 for the disclosure of assets in aid of execution to enforce an arbitration award where the arbitration is seated in England.<sup>874</sup> But the court has no jurisdiction to make a freezing order in aid of enforcement of an English arbitrator’s award against subsidiaries of the award debtor against whom no substantial claim is asserted and who have no presence or assets within the jurisdiction.<sup>875</sup>

## Foreign awards

- 34-191 A foreign award may be enforced in England against a party to the arbitration agreement and to the arbitration leading to the award

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 in a number of ways. First, it may likewise be enforced under s.66 of the Act or by action.

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 Secondly, an award made,

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 in pursuance of an arbitration agreement, in the territory of a state

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 which is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) may, by permission of the court, be enforced in the same manner as a judgment or order of the court to the same effect by virtue of s.101 of the 1996 Act.

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 Thirdly, except insofar as an award is a New York Convention award, by virtue of Pt II of the Arbitration Act 1950 a foreign award is enforceable in the same manner as an English award if it is made in pursuance of an arbitration agreement to which the Geneva Protocol (1923) applies,

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 and which is made between persons of whom one is subject to the jurisdiction of a state party to the Geneva Convention for the Execution of Foreign Arbitral Awards (1927),

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 and the award is made in such a state.

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**U** Fourthly, an arbitration award made in a Commonwealth country to which Pt II of the **Administration of Justice Act 1920** or Pt I of the **Foreign Judgments (Reciprocal Enforcement) Act 1933** has been extended

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**U** can be enforced in the same manner as a judgment of a court in that place, i.e. by registration under those Acts, provided that it has become enforceable in the same manner as a judgment given by a court in that country.

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**U** Fifthly, various other statutes permit the enforcement of certain awards upon registration.

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**U** The conditions for enforcement and the grounds on which enforcement of a foreign award may be refused must be ascertained by reference to the particular statute,

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**U** but neither at common law nor under the statutes concerned can the merits of the arbitrator's decision be impugned.

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**U**

34-192 Once a foreign award has been converted into an English judgment, the judgment is subject to the same procedural rules and conditions as generally apply to such judgments. So, in principle, the court can grant a stay of execution of the judgment. However, it would rarely be appropriate to order a stay in respect of a foreign award enforceable under the New York Convention when, by definition under the Convention, the time for enforcement had arrived. <sup>889</sup>

34-193 Where a State has agreed in writing to submit a dispute which has arisen, or may arise, to arbitration, the State is not immune as respects proceedings in the courts of the United Kingdom, except (a) where contrary provision is made in the arbitration agreement or (b) where the arbitration agreement is between States. <sup>890</sup> A State cannot, therefore, as a normal rule raise a defence of State immunity in respect of an application to enforce an award as a judgment, whether the award is an English or a foreign award.

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## Civil Jurisdiction and Judgments Act 1982

- 34-194 The [1982 Act](#) provides a summary procedure for the enforcement by registration of an award which has become enforceable in the part of the United Kingdom in which it was given in the same manner as a judgment given by a court of law in that part.

[892](#)

**U** But it has been held that a judgment in a foreign state party to the Brussels Convention, and it follows the Brussels Regulation Recast insofar as it now applies since the UK's exit from the European Union,

[893](#)

**U** by which a foreign arbitral award was made enforceable could not be registered as a judgment in England under the Act, since such a judgment fell within the exception in art.1(2)(d) of that Regulation relating to arbitration,

[894](#)

**U** but a judgment may be recognised or enforced insofar as it falls within the definition of "judgment" in arts 2(a), 36 and 45, unless the judgment entered by a court of a Member State in the terms of an arbitral award does not constitute a "judgment", where a judicial decision resulting in an outcome equivalent to the outcome of that award could not have been adopted by a court of that Member State without infringing the provisions and the fundamental objectives of that regulation.

[895](#)

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## Proceedings in aid of execution

- 34-195 A freezing order may be made in aid of execution, whether the award is domestic or foreign,<sup>896</sup> and third party debt proceedings may be brought in appropriate circumstances.<sup>897</sup>

## Limitation

- 34-196 An action to enforce an award, where the submission is not by deed, must be brought within six years of the date on which the cause of action accrued,<sup>898</sup> i.e. from the date on which the

claimant was entitled to enforce the award.<sup>899</sup> Alternatively, if the claim is regarded as being one for damages for breach of an implied promise to pay the award, then it accrues when a reasonable time to pay the award has elapsed.<sup>900</sup> However, an action may be brought within six years on a judgment obtained to enforce an award even though by then more than six years have passed since the accrual of the cause of action to enforce the award.<sup>901</sup>

## Footnotes

- 1 For a more detailed account of arbitration, and practice and procedure, the reader should consult: Merkin, Arbitration Law (2007); Merkin and Flannery, Arbitration Act 1996, 5th edn (2014); Russell on Arbitration, 24th edn (2015); Tweeddale and Tweeddale, Arbitration of Commercial Disputes, 2nd edn (2012); Harris, Planterose and Tecks, Arbitration Act 1996, 5th edn (2014); Mustill and Boyd, Commercial Arbitration, 2nd edn (1989) and Supplement (2001); Redfern and Hunter, Law and Practice of International Arbitration, 5th edn (2009); Park, Arbitration of International Business Disputes, 2nd edn (2012).
- 704 In *Enterprise Insurance Co Plc v U-Drive Solutions (Gibraltar) Ltd [2016] EWHC 1301 (QB)* at [34].
- 705 In *Enterprise Insurance Co Plc v U-Drive Solutions (Gibraltar) Ltd [2016] EWHC 1301 (QB)* at [39]–[40], [116] the Court held that an order refusing to strike out a claim and an order for security for costs were not “awards” for the purposes of ss.68 and 69.
- 706 s.5 of the Arbitration Act 1996. A decision by the secretariat of the arbitral institution, as opposed to the tribunal, will not be an award unless the arbitral institution’s rules provide otherwise.
- 707 s.52 of the Arbitration Act 1996 makes provision for the form of the award. See *The Republic of Uganda v Rift Valley Railways (Uganda) Ltd [2021] EWHC 970 (Comm)* at [41]–[48]. See above, para.34–140.
- 708 See CPR Pt 62.
- 709 Having regard to s.1(c) of the Act, the question arises whether the court still retains in addition its inherent powers to rule on jurisdiction: see *ABB Lummus Global Ltd v Keppel Fils Ltd [1999] 2 Lloyd's Rep. 24; Vale do Rio Doce Navegacao SA v Shanghai Bao Steel Ocean Shipping Co Ltd [2000] 2 Lloyd's Rep. 1; J T Mackley & Co Ltd v Gosport Marina Ltd [2002] EWHC 1315 (TCC), [2002] Build. L.R. 367*. But see *British Telecommunications Plc v SAE Group Inc [2009] EWHC 252 (TCC), [2009] B.L.R. 231* (declaration).
- 710 s.67(1)(a). See ss.30, 31, 82; above, paras 34–102, 34–103. A negative jurisdictional decision of the tribunal can be challenged under the provision: *LG Caltex Gas Co Ltd v China National Petroleum Corp [2001] EWCA Civ 788, [2001] 1 W.L.R. 1892; TTMI SARL v Statoil ASA [2011] EWHC 1150 (Comm), [2011] 2 Lloyd's Rep. 220*. For an instance of a decision not relating to the tribunal’s substantive jurisdiction, see *Petroleum Company of Trinidad and Tobago Ltd v Samsung Engineering Trinidad Co Ltd [2017] EWHC 3055 (TCC), [2018] 1 Lloyd's Rep. 242*.

- 711 s.67(1)(b); *Republic of Kazakhstan v Istil Group Inc* [2006] EWHC 448 (Comm), [2006] 2 *Lloyd's Rep.* 370; (*affirmed* [2007] EWCA Civ 471, [2007] 2 *Lloyd's Rep.* 548); *Sumukan Ltd v Commonwealth Secretariat (No.2)* [2007] EWCA Civ 1148, [2008] 1 *Lloyd's Rep.* 40.
- 712 *Obrascon Huarte Lain SA v Qatar Foundation for Education, Science and Community Development* [2020] EWHC 1643 (Comm) at [19]–[22]; *The Republic of Sierra Leone v SL Mining Ltd* [2021] EWHC 286 (Comm) at [8]–[21]; *Marasca Comercio de Cereais Ltda v Bunge International Commerce Ltd* [2021] EWHC 359 (Comm) at [16]–[18]; *NWA v NVF* [2021] EWHC 2666 (Comm), [2022] 1 *Lloyd's Rep.* 629.
- 713 Below, para.[34-177](#). See *Yegiazaryan v Smagin* [2016] EWCA Civ 1290, [2017] 1 *Lloyd's Rep.* 102 at [27]–[28].
- 714 s.70(2); below, para.[34-177](#); CPR Pt 62.
- 715 s.73(2); *Emirates Trading Agency LLC v Sociedade de Fomento Industrial Private Ltd* [2015] EWHC 1452 (Comm), [2015] 2 *Lloyd's Rep.* 487.
- 716 s.67(3).
- 717 *Azov Shipping Co v Baltic Shipping Co* [1999] 1 *Lloyd's Rep.* 68; *Aoot Kalmneft v Glencore International AG* [2002] 1 *Lloyd's Rep.* 128, 141; *Electrosteel Castings Ltd v Scan-Transshipping and Chartering Sdn Bhd* [2002] EWHC 1993 (Comm), [2003] 1 *Lloyd's Rep.* 190 at [22]; *Zaporozhye Production Society v Ashly Ltd* [2002] EWHC 1410 (Comm); *Peoples Insurance Co of China v Vysanthi Shipping Co Ltd* [2003] EWHC 1655 (Comm), [2003] 2 *Lloyd's Rep.* 617; *Peterson Farms Inc v C&M Farming Ltd* [2004] EWHC 121 (Comm), [2004] 1 *Lloyd's Rep.* 603 at [18]; *Metal Distributors UK Ltd v ZCCM Investments Holdings Plc* [2005] EWHC 156 (Comm), [2005] 2 *Lloyd's Rep.* 37 at [16]; *Republic of Ecuador v Occidental Exploration & Production Co (No.2)* [2006] EWHC 345 (Comm), [2006] 1 *Lloyd's Rep.* 773 at [7] (*affirmed* [2007] EWCA Civ 656, [2007] 2 *Lloyd's Rep.* 352); *Czech Republic v European Media Ventures SA* [2007] EWHC 2851 (Comm), [2008] 1 *Lloyd's Rep.* 186 at [13]; *Habas Sinai v Tibbi Gazlar Isthisal Endustri AS v Sometal SAL* [2010] EWHC 29 (Comm), [2010] 1 *Lloyd's Rep.* 661 at [1]; *Norscot Rig Management PVT Ltd v Essar Oilfields Services Ltd* [2010] EWHC 195 (Comm), [2010] 2 *Lloyd's Rep.* 209 at [1]; *Dallah Real Estate & Tourism Co v Ministry of Religious Affairs of the Government of Pakistan* [2010] UKSC 46, [2011] 1 A.C. 763 at [104], [160]; *A v B* [2010] EWHC 3302 (Comm), [2011] 1 *Lloyd's Rep.* 363 at [25]; *TTMI SARL v Statoil ASA* [2011] EWHC 1150 (Comm), [2011] 2 *Lloyd's Rep.* 220 at [16]; *Hyundai Merchant Marine Co Ltd v Americas Bulk Transport Ltd* [2013] EWHC 470 (Comm), [2013] 2 All E.R. (Comm) 649 at [31]; *GPF GP SARL v Poland* [2018] EWHC 409 (Comm), [2018] 1 *Lloyd's Rep.* 410 at [64]–[71]. cf. *Primetrade AG v Ythan Ltd* [2005] EWHC 2399 (Comm), [2006] 1 *Lloyd's Rep.* 457; *Central Trading Exports Ltd v Fioralba Shipping Co* [2014] EWHC 2397 (Comm), [2014] 2 *Lloyd's Rep.* 449 (in the circumstances new evidence not allowed to be introduced).
- 718 s.67(2). See (1998) 64 *Arbitration* 188.
- 719 s.4(1) and Sch.1.
- 720 s.72(2)(a). Taking part in an arbitration on the merits or substance of the alleged claim amounts to taking part in the arbitration proceedings for the purposes of this sub-section; see *Broda Agro Trade (Cyprus) Ltd v Alfred C Toepfer International Ltd* [2010] EWCA Civ 1100,

[2011] 1 Lloyd's Rep. 243, likewise making submissions to the tribunal as to its jurisdiction: at [42]–[49].

- ⑥721 s.72(1); *London Steam Ship Owners Mutual Insurance Association Ltd v Spain (The Prestige)* [2013] EWHC 2840 (Comm), [2014] All E.R. (Comm) 300 at [79]–[81]. cf. *Secretary of State for Transport v Stagecoach South Western Trains Ltd* [2009] EWHC 2431 (Comm), [2010] 1 Lloyd's Rep. 175. In *Sino Channel Asia Ltd v Dana Shipping and Trading Pte Singapore* [2016] EWHC 1118 (Comm), [2016] 2 Lloyd's Rep. 97 at [4]–[5] the Court said that there was no time limit applicable to proceedings under s.72 and such an action may be brought after the making of an arbitration award. The fact that the Court has made an order under s.18 does not preclude a party's reliance on s.72: *National Investment Bank Ltd v Eland International (Thailand) Co Ltd* [2022] EWHC 1168 (Comm) at [12]–[17].
- 722 s.73(1); *Hussman (Europe) Ltd v Al Ameen Development & Trade Co* [2000] 2 Lloyd's Rep. 83, 91; *Athletic Union of Constantinople v National Basketball Association* [2002] 1 Lloyd's Rep. 305, 310; *JSC Zestafoni G Nikoladz Ferroalloy Plant v Ronly Holdings Ltd* [2004] EWHC 245 (Comm), [2004] 2 Lloyd's Rep. 335; *Westland Helicopters Ltd v Sheikh Salah al-Hejailan (No.1)* [2004] EWHC 1625 (Comm), [2004] 2 Lloyd's Rep. 523; *Vee Networks Ltd v Econet Wireless International Ltd* [2004] EWHC 2909 (Comm), [2005] 1 Lloyd's Rep. 192; *Primetrade AG v Ythan Ltd* [2005] EWHC 2399 (Comm), [2006] 1 Lloyd's Rep. 457 at [56]; *Frontier Agriculture Ltd v Bratt Bros* [2015] EWCA Civ 611, [2015] 2 Lloyd's Rep. 500; *A v B* [2016] EWHC 3003 (Comm), [2017] 1 W.L.R. 2030 at [50]–[63]; *Stockman Interhold SA v Arricano Real Estate Plc* [2017] EWHC 2909 (Comm), [2018] 1 Lloyd's Rep. 135 at [144]–[151]; *Exportadora de Sal SA de CV v Corretaje Maritimo Sud-American Inc* [2018] EWHC 224 (Comm), [2018] 1 Lloyd's Rep. 399. cf. *Sumukan Ltd v Commonwealth Secretarial (No.2)* [2007] EWCA Civ 1148, [2008] 1 Lloyd's Rep. 40; *Habas Sinai Ve Tibbi Gazlar Istihsal Endustrisi As v VSC Steel Co Ltd* [2013] EWHC 4071 (Comm), [2014] 1 Lloyd's Rep. 479; see above, para.34-103 and below, para.34-178. But if the tribunal determines that it lacks jurisdiction and a party challenges that determination, s.73(1) is inapplicable, since that party is not making any of the objections to which s.73(1) applies: *LG Caltex Gas Co Ltd v China National Petroleum Corp* [2001] EWCA Civ 788, [2001] 1 W.L.R. 1892. Section 73(1) is inapplicable to applications under s.72(1): *London Steam Ship Owners Mutual Insurance Association Ltd v Spain (The Prestige)* [2013] EWHC 2840 (Comm), [2014] 1 All E.R. (Comm) 300 at [82].
- 723 *Westminster Chemicals & Produce Ltd v Eicholz & Loeser* [1954] 1 Lloyd's Rep. 99; *Luanda Exportadora SARL v Wahbe Tamari & Sons Ltd* [1967] 2 Lloyd's Rep. 353; *Cia Maritima Zorroza SA v Sesostris SAE* [1984] 1 Lloyd's Rep. 652; *Almare Societa di Navigazione SpA v Derby & Co Ltd* [1989] 2 Lloyd's Rep. 376; *Furness Withy (Australia) Pty Ltd v Metal Distributors (UK) Ltd* [1990] 1 Lloyd's Rep. 236; *Athletic Union of Constantinople v National Basketball Association* [2002] 1 Lloyd's Rep. 305 at 311. Contrast *LG Caltex Gas Co Ltd v China National Petroleum Corp* [2001] EWCA Civ 788, [2001] 1 W.L.R. 189; *Republic of Kazakhstan v Istil Group Inc* [2006] EWHC 448 (Comm), [2006] 2 Lloyd's Rep. 370 at [59]–[60].

- 724 *Altco Ltd v Sutherland* [1971] 2 Lloyd's Rep. 515; *Furness Withy (Australia) Pty Ltd v Metal Distributors (UK) Ltd* [1990] 1 Lloyd's Rep. 236.
- 725 See Vol.I, para.6-116.
- 726 *Furness Withy (Australia) Pty Ltd v Metal Distributors (UK) Ltd* [1990] 1 Lloyd's Rep. 236. But see Vol.I, paras 6-123—6-125.
- 727 s.2(1).
- 728 *Republic of Ecuador v Occidental Exploration and Production Co* [2005] EWCA Civ 1116, [2006] Q.B. 432. On the subsequent hearing of the challenge under ss.67, 68, the court upheld the award: *Republic of Ecuador v Occidental Exploration and Production Co (No.2)* [2006] EWHC 345 (Comm), [2006] 1 Lloyd's Rep. 773 (affirmed [2007] EWCA Civ 656, [2007] 2 Lloyd's Rep. 352).
- 729 *Hussman (Europe) Ltd v Pharaon* [2003] EWCA Civ 266, [2003] 1 All E.R. (Comm) 879.
- 730 *Michael Wilson & Partners Ltd v Emmott* [2008] EWHC 2684 (Comm), [2009] 1 Lloyd's Rep. 162.
- 731 Arbitration Act 1950 s.22.
- 732 Arbitration Act 1950 s.23(2).
- 733 See the 27th edition of this book, Vol.I, para.17-042.
- 734 s.68(1). See CPR Pt 62. The claim form must identify exactly what constitutes the alleged irregularity: *Orascom TMT Investments Sarl v Veon Ltd* [2018] EWHC 985 (Comm) at [2]; *T v V & W* [2018] EWHC 1492 (Comm) at [5]. It is unlikely that the Court's power under s.68 extends to removing an arbitral tribunal; that power is reserved under s.24: *RJ v HB* [2018] EWHC 2833 (Comm), [2018] 2 Lloyd's Rep. 613 at [15]–[16].
- 735 s.4(1) and Sch.1.
- 736 s.72(2)(b).
- 737 *Lesotho Highlands Development Authority v Impregilo SpA* [2005] UKHL 43, [2006] 1 A.C. 221 at [28]; *ABB AG v Hochtief Airport GmbH* [2006] EWHC 388 (Comm), [2006] 2 Lloyd's Rep. 1 at [61]–[67]; *Bandwith Shipping Corp v Intaari* [2007] EWCA Civ 998, [2008] 1 Lloyd's Rep. 7 at [38]; *Gulf Import and Export Co v Bunge SA* [2007] EWHC 2667 (Comm), [2008] 1 Lloyd's Rep. 316 at [21]; *London Underground Ltd v Citylink Telecommunications Ltd* [2007] Build. L.R. 391 at [22]; *TAG Wealth Management v West* [2008] EWHC 1466 (Comm), [2008] 2 Lloyd's Rep. 699 at [29]; *Petrochemical Industries Co (KSC) v Dow Chemical Co* [2012] EWHC 2739 (Comm), [2012] 2 Lloyd's Rep. 691 at [16]; *Secretary of State for the Home Department v Raytheon Systems Ltd* [2014] EWHC 4375 (TCC) at [33]; *Lorand Shipping Ltd v Davof Trading (Africa) BV* [2014] EWHC 3521 (Comm), [2015] 1 Lloyd's Rep. 67; *Essar Oilfield Services Ltd v Norscot Rig Management Pvt Ltd* [2016] EWHC 2361 (Comm), [2016] 2 Lloyd's Rep. 481 at [8]–[11].
- 738 s.68(2).
- 739 *Weldon Plant Hire Ltd v Commission for the New Towns* [2000] B.L.R. 496; *Pacol Ltd v Joint Stock Co Rossakhar* [2000] 1 Lloyd's Rep. 109; *Rustal Trading Ltd v Gill & Duffus SA* [2000] 1 Lloyd's Rep. 14; *Sanghi Polyesters (India) v International Investor (KCFC) (Kuwait)* [2000] 1 Lloyd's Rep. 480; *Groundshire v VHE Construction* [2001] Build. L.R. 395; *RC*

*Pillar & Sons v Edwards* [2001] C.I.L.L. 1799; *Aoot Kalmneft v Glencore International AG* [2002] 1 Lloyd's Rep. 128; *Al Hadha Trading Co v Tradigrain SA* [2002] 2 Lloyd's Rep. 512, 523–524; *Checkpoint Ltd v Strathclyde Pension Fund* [2003] EWCA Civ 84, [2003] E.G. 214; *Bulfracht (Cyprus) Ltd v Boneset Shipping Co Ltd* [2002] EWHC 2292 (Comm), [2002] 2 Lloyd's Rep. 681; *Warborough Investments Ltd v S Robinson & Sons (Holdings) Ltd* [2003] EWCA 751, [2003] 2 E.G.L.R. 149; *Minermet SpA Milan v Luckyfield Shipping Corp SA* [2004] EWHC 729 (Comm), [2004] 2 Lloyd's Rep. 348; *Westland Helicopters Ltd v Sheikh Salah al-Hejailan (No.1)* [2004] EWHC 1625 (Comm), [2004] 2 Lloyd's Rep. 523; *Tame Shipping Ltd v Easy Navigation Ltd* [2004] EWHC 1862 (Comm), [2004] 2 Lloyd's Rep. 626; *Newfield Construction Ltd v Tomlinson* [2004] EWHC 3051 (TCC), (2004) 97 Const. L.R. 98; *Alphapoint Shipping Ltd v Rotem Amfert Negev* [2004] EWHC 2232 (Comm), [2005] 1 Lloyd's Rep. 23; *Vee Networks Ltd v Econet Wireless International Ltd* [2004] EWHC 2909 (Comm), [2005] 1 Lloyd's Rep. 192; *Margulead Ltd v Exide Technologies* [2004] EWHC 1019 (Comm), [2005] 1 Lloyd's Rep. 324; *Home of Homes Ltd v Hammersmith & Fulham LBC* [2003] EWHC 807, (2003) 92 Const. L.R. 48; *Ronly Holdings Ltd v JSC Zestafoni G Nicoladze Ferroalloy Plant* [2004] EWHC 1354 (Comm), [2004] 1 C.L.C. 1168; *Omnibridge Consulting Ltd v Clearsprings Management Ltd* [2004] EWHC 2276 (Comm); *St George's Investment Co Ltd v Gemini Consulting Ltd* [2004] EWHC 2358 (Ch); *Bottiglieri di Navigazione SpA v Cosco Qingdao Ocean Shipping Co* [2005] EWHC 244 (Comm), [2005] 2 Lloyd's Rep. 1; *ASM Shipping Ltd of India v TTMI Ltd of England* [2005] EWHC 2238 (Comm), [2006] 1 Lloyd's Rep. 375, [2006] EWCA Civ 1341, [2007] 1 Lloyd's Rep. 136; *Bernuth Lines Ltd v High Seas Shipping Ltd* [2005] EWHC 3020 (Comm), [2006] 1 Lloyd's Rep. 536 at [53]; *Claire & Co Ltd v Thames Water Utilities Ltd* [2005] EWHC 1022 (TCC), [2005] Build. L.R. 366; *Cameroon Airlines v Transnet Ltd* [2004] EWHC 1829 (Comm), [2006] T.C.L.R. 1; *ABB AG v Hochtief Airport GmbH* [2006] EWHC 388 (Comm), [2006] 2 Lloyd's Rep. 1; *Norbrook Laboratories Ltd v Tank* [2006] EWHC 1055 (Comm), [2006] 2 Lloyd's Rep. 485; *HBC Hamburg Bulk Carriers GmbH & Co KG v Tangshan Haixing Shipping Co Ltd* [2006] EWHC 3250 (Comm), [2007] 2 Lloyd's Rep. 222; *OAO Northern Shipping Co v Remolcadores de Marin SL* [2007] EWHC 1821 (Comm), [2007] 2 Lloyd's Rep. 302; *JD Wetherspoon Plc v Jay Mar Estates* [2007] EWHC 856 (TCC), [2007] Build. L.R. 285; *Bandwith Shipping Corp v Intaari* [2007] EWCA Civ 998, [2008] 1 Lloyd's Rep. 7; *Stern Settlement Trustees v Levy* [2007] EWHC 1187 (TCC), (2007) 113 Const. L.R. 92; *TAG Wealth Management v West* [2008] EWHC 1466 (Comm), [2008] 2 Lloyd's Rep. 699; *Thomas O'Donoghue v Enterprise Inns Plc* [2008] EWHC 815 (Comm); *F Ltd v M Ltd* [2009] EWHC 275 (TCC), [2009] 2 Lloyd's Rep. 537 (irrelevance of dissenting arbitrator's opinion); *Van der Giessen de-Noord Shipbuilding Division BV v Imtech Marine & Offshore BV* [2008] EWHC 2904 (Comm), [2009] 1 Lloyd's Rep. 273; *UR Power GmbH v Kuok Oils and Grains Pte Ltd* [2009] EWHC 1940 (Comm), [2009] 2 Lloyd's Rep. 495; *Compania Sud-Americana de Vapores SA v Nippon Yusen Kaisha* [2009] EWHC 1880 (Comm), [2010] 1 Lloyd's Rep. 436; *Double K Oil Products 1996 Ltd v Neste Oil OYJ* [2009] EWHC 3380 (Comm), [2010] 1 Lloyd's Rep. 141; *Michael Wilson & Partners Ltd v Emmott* [2011] EWHC 1441 (Comm); *Milan Nigeria Ltd v Angeliki B Maritime Co* [2011] EWHC 892 (Comm); *Ispat Industries Ltd v Western Bulk Pte Ltd* [2011] EWHC 93 (Comm); *AK Kablo Imalat San*

*Ve Tic AS v Intamex SA* [2011] EWHC 2970 (Comm); *Microperi SrL v Shipowners Mutual P&I Association* [2011] EWHC 2686 (Comm); *EDF Man Sugar Ltd v Belmont Shipping Ltd* [2011] EWHC 2992 (Comm), [2012] 1 Lloyd's Rep. 206; *Abuja International Hotels Inc v Meridien SAS* [2012] EWHC 87 (Comm), [2012] 1 Lloyd's Rep. 461; *Petrochemical Industries Co (KSC) v Dow Chemical Co* [2012] EWHC 2739 (Comm), [2012] 2 Lloyd's Rep. 691; *Terna Bahrain Holding Co WLL v Al Shamsi* [2012] EWHC 3283 (Comm), [2013] 1 All E.R. (Comm) 580 at [85]; *Bulk Ship Union SA v Clipper Bulk Shipping Ltd* [2012] EWHC 2595 (Comm), [2012] 2 Lloyd's Rep. 533 at [11]–[18]; *Flame SA v Glory Wealth Shipping Pte Ltd* [2013] EWHC 3153 (Comm), [2013] 2 Lloyd's Rep. 653 at [101]–[107]; *Interprods Ltd v De La Rue International Ltd* [2014] EWHC 68 (Comm) at [18] (see above, paras 34-096—34-097); *Secretary of State for Defence v Turner Estate Solutions Ltd* [2014] EWHC 244 (TCC); *Brockton Capital LLP v Atlantic-Pacific Capital Inc* [2014] EWHC 1459 (Comm), [2014] 2 Lloyd's Rep. 475; *Lorand Shipping Ltd v Davof Trading (Africa) BV* [2014] EWHC 3521 (Comm), [2015] 1 Lloyd's Rep. 67; *BV Scheepswerf Damen Gorinchem v Marine Institute* [2015] EWHC 1810 (Comm), [2015] 2 Lloyd's Rep. 351; *W Ltd v M Sdn Bhd* [2016] EWHC 422 (Comm), [2016] 1 Lloyd's Rep. 552; *Obrascon Huarte Lain SA v Qatar Foundation for Education, Science and Community Development* [2019] EWHC 2539 (Comm), [2019] 2 Lloyd's Rep. 559 at [45]. On the use by the arbitrator of his own knowledge and experience, see above, para.34-096 (note).

- ⑤740 cf. *Equatorial Traders Ltd v Louis Dreyfus Trading Ltd* [2002] 2 Lloyd's Rep. 638; *Westland Helicopters Ltd v Sheikh Salah al-Hejailan* [2004] EWHC 1625 (Comm), [2004] 2 Lloyd's Rep. 523; *Newfield Construction Ltd v Tomlinson* [2004] EWHC 3051 (TCC), (2004) 97 Const. L.R. 98; *Republic of Ecuador v Occidental Exploration & Production Co (No.2)* [2006] EWHC 345 (Comm), [2006] 1 Lloyd's Rep. 773; *ABB AG v Hochtief Airport GmbH* [2006] EWHC 388 (Comm), [2006] 2 Lloyd's Rep. 1; *Gulf Import & Export Co v Bunge SA* [2007] EWHC 2667 (Comm), [2008] 1 Lloyd's Rep. 316 at [20]; *CNH Global NV v PGN Logistics Ltd* [2009] EWHC 977 (Comm), [2009] 1 C.L.C. 807; *Abuja International Hotels Inc v Meridien SAS* [2012] EWHC 87 (Comm), [2012] 1 Lloyd's Rep. 461; *New Age Alzarooni 2 Ltd v Range Energy Natural Resources Inc* [2014] EWHC 4358 (Comm). In *Lesotho Highlands Development Authority v Impregilo SpA* [2005] UKHL 43, [2006] 1 A.C. 221, the House of Lords held that a mere error of law by the arbitrators did not amount to an excess of power under s.68(2)(b), but at [29] Lord Steyn gave some examples of such an excess of power. See also *B v A* [2010] EWHC 1626 (Comm), [2010] 2 Lloyd's Rep. 681 (error in application of chosen law); *C v D1* [2015] EWHC 2126 (Comm) at [136]–[147]; *Essar Oilfield Services Ltd v Norscot Rig Management Pvt Ltd* [2016] EWHC 2361 (Comm), [2016] 2 Lloyd's Rep. 481 at [41]–[47]; *PT Transportasi Gas Indonesia v ConocoPhillips (Grissik) Ltd* [2016] EWHC 2834 (Comm), [2016] 2 Lloyd's Rep. 600 at [53]–[56].
- ⑤741 *Westland Helicopters v Sheikh Salah al-Hejailan* [2004] EWHC 1625 (Comm), [2004] 2 Lloyd's Rep. 523; *Newfield Construction Ltd v Tomlinson* [2004] EWHC 3051 (TCC), (2004) 97 Const. L.R. 98; *Michael Wilson & Partners Ltd v Emmott* [2011] EWHC 1441 (Comm).

In *Pakistan v Broadsheet LLC [2019] EWHC 1832 (Comm)* the Court held that inadequate reasons for the award were not a serious irregularity under s.68(2)(c).

- ①742 *Weldon Plant Hire Ltd v Commission for the New Towns [2000] B.L.R. 496; Ascot Commodities NV v Olam International Ltd [2001] EWHC 520 (Comm), [2002] C.L.C. 277; Hussman (Europe) Ltd v Al Ameen Development & Trade Co [2002] 2 Lloyd's Rep. 83; Petroships Pte Ltd v Petec Trading and Investment Corp [2001] 2 Lloyd's Rep. 348, 351, 355, 357; Checkpoint Ltd v Strathclyde Pension Fund [2003] EWCA Civ 84; Torch Offshore LLS v Cable Shipping Inc [2004] EWHC 787 (Comm), [2004] 2 Lloyd's Rep. 446; Tame Shipping Ltd v Easy Navigation Ltd [2004] EWHC 1862 (Comm), [2004] 2 Lloyd's Rep. 626; Alphapoint Shipping Ltd v Rolem Amfert Negev Ltd [2004] EWHC 2232 (Comm), [2005] 1 Lloyd's Rep. 23; World Trade Corp v C Czarnikow Sugar Ltd [2004] EWHC 2332 (Comm), [2005] 1 Lloyd's Rep. 422; Marklands Ltd v Virgin Retail Ltd [2003] EWHC 3428, [2004] 27 E.G. 130; Fidelity Management SA v Myriad International Holdings BV [2005] EWHC 1193 (Comm), [2005] 2 Lloyd's Rep. 508; Benaim (UK) Ltd v Davies Middleton & Davies Ltd (No.2) [2005] EWHC 1370 (TCC), (2005) 102 Const. L.R. 1; Protech Projects Constructions Pty Ltd v Al-Kharafi & Sons [2005] EWHC 2165 (Comm), [2005] 2 Lloyd's Rep. 779; Sinclair v Woods of Winchester Ltd [2005] EWHC 1631, (2005) 102 Const. L.R. 127; ABB AG v Hochtief Airport GmbH [2006] EWHC 388 (Comm), [2006] 2 Lloyd's Rep. 1; London Underground Ltd v Citylink Telecommunications Ltd [2007] EWHC 1749 (TCC), [2007] Build. L.R. 391 at [41]; TAG Wealth Management v West [2008] EWHC 1466, [2008] 2 Lloyd's Rep. 699; Van der Giessen de-Noord Shipbuilding Division BV v Imtech Marine & Offshore BV [2008] EWHC 2904 (Comm), [2009] 1 Lloyd's Rep. 273 at [8]–[15]; Metropolitan Property Realizations Ltd v Atmore Investments Ltd [2008] EWHC 2925 (Ch) (criticised by Dundas (2009) 75 Arbitration 284); Pace Shipping Co Ltd v Churchgate (Nigeria) Ltd [2009] EWHC 1975 (Comm), [2010] 1 Lloyd's Rep. 183; Double K Oil Products 1996 v Neste Oil OYJ [2009] EWHC 3380 (Comm), [2010] 1 Lloyd's Rep. 141; Shaw v MFP Foundation & Piling Ltd [2010] EWHC 1839 (TCC); Buyuk Camlica Shipping Trading and Industry Co Inc v Progress Bulk Carriers Ltd [2010] EWHC 442 (Comm), [2011] Bus. L.R. D99; Michael Wilson & Partners Ltd v Emmott [2011] EWHC 1441 (Comm); Ispat Industries Ltd v Western Bulk Pte Ltd [2011] EWHC 93 (Comm); Soeximex SAS v Agrocorp International Pte Ltd [2011] EWHC 2743 (Comm), [2012] 1 Lloyd's Rep. 52; Latvian Shipping Co v Russian People's Insurance Co [2012] EWHC 1412 (Comm); Transition Feeds LLP v Itochu Europe LLP [2013] EWHC 3629 (Comm); Secretary of State for the Home Department v Raytheon Systems Ltd [2014] EWHC 4375 (TCC) at [33]. A mere failure to set out in the award the tribunal's reasoning in relation to all the arguments advanced in the arbitration will not suffice: *Margulead Ltd v Exide Technologies [2004] EWHC 1019 (Comm)*, [2005] 1 Lloyd's Rep. 324 at [29]–[35]; *Fidelity Management SA v Myriad International Holdings BV [2005] EWHC 1193 (Comm)*, [2005] 2 Lloyd's Rep. 508 at [7]–[10]. In *Petrochemical Industries Co (KSC) v Dow Chemical Co [2012] EWHC 2739 (Comm)*, [2012] 2 Lloyd's Rep. 691 at [16]–[21] Andrew Smith J considered the distinction between “issues” on the one hand and “arguments”, “points”, “lines of reasoning” and “steps in an argument” on the other. See also *Atkins Ltd v Secretary of State for Transport**

[2013] EWHC 139 (TCC), [2013] B.L.R. 193; *Primera Maritime (Hellas) Ltd v Jiangsu Eastern Heavy Industry Co Ltd* [2013] EWHC 3066 (Comm), [2014] 1 All E.R. (Comm) 813 at [8]; *Transition Feeds LLP v Itochu Europe Plc* [2013] EWHC 3629 (Comm) at [18]; *BV Scheepswerf Damen Gorinchem v Marine Institute* [2015] EWHC 1810 (Comm); *PT Transportasi Gas Indonesia v ConocoPhillips (Grissik) Ltd* [2016] EWHC 2834 (Comm), [2016] 2 Lloyd's Rep. 600 at [57]–[64]; *A v B* [2017] EWHC 596 (Comm), [2017] 2 Lloyd's Rep. 1 at [35]–[39]; *Rav Bahamas Ltd v Therapy Beach Club Incorporated (Bahamas)* [2021] UKPC 8, [2021] 2 Lloyd's Rep. 188 at [38]–[41].

①743 *Gbangbola v Smith & Sherriff Ltd* [1998] 3 All E.R. 730; *Benaim (UK) Ltd v Davies Middleton & Davies Ltd (No.2)* [2005] EWHC 1370 (TCC), (2005) 102 Const. L.R. 1; *Pace Shipping Co Ltd v Churchgate (Nigeria) Ltd* [2009] EWHC 1975 (Comm), [2010] 1 Lloyd's Rep. 183; *Xstrata Coal Queensland Pty Ltd v Benxi Iron & Steel (Group) International Economic & Trading Co Ltd* [2020] EWHC 324, [2020] Bus. L.R. 954.

①744 *Cuslet Chartering v Carousel Shipping Co Ltd* [2001] 1 Lloyd's Rep. 707; *Profilati Italia Srl v Painewebber Inc* [2001] 1 Lloyd's Rep. 715; *Thyssen Canada Ltd v Mariana Maritime SA* [2005] EWHC 219 (Comm), [2005] 1 Lloyd's Rep. 640; *Protech Projects Construction Pty Ltd v Al-Kharafi & Sons* [2005] EWHC 2165 (Comm), [2005] 2 Lloyd's Rep. 779; *Elektrim SA v Vivendi Universal SA* [2007] EWHC 11 (Comm), [2007] 1 Lloyd's Rep. 693, especially at [75]–[87]; *DDT Trucks of North America Ltd v DDT Holdings Ltd* [2007] EWHC 1542 (Comm), [2007] 2 Lloyd's Rep. 213 at [22]–[23]; *Colliers International Property Consultants v Colliers Jordan Lee Jafaar Sd Bhd* [2008] EWHC 1524 (Comm), [2008] 2 Lloyd's Rep. 368; *R v V* [2008] EWHC 1531 (Comm), [2009] 1 Lloyd's Rep. 97; *Michael Wilson & Partners Ltd v Emmott* [2011] EWHC 1441 (Comm); *Nestor Maritime SA v Sea Anchor Shipping Co Ltd* [2012] EWHC 996 (Comm); *Stockman Interhold SA v Arricano Real Estate Plc* [2017] EWHC 2909 (Comm), [2018] 1 Lloyd's Rep. 135 at [168]–[169]. In *Double K Oil Products 1996 Ltd v Neste Oil OYJ* [2009] EWHC 3380 (Comm), [2010] 1 Lloyd's Rep. 141, Blair J stated that the court had to be satisfied that some form of reprehensible or unconscionable conduct had contributed in a substantial way to the obtaining of the award (allegation in the case was fraud in the production of evidence). See also *Chantiers de L'Atlantique SA v Gaztransport & Technigaz SAS* [2011] EWHC 3383 (Comm) at [53]–[62]; *Celtic Bioenergy Ltd v Knowles* [2017] EWHC 472 (TCC), [2017] 1 Lloyd's Rep. 495 (fraud in a party's deliberate failure to draw the tribunal's attention to relevant correspondence). In *Alexander Brothers Ltd v Alstom Transport SA* [2020] EWHC 1584 (Comm), [2021] 1 Lloyd's Rep. 179 at [104]–[105] the Court held that where the arbitration tribunal has jurisdiction to determine the relevant issue of illegality and has determined that there was no illegality on the facts, there is very nearly no scope for this Court to re-open the issue of illegality, save in exceptional circumstances, when dealing with a public policy objection to recognition or enforcement. As to relevance of the public policy of a foreign state, see *PT Transportasi Gas Indonesia v ConocoPhillips (Grissik) Ltd* [2016] EWHC 2834 (Comm), [2016] 2 Lloyd's Rep. 600 at [66]–[72].

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*Al Hadha Trading Co v Tradigrain SA* [2002] 2 *Lloyd's Rep.* 512, 521; *Benaim (UK) Ltd v Davies Middleton & Davies Ltd* [2005] EWHC 1370 (TCC), (2005) 102 *Const. L.R.* 1. In *Pakistan v Broadsheet LLC* [2019] EWHC 1832 (Comm) the Court held that inadequate reasons for the award were not a serious irregularity under s.68(2)(h).

- ①746 *Gannet Shipping Ltd v Eastrade Commodities Inc* [2002] 1 *Lloyd's Rep.* 713, 717–718. An admission by a member of the tribunal who is in the minority or who dissents would not be sufficient for this purpose: *A v B* [2017] EWHC 596 (Comm), [2017] 2 *Lloyd's Rep.* 1 at [53]–[56]. However, there was a serious irregularity where the tribunal admitted an error in calculating loss but refused to correct the award: *Doglemor Trade Ltd v Caledor Consulting Ltd* [2020] EWHC 3342 (Comm), [2021] Bus. L.R. 313.

- ①747 See the 27th edition of this book, Vol.I, paras 17-040—17-042.

- ①748 *Lindner Ceilings Floors Partitions Plc v How Engineering Services Ltd* [2001] *Build. L.R.* 90; *Arduina Holdings BV v Celtic Resource Holdings Plc* [2006] EWHC 3155 (Comm); *Schwebel v Schwebel* [2010] EWHC 3280 (TCC), [2011] 2 All E.R. (Comm) 1048; *Flame SA v Glory Wealth Shipping Pte Ltd* [2013] EWHC 3153 (Comm), [2013] 2 *Lloyd's Rep.* 653; *Atkins Ltd v Secretary of State for Transport* [2013] EWHC 139 (TCC), [2013] B.L.R. 193; *Sonatrach v Statoil Natural Gas LLC* [2014] EWHC 875 (Comm), [2014] 2 *Lloyd's Rep.* 252 at [11]; *New Age Alzarooni 2 Ltd v Range Energy Natural Resources Inc* [2014] EWHC 4358 (Comm) at [13]; *Secretary of State for the Home Department v Raytheon Systems Ltd* [2014] EWHC 4375 (TCC) at [33]; *R v K* [2020] EWHC 841 (Fam) at [60]. See also *World Trade Corp v C Czarnikow Sugar Ltd* [2004] EWHC 2322 (Comm), [2005] 1 *Lloyd's Rep.* 422 (weight of evidence); *Lesotho Highlands Development Authority v Impregilo SpA* [2005] UKHL 43, [2006] 1 A.C. 221 at [28]. But it may be that a failure by the tribunal to take account of or consider evidence (as opposed to an alleged failure to evaluate the evidence correctly) could come within ss.33(2), 68(2)(a). *Arduina Holdings BV v Celtic Resources Holdings Plc* [2006] EWHC 3155 (comm) at [46]; *Schwebel v Schwebel* [2010] EWHC 3280 (TCC) at [27]; *Petrochemical Industries Co (KSC) v Dow Chemical Co* [2012] EWHC 2739 (Comm), [2012] 2 *Lloyd's Rep.* 691 at [36]; *Brockton Capital LLP v Atlantic-Pacific Capital Inc* [2014] EWHC 1459 (Comm), [2014] 2 *Lloyd's Rep.* 275. In *Elektrim SA v Vivendi Universal SA* [2007] EWHC 11 (Comm), [2007] 1 *Lloyd's Rep.* 693 at [75]–[76] Aikens J said that the previous law was no longer applicable which gave to the court a power to remit the award where fresh evidence came to light after the award was made; cf. *BSG Resources Ltd v Vale SA* [2019] EWHC 3347 (Comm) at [19]; *Gee* (2006) 22 *Arbitration International* 337, 366.

- ①749 *Rav Bahamas Ltd v Therapy Beach Club Incorporated (Bahamas)* [2021] UKPC 8, [2021] 2 *Lloyd's Rep.* 188 at [32].

- ①750 *Costa v British Indian Trading Co Ltd* [1963] 1 Q.B. 201.

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s.68(2); *Egmatra v Marco Trading Corp* [1999] 1 Lloyd's Rep. 862; *Conder Structures v Kvaerner Construction Ltd* [1999] A.D.R. L.J. 305; *Pacol Ltd v Joint Stock Co Rossakhar* [2000] 1 Lloyd's Rep. 109, 115; *Sanghi Polyesters Ltd (India) v International Investor (KCFC) (Kuwait)* [2000] 1 Lloyd's Rep. 480, 484; *Hussman (Europe) Ltd v Al Ameen Development & Trade Co* [2000] 2 Lloyd's Rep. 83, 95; *Profilati Italia Srl v Painewebber Inc* [2001] 1 Lloyd's Rep. 715, 720, 722; *Petrosships Pte Ltd v Retec Trading and Investment Corp* [2001] 2 Lloyd's Rep. 348, 351; *Brandeis Brokers Ltd v Black* [2001] 2 Lloyd's Rep. 359, 370–371; *Groundshire v VHE Construction* [2001] Build. L.R. 395; *Al Hadha Trading Co v Tradigrain SA* [2002] 2 Lloyd's Rep. 512, 521–522; *Check Point Ltd v Strathclyde Pension Fund* [2003] EWCA Civ 84 [2003] E.G. 214; *Warborough Investments Ltd v S Robinson & Sons (Holdings) Ltd* [2003] EWCA Civ 751, [2003] 2 E.G.L.R. 145; *Torch Offshore LLS v Cable Shipping Inc* [2004] EWHC 787 (Comm), [2004] 2 Lloyd's Rep. 446; *Alphapoint Shipping Ltd v Rotem Amfert Negev Ltd* [2004] EWHC 2232 (Comm), [2005] 1 Lloyd's Rep. 23; *Newfield Construction Ltd v Tomlinson* [2004] EWHC 3051 (TCC), (2004) 97 Const. L.R. 148; *Fidelity Management SA v Myriad International Holdings BV* [2005] EWHC 1193 (Comm), [2005] 2 Lloyd's Rep. 508; *ASM Shipping Ltd of India v TTMI Ltd of England* [2005] EWHC 2238 (Comm), [2006] 1 Lloyd's Rep. 375, [2006] EWCA Civ 1341, [2007] 1 Lloyd's Rep. 136; *Bernuth Lines Ltd v High Seas Shipping Ltd* [2005] EWHC 3020 (Comm), [2006] 1 Lloyd's Rep. 537; *Cameroon Airlines v Transnet Ltd* [2004] EWHC 1829 (Comm), [2006] T.C.L.R. 1; *ABB AG v Hochtief Airport GmbH* [2006] EWHC 388 (Comm), [2006] 2 Lloyd's Rep. 1; *Norbrook Laboratories Ltd v Tank* [2006] EWHC 1055 (Comm), [2006] 2 Lloyd's Rep. 485; *CNH Global NV v PGN Logistics Ltd* [2009] EWHC 977 (Comm), [2009] 1 C.L.C. 807; *Compania Sud-Americana de Vapores SA v Nippon Yusen Kaisha* [2009] EWHC 1880 (Comm), [2010] 1 Lloyd's Rep. 436; *Double K Oil Products 1996 Ltd v Neste Oil OYJ* [2009] EWHC 3380 (Comm), [2010] 1 Lloyd's Rep. 141; *Michael Wilson & Partners Ltd v Emmott* [2011] EWHC 1441 (Comm); *E D & F Man Sugar Ltd v Belmont Shipping Ltd* [2011] EWHC 2992 (Comm), [2012] 1 Lloyd's Rep. 206 at [20]; *Petrochemical Industries Co (KSC) v Dow Chemical Co* [2012] EWHC 2739 (Comm), [2012] 2 Lloyd's Rep. 691; *Terna Bahrain Holding Co WLL v Al Shamsi* [2012] EWHC 3283 (Comm), [2013] 1 All E.R. (Comm) 580 at [121]; *Compton Beauchamp Estates Ltd v Spence* [2013] EWHC 1101 (Ch), [2013] 20 E.G. 107 (C.S.) at [36], [79]; *Transition Feeds LLP v Itochu Europe Plc* [2013] EWHC 3629 (Comm); *BV Scheepswerf Damen Gorinchem v Marine Institute* [2015] EWHC 1810 (Comm), [2015] 2 Lloyd's Rep. 351.

- ①752 para.280; *Petrosships Pte Ltd v Retec Trading and Investment Corp* [2001] 2 Lloyd's Rep. 348 at 351; *Bandwith Shipping Corp v Intaari* [2007] EWCA Civ 998, [2008] 1 Lloyd's Rep. 7 at [46]; *Michael Wilson & Partners Ltd v Emmott* [2011] EWHC 1441 (Comm) at [18]; *Ispat Industries Ltd v Western Bulk Pte Ltd* [2011] EWHC 93 (Comm) at [17]; *Bulk Ship Union SA v Clipper Bulk Shipping Ltd* [2012] EWHC 2595 (Comm), [2012] 2 Lloyd's Rep. 533 at [18]; *Flame SA v Glory Wealth Shipping Pte Ltd* [2013] EWHC 3153 (Comm), [2013] 2 Lloyd's Rep. 653 at [101]–[107]; *Secretary of State for Defence v Turner Estate Solutions Ltd* [2014] EWHC 244 (TCC) at [69]; *Lorand Shipping Ltd v Davof Trading (Africa) BV*

[2014] EWHC 3521 (Comm), [2015] 1 Lloyd's Rep. 67 at [18]; PBO v DONPRO [2021] EWHC 1951 (Comm) at [17]–[22].

- ①753 Vee Networks Ltd v Econet Wireless International Ltd [2004] EWHC 2909 (Comm), [2005] 1 Lloyd's Rep. 192 at [88]–[90]; SCM Financial Overseas Ltd v Raga Establishment Ltd [2018] EWHC 1008 (Comm), [2018] 2 Lloyd's Rep. 99 at [62]–[64]; Rav Bahamas Ltd v Therapy Beach Club Incorporated (Bahamas) [2021] UKPC 8, [2021] 2 Lloyd's Rep. 188 at [34]–[37].

- ①754 *St George's Investment Co Ltd v Gemini Consulting Ltd* [2004] EWHC 2353 (Ch), *Newfield Construction Ltd v Tomlinson* [2004] EWHC 305 (TCC), (2004) 97 Const. L.R. 148; *BTC Bulk Transport Corp v Glencore International AG* [2006] EWHC 1857 (Comm); *JD Wetherspoon Plc v Jay Mar Estates* [2007] EWHC 856 (TCC), [2007] Build. L.R. 285; *OAO Northern Shipping Co v Remolcadores de Marin SL* [2007] EWHC 1821 (Comm), [2007] 2 Lloyd's Rep. 302; *London Underground Ltd v Citylink Communications Ltd* [2007] B.L.R. 391; *Michael Wilson & Partners Ltd v Emmott* [2011] EWHC 1441 (Comm) at [17]; *Brockton Capital LLP v Atlantic-Pacific Capital Inc* [2014] EWHC 1459 (Comm), [2014] 2 Lloyd's Rep. 275 at [27]–[31]; *Secretary of State for the Home Department v Raytheon Systems Ltd* [2014] EWHC 4375 (TCC) at [33]. cf. *Soeximex v Agrocorp International Pte Ltd* [2011] EWHC 2743 (Comm), [2012] 1 Lloyd's Rep. 52 at [25]; *Maass v Musion Events Ltd* [2015] EWHC 1346 (Comm), [2015] 2 Lloyd's Rep. 383 at [40]–[42].

- ①755 s.33(1)(a); *Checkpoint Ltd v Strathclyde Pension Fund* [2003] EWCA Civ 751, [2003] E.G.L.R. 149; *Warborough Investment Ltd v S Robinson & Sons (Holdings) Ltd* [2003] EWHC 787 (Comm), [2005] 1 Lloyd's Rep. 23. See also the European Convention on Human Rights, above, para.34-015. But see *JD Wetherspoon Plc v Jay Mar Estates* [2007] EWHC 856 (TCC), [2007] Build. L.R. 285.

- ①756 *ASM Shipping Ltd of India v TTMI Ltd of England (at first instance)* [2005] EWHC 2238 (Comm), [2006] 1 Lloyd's Rep. 375, [2006] EWCA Civ 1341, [2007] 1 Lloyd's Rep. 136 at [39]; *Norbrook Laboratories v Tank* [2006] EWHC 1055 (Comm), [2006] 2 Lloyd's Rep. 485 at [144]–[145].

757 Below, para.34-177. For extension of time, see s.79.

758 s.70(2); below, para.34-177. See also CPR Pt 62.

759 s.73(1); below, para.34-177. See *Rustal Trading Ltd v Gill & Duffus SA* [2000] 1 Lloyd's Rep. 14, 19–20, and below, para.34-178. See also *Essar Oilfield Services Ltd v Norscot Rig Management Pvt Ltd* [2016] EWHC 2361 (Comm), [2016] 2 Lloyd's Rep. 481 at [78]–[85].

760 s.68(3). Remitting the award would be the normal remedy under s.68(2)(d), (f) and (h). But see *Pacol Ltd v Joint Stock Co Rossakhar* [2000] 1 Lloyd's Rep. 109, 115; *Secretary of State for the Home Department v Raytheon Systems Ltd (No.2)* [2015] EWHC 311 (TCC), [2015] 1 Lloyd's Rep. 493. cf. *Van der Giessen de-Noord Shipbuilding Division BV v Imtech Marine & Offshore BV* [2008] EWHC 2904 (Comm), [2009] 1 Lloyd's Rep. 273 (appointment of

umpire). For remission in a case under s.68(2)(a), see *Brockton Capital LLP v Atlantic-Pacific Capital Inc* [2014] EWHC 1459 (Comm), [2014] 2 Lloyd's Rep. 275.

761 *Dexters Ltd v Hill Crest Oil Co (Bradford) Ltd* [1926] 1 K.B. 348; *AA Amram Ltd v Bremar Co Ltd* [1966] 1 Lloyd's Rep. 494; *European Grain & Shipping Ltd v R Johnston* [1983] Q.B. 520; *ASM Shipping Ltd of India v TTMI Ltd of England* (at first instance) [2005] EWHC 2238 (Comm), [2006] 1 Lloyd's Rep. 375, [2006] EWCA Civ 1341, [2007] 1 Lloyd's Rep. 136 at [49]. Contrast *Lissenden v CAV Bosch Ltd* [1940] A.C. 412; *Sokratis Rokopoulos v Esperia SpA* [1978] 1 Lloyd's Rep. 456; *Banner Industrial and Commercial Properties v Clark Paterson* (1990) 47 E.G. 64.

762 s.52(4).

763 *Tame Shipping Ltd v Easy Navigation Ltd* [2004] EWHC 1862 (Comm), [2004] 2 Lloyd's Rep. 626.

764 s.2(1).

765 See (on s.22 of the Arbitration Act 1950) *Fletamentos Maritimos SA v Effjohn International BV (No.2)* [1997] 2 Lloyd's Rep. 302; *ZCCM Investments Holdings Plc v Kansanshi Holdings Plc* [2019] EWHC 1285 (Comm), [2019] 2 Lloyd's Rep. 29 (decision on a procedural issue).

766 *Needham* (1999) 65 Arbitration 205; *Holmes and O'Reilly* (2003) 69 Arbitration 1; *Dundas* (2003) 69 Arbitration 172; (2006) 72 Arbitration 111, 281; *Esposito* (2008) 74 Arbitration 429; *Tweedale and Tweedale* (2013) 79 Arbitration (3) 265; *Tweedale, Tweedale and Nguyen* (2013) 80 Arbitration (2) 136.

767 *National Iranian Oil Co v Crescent Petroleum Co International Ltd* [2022] EWHC 1645 (Comm) at [13]–[30].

768 s.69(1); CPR PD 62.12.

769 s.69(3)(c); *Demco Investments & Commercial SA v SE Banken Forsakring Holding Aktiebolag* [2005] EWHC 154 (Comm), [2005] 2 Lloyd's Rep. 650 at [35]; *Benaim (UK) Ltd v Davies Middleton & Davies Ltd* (2005) EWHC 1370 (TCC), (2005) 102 Const. L.R. 1 (application of law to fact); *CTI Group Inc v Transclear SA* [2008] EWCA Civ 856, [2008] 2 Lloyd's Rep. 526 at [11]; *TAG Wealth Management v West* [2008] EWHC 1466, [2008] 2 Lloyd's Rep. 699 at [46]–[52]; *ASM Shipping Ltd of India v TTMI Ltd of England* [2009] 1 Lloyd's Rep. 293n; *Trustees of Edmond Stern Settlement v Levy* [2009] EWHC 14 (TCC), [2009] 1 Lloyd's Rep. 345; *Dolphin Tanker SRL v Westport Petroleum Inc* [2010] EWHC 2617 (Comm), [2011] 1 Lloyd's Rep. 550 at [29]; *Eitzen Bulk A/S v TTMI SARL* [2012] EWHC 202 (Comm), [2012] 2 All E.R. 100 at [20]–[35]; *Wuhan Ocean Economic & Technical Co-operation Co Ltd v Schiffahrts-Gesellschaft "Hansa Murcia" mbH & Co KG* [2012] EWHC 3104 (Comm), [2013] 1 Lloyd's Rep. 273 at [15]–[18], [22]–[31]; *Latvian Shipping Co v Russian People's Insurance Co* [2012] EWHC 1412 (Comm), [2012] 2 Lloyd's Rep. 181; *Sun United Maritime Ltd v Kastell Marine Inc* [2014] EWHC 1476 (Comm), [2014] 2 Lloyd's Rep. 386. See also *Guangzhon Dockyards Co Ltd v ENE Aegiali I* [2010] EWHC 2826 (Comm), [2011] 1 Lloyd's Rep. 30 at [30]–[34] (doubtful whether court can hear appeal from arbitrators on questions of fact even if parties so agree).

- ①770 *Egmatra v Marco Trading Corp* [1999] 1 Lloyd's Rep. 862; *Sanghi Polyesters (India) v International Investor (KCFC) Kuwait* [2000] 1 Lloyd's Rep. 480; *Reliance Industries Ltd v Enron Oil and Gas Ltd* [2002] 1 Lloyd's Rep. 645; *Athletic Union of Constantinople v National Basketball Association* [2002] 1 Lloyd's Rep. 305, 313; *Schwebel v Schwebel* [2010] EWHC 3280 (TCC), [2011] 2 All E.R. (Comm) 1048. For a court in Northern Ireland, it means the law of Northern Ireland.
- ①771 *Poseidon Schiffahrt GmbH v Nomadic Navigation Co Ltd* [1998] 1 Lloyd's Rep. 57; and *Royal and Sun Alliance Insurance Plc v BAE Systems (Operations) Ltd* [2008] EWHC 743 (Comm), [2008] 1 Lloyd's Rep. 712 (consent in advance); cf. *ST Shipping and Transport Pte Ltd v Space Shipping Ltd* [2016] EWHC 880 (Comm), [2016] 2 Lloyd's Rep. 17; [2021] EWHC 2288 (Comm), [2022] 1 Lloyd's Rep. 395 at [5]. In this situation, the barriers set by subs.(3) will not apply.
- ①772 s.69(2).
- ①773 *CMA CGMSA v KGMS "Northern Pioneer"* [2002] EWCA Civ 1878, [2003] 1 W.L.R. 1015; *Stern Settlement Trustees v Levy* [2007] EWHC 1187 (TCC), (2007) 113 Const. L.R. 92; *Shaw v MFP Foundations Piling Ltd* [2010] EWHC 1839 (TCC); *Corooba Holdings Ltd v Ballymore Properties Ltd* [2011] EWHC 1636 (Ch); *House of Fraser Ltd v Scottish Widows Plc* [2011] EWHC 2800 (Ch).
- ①774 *Marklands Ltd v Virgin Retail Ltd* [2003] EWHC 3428, [2004] 2 E.G.L.R. 43; *Pace Shipping Co Ltd v Churchgate (Nigeria) Ltd* [2009] EWHC 1975 (Comm), [2010] 1 Lloyd's Rep. 183 at [43]; *House of Fraser Ltd v Scottish Widows Plc* [2011] EWHC 2800 (Ch); cf. *HOK Sport Ltd v Aintree Racecourse Co Ltd* [2002] EWHC 3094 (TCC), [2003] Build. L.R. 155. In *GSE Trustee Co Ltd v Tyler* [2021] EWHC 2097 (Ch), the court held that an unheralded point taken by the arbitrator was not one which the tribunal was asked to determine.
- ①775 *HMV UK Ltd v Propinvest Friar Ltd* [2011] EWCA Civ 1708, [2012] 1 Lloyd's Rep. 416 at [5], [6] (i.e. transparent and clear upon a mere perusal of the reasoned award itself); *Morris Homes (West Midlands) Ltd v Keay* [2013] EWHC 932 (TCC), [2013] B.L.R. 370 at [50]; *AMEC v Secretary of State for Defence* [2013] EWHC 110 (TCC), 146 Con. L.R. 152; *Transition Feeds LLP v Itochu Europe Plc* [2013] EWHC 3629 (Comm).
- ①776 See *CMA CGM SA v KGMS "Northern Pioneer"* [2002] EWCA Civ 1878, [2003] 1 W.L.R. 1015; *Icon Navigation Corp v Sinochem International Petroleum (Bahamas) Co Ltd* [2002] EWHC 2812 (Comm), [2003] 1 All E.R. (Comm) 405. *HOK Sport Ltd v Aintree Racecourse Co Ltd* [2002] EWHC 3094 (TCC), [2003] Build. L.R. 155; *Keydon Estates Ltd v Western Power Distribution (South Wales) Ltd* [2004] EWHC 996 (Ch); *JSC Zestafoni G Nikoladz Ferroalley Plant v Ronly Holdings Ltd* [2004] EWHC 245 (Comm), [2004] 2 Lloyd's Rep. 335; *Vrinera Marine Co Ltd v Eastern Rich Operations Inc* [2004] EWHC 1752 (Comm),

[2004] 2 Lloyd's Rep. 465; *Alphapoint Shipping Ltd v Rotem Amfert Negev Ltd* [2004] EWHC 2232 (Comm), [2005] 1 Lloyd's Rep. 23; *Newfield Construction Ltd v Tomlinson* [2004] EWHC 3051 (TCC), (2004) 97 Const. L.R. 148; *Bottiglieri di Navigazione SpA v Cosco Quindao Ocean Shipping Co* [2005] EWHC 244 (Comm), [2005] 2 Lloyd's Rep. 1; *Surefire Systems Ltd v Guardian ECL Ltd* [2005] EWHC 1860 (TCC), [2006] *Build. L.R.* 534; *Essex CC v Premier Recycling Ltd* [2007] *Build. L.R.* 233; *DDT Trucks of North America Ltd v DDT Holdings Ltd* [2007] EWHC 154 (Comm), [2007] 2 Lloyd's Rep. 213; *Stern Settlement Trustees v Levy* [2007] EWHC 1187 (TCC), [2007] 113 Const. L.R. 92; *Braes of Doune Wind Farm (Scotland) Ltd v Alfred McAlpine Business Services Ltd* [2008] EWHC 426 (TCC), [2008] 1 Lloyd's Rep. 608 at [26]–[32]; *Mayhaven Healthcare Ltd v Bothma* [2009] EWHC 2634 (TCC), 127 Con. L.R. 1; *UR Power GmbH v Kuok Oils and Grains Pte Ltd* [2009] EWHC 1940 (Comm), [2009] 2 Lloyd's Rep. 495; *National Trust v Fleming* [2009] EWHC 1789 (Ch), [2009] N.P.C. 97; *Pace Shipping Co Ltd v Churchgate (Nigeria) Ltd* [2009] EWHC 1975 (Comm), [2010] 1 Lloyd's Rep. 183; *Gas Natural Approvisionamientos SDG SA v Methane Services Ltd* [2009] EWHC 2298 (Comm), [2010] 1 Lloyd's Rep. 610; *SOS Corporacion Alimentaria SA v Inerco Trade SA* [2010] EWHC 162 (Comm), [2010] 2 Lloyd's Rep. 345; *Sylvia Shipping Co Ltd v Progress Bulk Carriers Ltd* [2010] EWHC 542 (Comm), [2010] 2 Lloyd's Rep. 81; *Dolphin Tanker SRL v Westport Petroleum Inc* [2010] EWHC 2617 (Comm), [2011] 1 Lloyd's Rep. 550; *Milan Nigeria Ltd v Angeliki B Maritime Co* [2011] EWHC 892 (Comm); *Ispat Industries Ltd v Western Bulk Pte Ltd* [2011] EWHC 93 (Comm); *Cordoba Holdings Ltd v Ballymore Properties Ltd* [2011] EWHC 1636 (Ch); *HMV UK Ltd v Propinvest Friar Ltd Partnership* [2011] EWCA Civ 1708; *House of Fraser Ltd v Scottish Widows Plc* [2011] EWHC 2800 (Ch); *MRI Trading AG v Erdenet Mining Corp LLC* [2012] EWHC 1988 (Comm), [2012] 2 Lloyd's Rep. 465; *Morris Homes (West Midlands) Ltd v Keay* [2013] EWHC 932 (TCC), [2013] B.L.R. 370.

①777 [1982] A.C. 724.

①778 [1985] A.C. 191; *CMA CGM SA v KGMS "Northern Pioneer"* [2002] EWCA Civ 1878, [2003] 1 W.L.R. 1015 at [11], [60].

①779 *Egmatra v Marco Trading Corp* [1999] 1 Lloyd's Rep. 862 (foreign law); *CMA CGM SA v KGMS "Northern Pioneer"* [2002] EWCA Civ 1878, [2003] 1 W.L.R. 1015 (question rendered academic); *HOK Sport Ltd v Aintree Racecourse Co Ltd* [2002] EWHC 3094 (TCC), [2003] *Build. L.R.* 155 (delay allegedly prejudicial); *Keydon Estates Ltd v Western Power Distribution (South Wales) Ltd* [2004] EWHC 996 (Ch) (expert tribunal); *Essex CC v Premier Recycling Ltd* [2007] *Build. L.R.* 534 ("final and binding" decision); *Stern Settlement Trustees v Levy* [2007] EWHC 1187 (TCC), [2007] 113 Con. L.R. 92 at [29] (waste of time, cost and resource in pursuing weak challenge in context of arbitration claim of modest proportions). See also (on s.1 of the Arbitration Act 1979) *Aden Refinery Co Ltd v Ugland Management Co Ltd* [1987] Q.B. 650; *Petraco (Bermuda) Ltd v Petromed International Ltd* [1988] 1 W.L.R. 896; *Ipswich BC v Fisons Plc* [1990] Ch. 709.

- ①780 s.69(4). CPR PD 62.12; *Parbulk II A/S v Heritage Maritime SA* [2011] EWHC 2917 (Comm), [2012] 2 All E.R. (Comm) 418.
- ①781 s.69(5) (unless it appears to the court that a hearing is required). This is not contrary to art.6 of the European Convention on Human Rights: *BLCT (13096) Ltd v J Sainsbury Plc* [2003] EWCA Civ 884, [2004] 2 P & C.R. 3; above, para.34-017. See also *CMA CGM SA v KGMS “Northern Pioneer”* [2002] EWCA Civ 1878, [2003] 1 W.L.R. 1015 (brevity required in written submissions).
- ①782 See below, para.34-177.
- ①783 s.70(2); below, para.34-177. See also CPR PD 62.12.
- ①784 *Universal Petroleum Co Ltd v Handels und Transport GmbH* [1987] 1 W.L.R. 1178, 1189; *Foley’s Ltd v City and East London Family and Community Services* [1997] A.D.R. L.J. 401; *HOK Sport Ltd v Aintree Racecourse Co Ltd* [2002] EWHC 3094 (TCC), [2003] B.L.R. 155; *Great Western Trains Co Ltd v Network Rail Infrastructure Ltd* [2010] EWHC 117 (Comm) at [89]; *Sylvia Shipping Co Ltd v Progress Bulk Carriers Ltd* [2010] EWHC 542 (Comm), [2010] 2 Lloyd’s Rep. 81 at [88]; *Dolphin Tanker SRL v Westport Petroleum Inc* [2010] EWHC 2617 (Comm), [2011] 1 Lloyd’s Rep. 550 at [29]–[30]. cf. *Kershaw Mechanical Services Ltd v Kendrick Construction Ltd* [2006] EWHC 727 (TCC), [2006] 4 All E.R. 79 at [45]; *White Young Green Consulting v Brooke House Sixth Form College* [2007] EWHC 2018 (TCC) at [25].
- ①785 *Demco Investments & Commercial SA v SE Banken Forsakring Holding Aktiebolag* [2005] EWHC 1542 (Comm), [2005] 2 Lloyd’s Rep. 650 at [35]–[48]; *Surefire Systems Ltd v Guardian ECL Ltd* [2005] EWHC 1860 (TCC), [2006] Build. L.R. 534; *London Underground Ltd v Citylink Telecommunications Ltd* [2007] EWHC 1749 (TCC), [2007] 2 All E.R. (Comm) 694; *House of Fraser Ltd v Scottish Widows Plc* [2011] EWHC 2800 (Ch); *Guangzhou Dockyards Co Ltd v ENE Aegiali I* [2010] EWHC 2826 (Comm), [2011] 2 All E.R. (Comm) 595. See (before the Act) *Mondial Trading Co GmbH v Gill & Duffus Zuckerhandelsgesellschaft mbH* [1980] 2 Lloyd’s Rep. 376, 379; *Hayn Roman & Co SA v Cominter (UK) Ltd* [1982] 2 Lloyd’s Rep. 458, 462; *Bulk Oil (Zug) AG v Sun International Ltd* [1984] 1 Lloyd’s Rep. 531, 533; *Athens Cape Naviera SA v Deutsche Dampfschiffahrtsgesellschaft Hansa AG* [1985] 1 Lloyd’s Rep. 528, 531–532; *Universal Petroleum Co Ltd v Handels und Transport GmbH* [1987] 1 W.L.R. 1178; *Geogas SA v Trammo Gas Ltd* [1993] 1 Lloyd’s Rep. 215, 217. But see (no evidence) *Edwards v Bairstow* [1956] A.C. 14; *Pioneer Shipping Ltd v BTP Tioxide Ltd (The Nema)* [1982] A.C. 724, 752; *Antaios Compania Naviera SA v Salen Rederiana AB (The Antaios)* [1985] A.C. 191, 205; *CMA CGM SA v KGMS “Northern Pioneer”* [2002] EWCA Civ 1878, [2003] 1 W.L.R. 1015 at [28]. cf. *Benaim (UK) Ltd v Davies Middleton & Davies Ltd* [2005] EWHC 1370 (TCC); *CTI Group Inc v Transclear SA* [2007] EWHC 2340 (Comm), [2007] 2 C.L.C. 530.

- ①786 *Cottonex Anstalt v Patriot Spinning Mills Ltd* [2014] EWHC 236 (Comm), [2014] 1 *Lloyd's Rep.* 615; *MUR Shipping BV v RTI Ltd* [2022] EWHC 467 (Comm), [2022] Bus. L.R. 473 at [48]–[49].
- ①787 s.70(6), (7), (8).
- ①788 *North Range Shipping Ltd v Seatrans Shipping Corp (The Western Triumph)* [2002] EWCA Civ 405, [2002] 1 W.L.R. 2397. cf. *Mousaka Inc v Golden Seagull Maritime Inc* [2002] 1 W.L.R. 295.
- ①789 *Latvian Shipping Co v Russian People's Insurance Co* [2012] EWHC 1412 (Comm), [2012] 2 *Lloyd's Rep.* 181.
- 790 s.69(7). As to the width of the Court's powers under s.69(7), see *Martin v Harris* [2019] EWHC 2735 (Ch), [2020] Bus. L.R. 122 at [27]–[32]. cf. *Loon Navigation Corp v Sinochern International Petroleum (Bahamas) Co Ltd* [2002] EWHC 2812, [2003] 1 All E.R. (Comm) 405; *Vrinera Marine Co Ltd v Eastern Rich Operations Inc* [2004] EWHC 1752 (Comm), [2004] 2 *Lloyd's Rep.* 465 at [15]. There is no reason why the judge who granted permission to appeal on a point of law cannot hear the substantive appeal: *L v A* [2016] EWHC 1789 (Comm) at [4]–[8].
- 791 *Bulfracht (Cyprus) Ltd v Boneset Shipping Co Ltd* [2002] EWHC 2292 (Comm), [2002] 2 *Lloyd's Rep.* 681; *Newfield Construction Ltd v Tomlinson* [2004] EWHC 3051 (TCC), (2004) 97 Const. L.R. 148; *Alphapoint Shipping Ltd v Rotem Amfert Negev Ltd* [2004] EWHC 2232, [2005] 1 *Lloyd's Rep.* 23.
- 792 *Alphapoint Shipping Ltd v Rotem Amfert Negev Ltd* [2004] EWHC 2232 (Comm), [2005] 1 *Lloyd's Rep.* 23 at [5]–[7].
- 793 *Alphapoint Shipping Ltd v Rotem Amfert Negev Ltd* [2004] EWHC 2232 (Comm), [2005] 1 *Lloyd's Rep.* 23 at [7].
- 794 s.69(1).
- 795 See above, para.34-005.
- 796 *Arab African Energy Corp Ltd v Olieprodukten Nederland NV* [1983] 2 *Lloyd's Rep.* 419; *Marine Contractors Inc v Shell Petroleum Development Co of Nigeria* [1984] 2 *Lloyd's Rep.* 77; *Sanghi Polyesters (India) v International Investor (KCFC) (Kuwait)* [2000] 1 *Lloyd's Rep.* 480 (ICC rules); *Sumukan Ltd v Commonwealth Secretariat* [2006] EWHC 304 (Comm), [2007] EWCA Civ 243, [2007] 2 *Lloyd's Rep.* 87 (Com Sec rules). Contrast *Shell Egypt West Manzala GmbH v Dana Gas Egypt Ltd* [2009] EWHC 2097 (Comm), [2010] 1 *Lloyd's Rep.* 109 (UNCITRAL Arbitration Rules 1976).
- 797 s.69(1).
- 798 *Essex CC v Premier Recycling Ltd* [2007] Build. L.R. 233; but see s.69(3)(d), above, para.34-136. See also *Shell Egypt West Manzala GmbH v Dana Gas Egypt Ltd* [2009] EWHC 2097 (Comm), [2010] 1 *Lloyd's Rep.* 109 (“final, conclusive and binding”).
- 799 *Sumukan Ltd v Commonwealth Secretariat* [2006] EWHC 304 (Comm), [2007] EWCA Civ 243, [2007] 2 *Lloyd's Rep.* 87; see above, para.34-017.

- 800 s.52(4). In maritime and some other arbitrations reasons may, by agreement, be set out in a separate “confidential” document and not in the award: see above, para.34-167.
- 801 This replaced s.1(5) of the Arbitration Act 1979. (Considered by the Court of Appeal in *Universal Petroleum Co Ltd v Handels und Transport GmbH* [1987] 1 W.L.R. 1178). But s.70(4) extended the courts’ ability to order reasons beyond appeal on a point of law to applications under ss.67, 68. See *JFS (UK) Ltd v South West Water Services Ltd* (1998) 65 Con. L.R. 157; *Petroships Pte Ltd v Petec Trading and Investment Corp* [2001] 2 Lloyd’s Rep. 348, 357; *Alphapoint Shipping Ltd v Rotem Amfert Negev Ltd* [2004] EWHC 2232 (Comm), [2005] 1 Lloyd’s Rep. 23 at [5]; *Margulead Ltd v Exide Technologies* [2004] EWHC 1019 (Comm), [2005] 1 Lloyd’s Rep. 324 at [41]-[42]; *Van der Giessen de-Noord Shipbuilding Division BV v Imtech Marine & Offshore BV* [2008] EWHC 2904 (Comm), [2009] 1 Lloyd’s Rep. 273 at [14]. cf. *Navios International Inc v Sangamon Transportation Group* [2012] EWHC 166 (Comm), [2012] 1 Lloyd’s Rep. 493 (order not necessary).
- 802 *Universal Petroleum Co Ltd v Handels und Transport GmbH* [1987] 1 W.L.R. 1178 at 1194; *Granges Aluminium AB v The Cleveland Bridge and Engineering Co*, *The Times*, 15 May 1990, CA.
- 803 *Navios International Inc v Sangamon Transportation Group* [2012] EWHC 166 (Comm), [2012] 1 Lloyd’s Rep. 493 at [26].
- 804 *Navios International Inc v Sangamon Transportation Group* [2012] EWHC 166 (Comm), [2012] 1 Lloyd’s Rep. 493 at [24].
- 805 *The Gay Fidelity* [1982] 1 Lloyd’s Rep. 469, 470; *Warde v Feedex International Inc* [1984] 1 Lloyd’s Rep. 310, 314, [1985] 2 Lloyd’s Rep. 289; *Trave Schiffahrtsgesellschaft mbH v Ninemia Maritime Corp* [1986] Q.B. 802; *Universal Petroleum Co Ltd v Handels und Transport GmbH* [1987] 1 W.L.R. 1178 at 1194; *Gebr Van Weelde Scheepvaart Kantoor BV v Société Industrielle d’Acide, etc.* [1986] 1 Lloyd’s Rep. 435; *Kansa General Insurance Co Ltd v Bishopsgate Insurance Plc* [1988] 1 Lloyd’s Rep. 503, 511; *JFS (UK) Ltd v South West Water Services Ltd* (1998) 65 Con. L.R. 157.
- 806 s.70(5).
- 807 *Schiffahrtsagentur Hamburg Middle East Line GmbH v Virtue Shipping Corp* [1981] 1 Lloyd’s Rep. 533, 539; *Bulk Oil (Zug) AG v Sun International Ltd (No.2)* [1984] 1 Lloyd’s Rep. 531, 533.
- 808 *Interbulk Ltd v Aiden Shipping Co Ltd* [1983] 2 Lloyd’s Rep. 424, 429, [1984] 2 Lloyd’s Rep. 66; *Mafracht v Patries Shipping Co SA* [1986] 2 Lloyd’s Rep. 405, 414; *Universal Petroleum Co Ltd v Handels und Transport GmbH* [1987] 1 W.L.R. 1178; Mustill and Boyd at p.541. See also *Hayn Roman & Co SA v Cominter (UK) Ltd* [1982] 2 Lloyd’s Rep. 458, 462; *Bulk Oil (Zug) AG v Sun International Ltd (No.2)* [1984] 1 Lloyd’s Rep. 531 at 533; *Athens Cape Naviera SA v Deutsche Dampschiffahrtsgesellschaft Hansa AG* [1985] 1 Lloyd’s Rep. 528.
- 809 *Three Valleys Water Committee v Binnie and Partners* (1990) 52 B.L.R. 42.
- 810 s.70(2); CPR PD 62.11; *Groundshire v VHE Construction* [2001] Build. L.R. 395; *Al Hadha Trading Co v Tradigrain SA* [2002] 2 Lloyd’s Rep. 512; *Torch Offshore LLC v Cable Shipping Inc* [2004] EWHC 787 (Comm), [2004] 2 Lloyd’s Rep. 446; *Sinclair v Woods of Winchester Ltd* [2005] EWHC 1631 (QB), (2005) 102 Const. L.R. 127; *Bulk Ship Union SA v Clipper Bulk Shipping Ltd* [2012] EWHC 2595 (Comm), [2012] 2 Lloyd’s Rep. 533 at [31]-[32]; cf.

*Gbangbola v Smith & Sherriff Ltd [1998] 3 All E.R. 730; World Trade Corp v C Czarnikow Sugar Ltd [2004] EWHC 2332 (Comm), [2005] 1 Lloyd's Rep. 422; Ases Havacilik Servis ve Destek Hizmetleri AS v Delkor UK Ltd [2012] EWHC 3518 (Comm), [2013] 1 Lloyd's Rep. 254 at [19]–[24]; A Ltd v B Ltd [2014] EWHC 1870 (Comm).* See above, para.34-144 and *Buyuk Camlica Shipping Trading and Industry Co Inc v Progress Bulk Carriers Ltd [2010] EWHC 442 (Comm), [2011] Bus. L.R. D99.*

- 811 s.70(3); *Westland Helicopters Ltd v Sheikh Salah al-Hejailan (No.1) [2004] EWHC 1625 (Comm), [2004] 2 Lloyd's Rep. 523; Thyssen Canada Ltd v Mariana Maritime SA [2005] EWHC 219 (Comm), [2005] 1 Lloyd's Rep. 640; Sinclair v Woods of Winchester Ltd [2005] EWHC 1631 (QB), (2005) 102 Const. L.R. 127; UR Power GmbH v Kuok Oils and Grains Pte Ltd [2009] EWHC 1940 (Comm), [2009] 2 Lloyd's Rep. 495 at [58] and PEC Ltd v Asia Golden Rice Ltd [2012] EWHC 846 (Comm), [2013] 1 Lloyd's Rep. 82* (two-tier arbitration). It is a moot point whether the extended time for appeal under s.70(2)(a) or applies to an application under s.57 as well: see *Surefire Systems Ltd v Guardian ECL Ltd [2005] EWHC 1860 (TCC), [2005] B.L.R. 534; Price v Carter [2010] EWHC 1451 (TCC)*. In *Essar Oilfield Services Ltd v Norscot Rig Management Pvt Ltd [2016] EWHC 2361 (Comm), [2016] 2 Lloyd's Rep. 481* at [90]–[93] the Court held that if the award is corrected pursuant to s.57, the 28-day time period runs from the date of the corrected award, provided that the application to correct is material to the issue being raised by the application to the Court. An application is material if it is necessary to enable the party to know whether he has grounds to challenge the award or not. If a material application to correct the award is refused, time starts running from the date of the decision that there would be no correction: *Xstrata Coal Queensland Pty Ltd v Benxi Iron & Steel (Group) International Economic & Trading Co Ltd [2020] EWHC 324 (Comm), [2020] Bus. L.R. 954* at [36]–[42]. See also *K v S [2015] EWHC 1945 (Comm), [2015] 2 Lloyd's Rep. 363; Daewoo Shipbuilding & Marine Engineering Co Ltd v Songa Offshore Equinox Ltd [2018] EWHC 538 (Comm), [2018] 1 Lloyd's Rep. 443* at [52]–[65]. An application or appeal may also be struck out for want of prosecution: *Huyton SA v Jakil Spa [1999] 2 Lloyd's Rep. 83.*
- 812 s.80(5), CPR rr.3.1, 3.9; *Dubai Islamic Bank PJSC v Paymentech Merchant Services Inc [2001] 1 Lloyd's Rep. 65, 75; Aoot Kalmneft v Glencore International AG [2002] 1 Lloyd's Rep. 128, 134; Peoples Insurance Co of China v Vysanthi Shipping Co Ltd [2003] EWHC 1655 (Comm), [2003] 2 Lloyd's Rep. 616; Thyssen Canada Ltd v Mariana Maritime SA [2005] EWHC 219 (Comm), [2005] 1 Lloyd's Rep. 640; Sinclair v Woods of Winchester Ltd [2005] EWHC 1631 (QB), (2005) 102 Const. L.R. 127; Elektrim SA v Vivendi Universal SA [2007] EWHC 11 (Comm), [2007] 1 Lloyd's Rep. 693 at [72]; PEC Ltd v Asia Golden Rice Ltd [2012] EWHC 846 (Comm), [2013] 1 Lloyd's Rep. 82; Terna Bahrain Holding Co WLL v Al Shamsi [2012] EWHC 3283 (Comm), [2013] 1 All E.R. (Comm) 580; London Steam Ship Owners Mutual Insurance Association Ltd v Spain (*The Prestige*) [2013] EWHC 2840 (Comm), [2014] 1 All E.R. (Comm) 300; Minister of Finance v International Petroleum Investment Co [2021] EWHC 2949 (Comm), [2022] 1 Lloyd's Rep. 595 at [124]–[126]; Hays v Bloomfield Investments LLC [2022] EWHC 1648 (Comm).*

- 813 In *Aoot Kalmneft v Glencore International AG* [2002] 1 Lloyd's Rep. 128, Colman J (at 137) set out six considerations which, in his judgment, were likely to be material to the exercise by the court of its power to extend time (applied in *Nagusina Naviera v Allied Maritime Inc* [2002] EWCA Civ 1147, [2003] 2 C.L.C. 1; *Gold Coast Ltd v Naval Gijon SA* [2006] EWHC 1044 (Comm), [2006] 2 Lloyd's Rep. 400 (s.79 application); *DDT Trucks of North America Ltd v DDT Holdings Ltd* [2007] EWHC 1542 (Comm), [2007] 2 Lloyd's Rep. 213); *Colliers International Property Consultants v Colliers Jordan Lee Jafaar Sdn Bhd* [2008] EWHC 1524 (Comm), [2008] 2 Lloyd's Rep. 396; *L Brown & Sons Ltd v Crosby Homes (North West) Ltd* [2008] EWHC 817 (TCC), [2008] Build. L.R. 366; *ASM Shipping Ltd of India v TTMI Ltd of England* [2009] 1 Lloyd's Rep. 293n; *UR Power GmbH v Kuok Oils and Grains Pte Ltd* [2009] EWHC 1940 (Comm), [2009] 2 Lloyd's Rep. 495 at [62], [63]; *Broda Agro Trade (Cyprus) Ltd v Alfred C Toepfer International Ltd* [2010] EWCA Civ 1100, [2011] 1 Lloyd's Rep. 243; *Chantiers de L'Atlantique SA v Gaztransport & Technigaz SAS* [2011] EWHC 3383 (Comm) at [63]; *Nestor Maritime SA v Sea Anchor Shipping Co Ltd* [2012] EWHC 996 (Comm); *PEC Ltd v Asia Golden Rice Ltd* [2012] EWHC 846 (Comm), [2013] 1 Lloyd's Rep. 82 at [21]; *Terna Bahrain Holding Co WLL v Al Shamsi* [2012] EWHC 3283 (Comm), [2013] 1 All E.R. (Comm) 580 at [27]–[34]; *London Steam Ship Owners Mutual Insurance Association Ltd v Spain (The Prestige)* [2013] EWHC 2840 (Comm), [2014] 1 All E.R. (Comm) 300; *K v S* [2015] EWHC 1945 (Comm); *Daewoo Shipbuilding & Marine Engineering Co Ltd v Songa Offshore Equinox Ltd* [2018] EWHC 538 (Comm), [2018] 1 Lloyd's Rep. 443 at [70]–[77]; *State A v Party B* [2019] EWHC 799 (Comm), [2019] 1 Lloyd's Rep. 569; *The Federal Republic of Nigeria v Process & Industrial Developments Ltd* [2020] EWHC 2379 (Comm); [2021] 1 Lloyd's Rep 121 at [154]–[176]; Dundas (2012) 78 Arbitration (3) 293. In *S v A* [2016] EWHC 846 (Comm), [2016] 1 Lloyd's Rep. 604 at [26], the Court applied the test laid down in *Terna Bahrain Holding Co WLL v Al Shamsi*, because it was common ground that it should do so, but questioned whether such a test should continue to apply in light of the Court's more recent decision in *Denton v TH White Ltd* [2014] EWCA Civ 906, [2014] 1 W.L.R. 3926. In *STA v OFY* [2021] EWHC 1574 (Comm) at [15]–[17], the Court considered that, on the facts of the case before it, the application for an extension of time succeeded or failed under either the *Denton v White* factors or the *Kalmneft* factors.
- 814 s.73(2); see above, para.34-158.
- 815 *Wicketts v Brine Builders* [2001] C.I.L.L. 1805; *Essar Oilfield Services Ltd v Norscot Rig Management Pvt Ltd* [2016] EWHC 2361 (Comm), [2016] 2 Lloyd's Rep. 481 at [78]–[85].
- 816 *Gater Assets Ltd v NAK Naftogaz Ukrainiy* [2007] EWCA Civ 988, [2007] 2 Lloyd's Rep. 588 at [79]; *Broda Agro Trade (Cyprus) Ltd v Alfred C Toepfer International GmbH* [2010] EWCA Civ 1100, [2011] 1 Lloyd's Rep. 243; *Sovarex SA v Romero Alvarez SA* [2011] EWHC 1661 (Comm), [2011] 2 Lloyd's Rep. 320 at [12]–[15]; *Sierra Fishing Co Ltd v Mohamed* [2015] EWHC 140 (Comm) at [72]; *Frontier Agriculture Ltd v Bratt Bros (A Firm)* [2015] EWCA Civ 611, [2015] 2 Lloyd's Rep. 500 at [35]; *A v B* [2016] EWHC 3003 (Comm), [2017] 1 W.L.R. 2030 at [50]–[63].
- 817 s.73(1); *Rustal Trading Ltd v Gill & Duffas SA* [2000] 1 Lloyd's Rep. 14, 19; *Hussman (Europe) Ltd v Al Ameen Development & Trade Co* [2000] 2 Lloyd's Rep. 83, 91; *Athletic*

*Union of Constantinople v National Basketball Association* [2002] 1 Lloyd's Rep. 305, 311; *Peterson Farms Inc v C&M Farming Ltd* [2004] EWHC 121 (Comm), [2004] 1 Lloyd's Rep. 603; *JSC Zestafoni G Nikoladz Ferroalloy Plant v Ronly Holdings Ltd* [2004] EWHC 245 (Comm), [2004] 2 Lloyd's Rep. 335; *Westland Helicopters Ltd v Sheikh Salah al-Hejailan (No.1)* [2004] EWHC 1625 (Comm), [2004] 2 Lloyd's Rep. 523; *Vee Networks Ltd v Econet Wireless International Ltd* [2004] EWHC 2909 (Comm), [2005] 1 Lloyd's Rep. 192; *Margulead Ltd v Exide Technologies* [2004] EWHC 1019 (Comm), [2005] 1 Lloyd's Rep. 324; *Thyssen Canada Ltd v Mariana Maritime SA* [2005] EWHC 219 (Comm), [2005] 1 Lloyd's Rep. 640; *ASM Shipping Ltd of India v TTMI Ltd of England* [2005] EWHC 2238 (Comm), [2006] 1 Lloyd's Rep. 375, [2006] EWCA Civ 1341, [2007] 1 Lloyd's Rep. 136; *Primetrade AG v Ythan Ltd* [2005] EWHC 2399 (Comm), [2006] 1 Lloyd's Rep. 457; *Sinclair v Woods of Winchester Ltd* [2005] EWHC 1631 (QB), [2005] 102 Const. L.R. 127; *Sumukan Ltd v Commonwealth Secretariat (No.2)* [2007] EWCA Civ 1148, [2008] 1 Lloyd's Rep. 40; *ASM Shipping Ltd v Harris* [2007] EWHC 1513 (Comm), [2008] 1 Lloyd's Rep. 61; *Stern Settlement Trustees v Levy* [2007] EWHC 1187 (TCC), (2007) 113 Const. L.R. 92; *Colliers International Property Consultants v Colliers Jordan Lee Jafaar Sdn Bhd* [2008] EWHC 1524 (Comm), [2008] 2 Lloyd's Rep. 396; *Nestor Maritime SA v Sea Anchor Shipping Co Ltd* [2012] EWHC 996 (Comm); *Habas Sinai Ve Tibbi Gazlav Istihsal Endustrisi AS v VSC Steel Co Ltd* [2013] EWHC 4071 (Comm), [2014] 1 Lloyd's Rep. 479 at [81]–[87]. See also above, paras 34–103, 34–160, 34–166, 34–170.

818 [2000] 1 Lloyd's Rep. 14, 19, 20. See also *JSC Zestafoni G Nikoladz Ferroalloy Plant v Ronly Holdings Ltd* [2004] EWHC 245 (Comm), [2004] 2 Lloyd's Rep. 335 at [63]–[64]. But see *Sumukan Ltd v Commonwealth Secretariat (No.2)* [2007] EWCA Civ 1148, [2008] 1 Lloyd's Rep. 40 at [36]; *Ases Havacilik Servis ve Destek Hizmetleri AS v Delkor UK Ltd* [2012] EWHC 3518 (Comm), [2013] 1 Lloyd's Rep. 254.

819 s.70(5), (6); CPR Pt 25. *Azov Shipping Co v Baltic Shipping Co* [1999] 2 Lloyd's Rep. 39; *Republic of Kazakhstan v Istil Group Ltd* [2005] EWCA Civ 1468, [2006] 1 W.L.R. 596; *Peterson Farms Inc v C & M Farming Ltd* [2003] EWHC 2298 (QB), [2004] 1 Lloyd's Rep. 614; *Moondance Maritime Enterprises SA v Carbofer Maritime Trading APS* [2012] EWHC 3618 (Comm), [2013] 1 Lloyd's Rep. 269; *X v Y* [2013] EWHC 1104 (Comm), [2013] 2 Lloyd's Rep. 230; *Konkola Copper Mines Plc v U&M Mining Zambia Ltd* [2014] EWHC 2374 (Comm), [2014] 2 Lloyd's Rep. 649; *Progas Energy Ltd v Islamic Republic of Pakistan* [2018] EWHC 209 (Comm), [2018] 1 Lloyd's Rep. 252 at [18]–[46].

820 s.70(7); Merkin, Arbitration Act 1996, 5th edn, 346–348. cf. *Peterson Farms Inc v C & M Farming Ltd* [2003] EWHC 2298 (QB), [2004] 1 Lloyd's Rep. 614; *Tajik Aluminium Plant v Hydro Aluminium AS* [2006] EWHC 1135 (Comm); *Moondance Maritime Enterprises SA v Carbofer Maritime Trading APS* [2012] EWHC 3618 (Comm), [2013] 1 Lloyd's Rep. 269 at [9]; *X v Y* [2013] EWHC 1104 (Comm), [2013] 2 Lloyd's Rep. 230; *Konkola Copper Mines Plc v U&M Mining Zambia Ltd* [2014] EWHC 2374 (Comm), [2014] 2 Lloyd's Rep. 649; *Erdenet Mining Corp LLC v ICBC Standard Bank Plc* [2017] EWHC 1090 (Comm), [2017] 2 Lloyd's Rep. 25; *Progas Energy Ltd v Islamic Republic of Pakistan* [2018] EWHC 209 (Comm), [2018] 1 Lloyd's Rep. 252 at [47]–[68]. But see *A v B* [2010] EWHC 3302 (Comm),

- [2011] *1 Lloyd's Rep.* 363 (differing requirements for s.70(7) with respect to applications under s.67 on the one hand and ss.68, 69 on the other).
- 821 [2021] *EWCA Civ* 1110 at [62].
- 822 s.71(2).
- 823 s.71(3).
- 824 *Interbulk Ltd v Aiden Shipping Co Ltd* [1985] *2 Lloyd's Rep.* 410.
- 825 *Huyton SA v Jakil SpA* [1999] *2 Lloyd's Rep.* 83 (on s.22 of the 1950 Act).
- 826 See above, para.34-048.
- 827 s.71(4).
- 828 See Senior Courts Act 1981 s.18(1)(g), as substituted by s.107(1) and Sch.3 para.37, of the Arbitration Act 1996.
- 829 ss.67(4), 68(4).
- 830 *Athletic Union of Constantinople v National Basketball Association (No.2)* [2002] *EWCA Civ* 830, [2002] *1 W.L.R.* 2863; *ASM Shipping Ltd of India v TTMI Ltd of England* [2006] *EWCA Civ* 1341, [2007] *1 Lloyd's Rep.* 136; *Republic of Kazakhstan v Istil Group Ltd* [2007] *EWCA Civ* 471, [2007] *2 Lloyd's Rep.* 548; *Integral Petroleum Ltd v Melars Group Ltd* [2016] *EWCA Civ* 108, [2016] *2 Lloyd's Rep.* 141. But the Court of Appeal could set aside permission to appeal under CPR r.52.18.
- 831 This does not infringe art.6 of the European Convention on Human Rights: *ASM Shipping Ltd of India v TTMI Ltd of England* [2005] *EWHC* 2238 (Comm), [2006] *1 Lloyd's Rep.* 375, [2006] *EWCA Civ* 1341, [2007] *1 Lloyd's Rep.* 136; *Republic of Kazakhstan v Istil Group Ltd* [2007] *EWCA Civ* 471, [2007] *2 Lloyd's Rep.* 548: see above, para.34-017.
- 832 s.69(6). But a decision that the parties had entered into an exclusion agreement (para.34-173, above) is not within s.69(6); *Sumukan Ltd v Commonwealth Secretariat* [2007] *EWCA Civ* 243, [2007] *2 Lloyd's Rep.* 87.
- 833 *Kirby v Baker & Metson Ltd* [2020] *EWHC* 3181 (Ch).
- 834 *CMA CGM SA v KGMS "Northern Pioneer"* [2002] *EWCA Civ* 1878, [2003] *1 W.L.R.* 1015 at [12]–[13], reflecting s.1(6A) of the Arbitration Act 1979: *The Antaios* [1985] *A.C.* 191, 205; *Petraco (Bermuda) Ltd v Petromed International Ltd* [1988] *1 W.L.R.* 896, 899.
- 835 *Aden Refinery Co Ltd v Ugland Management Co Ltd* [1987] *Q.B.* 650.
- 836 s.69(8).
- 837 s.69(8). But only the court (and not the Court of Appeal) can give leave. Section 69(8) is unaffected by s.55 of the Access to Justice Act 1999: *Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd* [2001] *Q.B.* 388, *CA*. A decision that the parties had entered into an exclusion agreement (para.34-173, above) is not within s.69(8): *Sumukan Ltd v Commonwealth Secretariat* [2007] *EWCA Civ* 243, [2007] *2 Lloyd's Rep.* 87.
- 838 This does not infringe art.6 of the European Convention on Human Rights: *CGU International Insurance Plc v Astrazeneca Insurance Co Ltd* [2006] *EWCA Civ* 1340, [2007] *1 Lloyd's Rep.* 142; see above, para.34-017. This restriction does not apply to decisions of the court related to, but not made under, ss.24, 67 or 68: *Manchester City Football Club Ltd v Football Association Premier League Ltd* [2021] *EWCA Civ* 1110, [2021] *1 W.L.R.* 5513.

- 839 ss.12(6), 17(4), 18(5), 21(6), 24(6), 25(5), 32(6), 42(5), 44(7), 45(5), 50(5), 56(7), 77(4), 79(6).
- 840 *Cetelem SA v Roust Holdings Ltd* [2005] EWCA Civ 618, [2005] 2 Lloyd's Rep. 494 at [28]. cf. *Shuttari v Solicitors' Indemnity Fund* [2007] EWCA Civ 244, [2007] 1 C.L.C. 303.
- 841 *Aden Refinery Co Ltd v Ugland Management Co Ltd* [1987] Q.B. 650 at 666.
- 842 *North Range Shipping Ltd v Seatrans Shipping Corp* [2002] EWCA Civ 405, [2002] 1 W.L.R. 2397 at [44]; *CGU International Insurance Plc v Astrazeneca Insurance Co Ltd* [2006] EWCA Civ 1340, [2007] 1 Lloyd's Rep. 142 at [45]–[47]; *Republic of Kazakhstan v Istil Group Ltd* [2007] EWCA Civ 417, [2007] 2 Lloyd's Rep. 548 at [30]–[31]; *Bunge SA v Kyla Shipping Co Ltd* [2013] EWCA Civ 734, [2013] 3 All E.R. 1006. See also *BLCT (13096) Ltd v J Sainsbury Ltd* [2003] EWCA Civ 884, [2004] 2 P. & C.R. 3.
- 843 Senior Courts Act 1981 s.16. In *Michael Wilson & Partners Ltd v Emmott* [2015] EWCA Civ 1285, [2016] 1 W.L.R. 857 the Court explained the nature of the Court's jurisdiction. See also *Integral Petroleum Ltd v Melars Group Ltd* [2016] EWCA Civ 108, [2016] 2 Lloyd's Rep. 141 at [25]–[31].
- 844 arts 3, 6, 8; see above, para.34-017. See also *Yegiazaryan v Smagin* [2016] EWCA Civ 1290, [2017] 1 Lloyd's Rep. 102 at [26].
- 845 *CGU International Insurance Plc v Astrazeneca Insurance Co Ltd* [2006] EWCA Civ 1340, [2007] 1 Lloyd's Rep. 142 at [58]–[63]; *Republic of Kazakhstan v Istil Group Ltd* [2007] EWCA Civ 471, [2007] 2 Lloyd's Rep. 548 at [32].
- 846 *Manchester City Football Club Ltd v The Football Association* [2021] EWCA Civ 1110 at [40].
- 847 This section replaced s.26 of the Arbitration Act 1950. It is mandatory.
- 848 s.66(1). See CPR r.62.18 and Sch.2 para.11 (judge-arbitrator); *Norwich Union v Whealing Horton & Toms* [2008] EWHC 370 (TCC); *African Fertilizers and Chemicals Nig Ltd v BD Shipsnavo GmbH & Co Reederi KG* [2011] EWHC 2452, [2011] 2 Lloyd's Rep. 53 (declaration); *West Tankers Inc v Allianz Spa* [2012] EWCA Civ 27, [2012] 1 Lloyd's Rep. 398 (negative declaration); *Mobile Telesystems Finance SA v Nomihold Securities Inc* [2011] EWCA Civ 140, [2012] 1 Lloyd's Rep. 6. Part of an award may be enforced where the remaining balance has been duly satisfied: *Continental Grain Co v Bremer Handelsgesellschaft mbH (No.2)* [1984] 2 Lloyd's Rep. 121, 124.
- 849 s.66(2). Judgment must be entered in the same terms as the award: *Norsk Hydro ASA v The State Property Fund of the Ukraine* [2002] EWHC 2120 (Comm). The entry of judgment creates a new cause of action in favour of the enforcing party: *A v B* [2020] EWHC 2790 (Comm), [2021] 1 Lloyd's Rep. 281 at [29]–[30]. The court has no power to add interest under s.35A of the Senior Courts Act 1981 to a sum awarded by the arbitral tribunal which remains unpaid after the award: *Walker v Rowe* [2000] 1 Lloyd's Rep. 116; *Sonatrach v Statoil Natural Gas LLC* [2014] EWHC 875 (Comm), [2014] 2 Lloyd's Rep. 252; cf. *Yukos Capital SARL v OJSC Oil Co Rosneft* [2014] EWHC 2188 (Comm), [2014] 2 Lloyd's Rep. 435. But, where judgment is entered under s.66(2) or s.101(3) in terms of the award, the obligation to pay interest follows from the power of the court under s.17 of the Judgments Act 1838: *Gater Assets Ltd v Nak Naftogaz Ukrainiy (No.3)* [2008] EWHC 1108 (Comm), [2008] 2 Lloyd's Rep. 294; *Sonatrach v Statoil Natural Gas LLC* [2014] EWHC 875 (Comm), [2014]

- 2 *Lloyd's Rep.* 252 (s.66); *Nigerian National Petroleum Corp v IPCO (Nigeria) Ltd (No.2)* [2008] EWCA Civ 1157, [2009] 1 *Lloyd's Rep.* 89 (on s.101(3)).
- 850 • *ASM Shipping Ltd of India v TTMI Ltd of England* (No.2) [2007] EWHC 927 (Comm), [2007] 2 *Lloyd's Rep.* 155 at [26]; *Sodzawiczny v McNally* [2021] EWHC 3384 (Comm), [2022] 1 *Lloyd's Rep.* 117 at [10]. cf. *Mobile Telesystems Finance SA v Nomihold Securities Inc* [2011] EWHC Civ 1040, [2012] 1 *Lloyd's Rep.* 6 at [10]. See also *National Ability SA v Tinna Oils and Chemicals Ltd* [2009] EWCA Civ 1330, [2010] 1 *Lloyd's Rep.* 222 at [10], [14] (limitation).
- 851 s.66(3). See *Sovarex SA V Romero Alvarez SA* [2011] EWHC 1661 (Comm), [2011] 2 *Lloyd's Rep.* 320 (power to determine disputed issues of fact).
- 852 s.73; above, paras 34-103, 34-158, 34-177. But see *Dallah Real Estate & Tourism Co v Ministry of Religious Affairs of the Government of Pakistan* [2010] UKSC 46, [2010] 1 A.C. 763 at [98]; *London Steam Ship Owners Mutual Insurance Association Ltd v Spain (The Prestige)* [2013] EWHC 2840, [2014] 1 All E.R. 300 (defendant does not participate in the arbitration).
- 853 *Middlemiss & Gould v Hartlepool Corp* [1972] 1 W.L.R. 1643 (not following *Re Boks & Co and Peters Rushton & Co Ltd* [1919] 1 K.B. 491, 497); *Curacao Trading Co BV v Harkisandas & Co* [1992] 2 *Lloyd's Rep.* 186, 192.
- 854 See above, para.34-020.
- 855 *Soleimany v Soleimany* [1999] Q.B. 785 (illegality). cf. *R v V* [2008] EWHC 1531 (Comm), [2009] 1 *Lloyd's Rep.* 97; *Process and Industrial Developments Ltd v Nigeria* [2019] EWHC 2241 (Comm), [2019] 2 *Lloyd's Rep.* 361 at [102]. See s.81(1)(c).
- 856 *Margulies Brothers Ltd v Dafaris Thomsides & Co (UK) Ltd* [1958] 1 W.L.R. 398, 404.
- 857 *Jugoslovenska Oceanska Plovibba v Castle Investment Co Inc* [1974] Q.B. 292 (approved in *Miliangos v George Frank Textiles Ltd* [1976] A.C. 443). The date for conversion into sterling of the award was said in the former case to be the date of the award, but in the latter case (at 469) it was suggested that conversion could be made on the date that leave to enforce was given.
- 858 *Dalmia Cement Ltd v National Bank of Pakistan* [1975] Q.B. 9. But see *Dalmia Dairy Industries Ltd v National Bank of Pakistan* [1978] 2 *Lloyd's Rep.* 223 (action for damages); and *Bank Mellat v GAA Development and Construction Co* [1988] 2 *Lloyd's Rep.* 44, 55 (requirement not part of award).
- 859 s.2(2)(b).
- 860 *Gater Assets Ltd v NAK Naftogaz Ukrainiy* [2007] EWCA Civ 988, [2007] 2 *Lloyd's Rep.* 588. But see *Diag Human SE v Czech Republic* [2013] EWHC 3190 (Comm), [2014] 1 All E.R. (Comm) 605.
- 861 *Apis AS v Fantazia Kereskedelmi KFT* [2001] 1 All E.R. (Comm) 348; *Socadec SA v Pan Afric Impex Co Ltd* [2003] EWHC 2086 (QB); *Broda Agro Trade (Cyprus) Ltd v Alfred C Toepfer International GmbH* [2009] EWHC 3318 (Comm), [2010] 1 *Lloyd's Rep.* 533 at [70] (affirmed [2010] EWCA Civ 1100, [2011] 1 *Lloyd's Rep.* 243). cf. *Y v S* [2015] EWHC 612 (Comm), [2015] 1 *Lloyd's Rep.* 703.
- 862 See Mustill and Boyd at p.417.

- 863 See above, para.34-025.
- 864 *Walshaw v Brighouse Corp* [1899] 2 Q.B. 286.
- 865 *Thorburn v Barnes* (1867) L.R. 2 C.P. 384; *Oppenheim & Co v Majomed Janeef* [1922] 1 A.C. 482; *Scrimaglio v Thorne and Fehr* (1924) 131 L.T. 174.
- 866 s.69; above, para.34-136.
- 867 s.68; above, para.34-164.
- 868 ss.70, 73; above, paras 34-166, 34-170, 34-177; *Birtley and District Co-operative Soc Ltd v Windy Nook and District Co-operative Soc Ltd (No.1)* [1959] 1 W.L.R. 142.
- 869 *Brown v Genossenschaft Oesterreichischer Waldbesitzer R GmbH* [1954] 1 Q.B. 8.
- 870 *Bremer Oeltransport GmbH v Drewry* [1993] 1 K.B. 753, 764; *FL Bloemen Pty Ltd v City of Gold Coast Council* [1973] A.C. 115, 126; *The Bumbesti* [2000] Q.B. 559, 566. See further *A v B* [2020] EWHC 2790 (Comm), [2021] 1 Lloyd's Rep. 281 at [29]–[30].
- 871 *The Bumbesti* [2000] Q.B. 559 at 566. See also CPR r.62.18(6) and *Colliers International Property Consultants v Colliers Jordan Lee Jafaar Sdn Bhd* [2008] EWHC 1524 (Comm), [2008] 2 Lloyd's Rep. 368 at [19].
- 872 *The Bumbesti* [2000] Q.B. 559 at 566.
- 873 *The Beldis* [1936] P. 51; *The Bumbesti* [2000] Q.B. 559 (not following *The Santa Anna* [1983] 1 W.L.R. 895).
- 874 *Cruz City 1 Mauritius Holdings v Unitech Ltd* [2013] EWHC 1323 (Comm), [2013] 2 All E.R. (Comm) 1137. See also below, para.34-195.
- 875 *Cruz City 1 Mauritius Holdings v Unitech Ltd* [2014] EWHC 3704 (Comm), [2015] 1 Lloyd's Rep. 181. But see *Cruz City 1 Mauritius Holdings v Unitech Ltd* [2014] EWHC 3131 (Comm), [2015] 1 All E.R. (Comm) 336 (receiver).
- 876 *Kabab-Ji Sal (Lebanon) v Kout Food Group (Kuwait)* [2020] EWCA Civ 6, [2020] 1 Lloyd's Rep. 269 at [81]; [2021] UKSC 48, [2022] 2 All E.R. 911.
- 877 See ss.2(2)(b), 104 and Dicey, Morris and Collins on the Conflict of Laws, 15th edn (2012), para.16-099.
- 878 An award is to be treated as made at the seat of the arbitration (see above, para.34-141) regardless of where it was signed, despatched or delivered to any of the parties: s.100(2)(b).
- 879 For a list of contracting states, see <http://www.newyorkconvention.org> and <http://www.uncitral.org>.
- 880 See ss.66(4), 100–104 and *Government of the State of Kuwait v Sir Frederick Snow and Partners* [1984] A.C. 426; *Agromet Motoimport v Maulden Engineering (Beds) Ltd* [1985] 1 W.L.R. 762; *Bank Mellat v GAA Development and Construction Co* [1988] 2 Lloyd's Rep. 44. cf. *Deutsche Schachtbau-und Tiefbohrgesellschaft mbH v R'as al-Khaimah National Oil Co* [1990] 1 A.C. 295; *Soleh Boneh International Ltd v Government of Uganda* [1993] 2 Lloyd's Rep. 208; *Minmetals German GmbH v Ferco Steel Ltd* [1999] 1 All E.R. Comm. 315; *Norsk Hydro ASA v The State Property Fund of Ukraine* [2002] EWHC 2120 (Comm); Dicey,

Morris and Collins on the Conflict of Laws, 15th edn (2012), para.16-128; CPR r.62.18. In *Pencil Hill Ltd v US Citta Di Palermo SpA*, Unreported 19 January 2016 at [30], the Court said that there is a strong leaning towards the enforcement of foreign arbitral awards and the circumstances in which the English Court may refuse enforcement are narrow. In this case, the Court allowed the enforcement of an award which included a penalty. For procedure, see *Lombard Knight v Rainstorm Pictures Inc* [2014] EWCA Civ 356, [2014] 2 Lloyd's Rep. 74. The court retains jurisdiction in relation to challenge to or appeal from an award (ss.67–69) if the seat of arbitration is in England (or, as the case may be Northern Ireland): s.2(1) and *Hiscox v Outhwaite* [1992] 1 A.C. 562. A judgment entered in terms of the award under s.101(3) carries interest under s.17 of the Judgments Act 1838; *Gater Assets Ltd v Nak Naftogaz Ukrainiy (No.3)* [2008] EWHC 1108 (Comm), [2008] 2 Lloyd's Rep. 295; *Sonatrach v Statoil Natural Gas LLC* [2014] EWHC 875 (Comm), [2014] 2 Lloyd's Rep. 252.

①881 Arbitration Act 1950 Sch.1.

①882 Arbitration Act 1950 Sch.2.

①883 Arbitration Act 1996 ss.66(4), 99; Dicey, Morris and Collins on the Conflict of Laws, 15th edn (2012), para.16-100; CPR Pt 62; DAC Report para.346.

①884 For a list of such countries, see <http://www.lexisnexis.com/uk/lexispsl/disputeresolution/home>.

①885 Administration of Justice Act 1920 s.12(1); Foreign Judgments (Reciprocal Enforcement) Act 1933 s.10A (added by Civil Jurisdiction and Judgments Act 1982 Sch.10 para.4); Dicey, Morris and Collins on the Conflict of Law, 15th edn (2012), para.16-161; CPR r.62.20. See also *LR Avionics Technologies Ltd v Federal Republic of Nigeria* [2016] EWHC 1761 (Comm), [2016] 4 W.L.R. 120 at [24]–[27].

①886 Arbitration (International Investment Disputes) Act 1966 ss.1, 2; Multilateral Investment Guarantee Agency Act 1988 s.4; Carriage of Goods by Road Act 1965 ss.4(1), 7(1) and Sch.; Arbitration Act 1996 s.66(4) and Sch.3 paras 21, 24, 49; Dicey, Morris and Collins on the Conflict of Laws, 15th edn (2012), paras 16-161, 16-172; CPR r.62.21.

①887 For the closed list of cases in which recognition or enforcement of a New York Convention award may be refused, see s.103 of the 1996 Act and *Rosseel NV v Oriental Shipping (UK) Ltd* [1991] 2 Lloyd's Rep. 625; *China Agrebusiness Development Corp v Balli Trading* [1998] 2 Lloyd's Rep. 76; *Soinco Saci v Novokuznetsk Aluminium Plant* [1998] 2 Lloyd's Rep. 337; *Westacre Investments Ltd v Jugoimport-SPDR Holding Co Ltd* [2000] Q.B. 288; *Soleimany v Soleimany* [1999] Q.B. 785; *Minmetals German GmbH v Ferco Steel Ltd* [1999] 1 All E.R. (Comm) 315; *Omnium de Traitement SA v Hilmarton Ltd* [1999] 2 Lloyd's Rep. 222; *Eco Swiss China Time Ltd v Benetton International NV* [1999] 2 All E.R. (Comm) 44,

*ECJ; Irvani v Irvani* [2000] 1 Lloyd's Rep. 412; *ABCI v Banque Franco-Tunisienne* [2002] 1 Lloyd's Rep. 511, 538; *Dardana Ltd v Yukos Oil Co* [2002] EWCA Civ 543, [2002] 2 Lloyd's Rep. 326; *Reeves v One World Challenge LLC* [2005] NZCA 314; *Svenska Petroleum Exploration AB v Government of the Republic of Lithuania* [2005] EWHC 9 (Comm), [2005] 1 Lloyd's Rep. 515; *Ipcoco (Nigeria) Ltd v Nigerian National Petroleum Ltd* [2005] EWHC 726 (Comm), [2005] 2 Lloyd's Rep. 326; *Kanoria v Guinness* [2006] EWCA Civ 222, [2006] 1 Lloyd's Rep. 701; *Tamil Nadu Electricity Board v ST-CMS Electric Co Private Ltd* [2007] EWHC 1713 (Comm), [2008] 1 Lloyd's Rep. 93; *Gater Assets Ltd v NAK Naftogaz Ukrainiy (No.2)* [2008] EWHC 237 (Comm), [2008] 1 Lloyd's Rep. 479; *AC Ward & Sons Ltd v Catlin (Five) Ltd* [2009] EWCA Civ 1098; *Dallah Real Estate & Tourism Co v Ministry of Religious Affairs of the Government of Pakistan* [2010] UKSC 46, [2011] 1 A.C. 763; *Norsk Hydro ASA v State Property Fund of Ukraine* [2002] EWHC 2120 (Admin), [2009] Bus. L.R. 558; *Nigerian National Petroleum Corp v IPCO (Nigeria) Ltd (No.2)* [2008] EWCA Civ 1157, [2009] 1 Lloyd's Rep. 89 (enforcement in part); *HJ Heinz Co Ltd v EFL Inc* [2010] EWHC 1203 (Comm), [2010] 2 Lloyd's Rep. 727; *Yukos Capital SARL v OJSC Rosneft Oil Co* [2012] EWCA Civ 855, [2013] 1 All E.R. 223; *Honeywell International Middle East Ltd v Meydan Group LLC* [2014] EWHC 1344 (TCC), [2014] 2 Lloyd's Rep. 133; *Diag Human SE v Czech Republic* [2014] EWHC 1639 (Comm), [2014] 2 Lloyd's Rep. 283; *IPCO (Nigeria) Ltd v Nigerian National Petroleum Corp* [2015] EWCA Civ 1144, [2016] 1 Lloyd's Rep. 5, [2015] EWCA Civ 1145, [2016] 1 Lloyd's Rep. 36; *Lombard Knight v Rainstorm Pictures Inc* [2014] EWCA Civ 356, [2014] 2 Lloyd's Rep. 74; *Travis Coal Restructured Holdings LLC v Essar Global Fund Ltd* [2014] EWHC 2510 (Comm), [2014] 2 Lloyd's Rep. 414; *Malicorp Ltd v Egypt* [2015] EWHC 361 (Comm), [2015] 1 Lloyd's Rep. 423; *Stati v Republic of Kazakhstan* [2017] EWHC 1348 (Comm), [2017] 2 Lloyd's Rep. 201; *RBRG Trading (UK) Ltd v Sinocore International Co Ltd* [2017] EWHC 251 (Comm), [2017] 2 Lloyd's Rep. 375; [2018] EWCA Civ 838; [2018] 2 Lloyd's Rep. 133; *PAO Tatneft v Ukraine* [2020] EWHC 3161 (Comm), [2021] 1 W.L.R. 1123. In *Carpatsky Petroleum Corp v PJSC Ukrnafta* [2020] EWHC 769 (Comm), [2020] Bus. L.R. 1284 at [122]–[126] the Court held that if substantially the same complaint as to the procedural fairness or irregularity of the arbitration, which is presented to this court as a reason for non-enforcement under the 1996 Act s.103(2), has been made and decided upon by the supervisory court, then that should be regarded as precluding the point being raised again, unless it can be plainly perceived that it would cause injustice to recognise an issue estoppel (or an abuse of process) in the circumstances; the same consideration may well apply to the same objection having been determined by another enforcing court (see also *Kei Kin Hung v Hua She Asset Management (Shanghai) Co Ltd* [2022] EWHC 662 (Comm)). Where an application has been made to the competent authority in the jurisdiction in which the award was made to set aside or suspend the award, the Court may adjourn the recognition or enforcement of the award under s.103(5) (*Kabab-Ji SAL v Kout Food Group* [2021] UKSC 48, [2022] 2 All E.R. 911 at [84]–[91]; *Consilient Health Ltd v Gedeon Richter Plc* [2022] EWHC 1744 (Ch) at [72]–[86]). But the court has power under s.103(5) to adjourn the decision on enforcement and to order security: see *Soleh Boneh International Ltd v Government of Uganda* [1993] 2 Lloyd's Rep. 208; *Dardana Ltd v Yukos Oil Co* [2002] EWCA Civ 543, [2002] 2 Lloyd's Rep. 326; *Apis AS v Fantazia Kereskedelmi* [2001] 1

*All E.R. (Comm) 348; IpcO (Nigeria) Ltd v Nigerian National Petroleum Ltd*, above; *Gater Assets Ltd v NAK Naftogaz Ukrainiy* [2007] EWHC 697 (Comm), [2007] 1 Lloyd's Rep. 522; *Nigerian National Petroleum Corp v IPCO (Nigeria) Ltd (No.2)* [2008] EWCA Civ 1157, [2009] 1 Lloyd's Rep. 89; *Dowans Holding SA v Tanzania Electric Supply Co Ltd* [2011] EWHC 1957 (Comm), [2011] 2 Lloyd's Rep. 474; *IPCO (Nigeria) Ltd v Nigerian National Petroleum Corp* [2015] EWCA Civ 1144, [2016] 1 Lloyd's Rep. 5, [2015] EWCA Civ 1145, [2016] 1 Lloyd's Rep. 36; *Travis Coal Restructured Holdings LLC v Essar Global Fund Ltd* [2014] EWHC 2510 (Comm), [2014] 2 Lloyd's Rep. 414; *National Joint Stock Company Naftogaz of Ukraine v Public Joint Stock Company Gazprom* [2019] EWHC 658 (Comm), [2019] 2 Lloyd's Rep. 20; *J (Lebanon) v K (Kuwait)* [2019] EWHC 899 (Comm); *PAO Tatneft v Ukraine* [2019] EWHC 3740 (Ch) at [82]; *Hulley Enterprises Ltd v The Russian Federation* [2021] EWHC 894 (Comm); [2021] 1 Lloyd's Rep. 617. In *IPCO (Nigeria) Ltd v Nigerian National Petroleum Corp* [2017] UKSC 16, [2017] 1 W.L.R. 970 the Supreme Court held that there was nothing in s.103(2) or (3) which provided that an enforcing court could make the decision of an issue raised under that subsection conditional on the provision of security in respect of the award (unlike s.103(5)).

①888 *Betamax Ltd v State Trading Corp (Mauritius)* [2021] UKPC 14 at [42]–[53].

889 *Far Eastern Shipping Co v AKP Sovcomflot* [1995] 1 Lloyd's Rep. 520.

890 State Immunity Act 1978 s.9. In challenging the jurisdiction of an arbitral tribunal under the State Immunity Act 1978, the parties are not bound by the constraints of the Arbitration Act 1996: *PAO Tatneft v Ukraine* [2018] EWHC 1797 (Comm) at [34]–[35].

①891 *Svenska Petroleum Exploration AB v Government of the Republic of Lithuania* (No.2) [2006] EWCA Civ 1529, [2007] Q.B. 886; *Norsk Hydro ASA v State Property Fund of Ukraine* [2002] EWHC 2120 (Admin), [2009] Bus. L.R. 558; *London Steam Ship Owners Mutual Insurance Association Ltd v Spain* (No.2) [2015] EWCA Civ 333, [2015] 2 Lloyd's Rep. 33; *Taurus Petroleum Ltd v State Oil Marketing Company of the Ministry of Oil, Republic of Iraq* [2013] EWHC 3494 (Comm), [2014] 1 All E.R. (Comm) 942; *Gold Reserve Inc v Bolivarian Republic of Venezuela* [2016] EWHC 153 (Comm), [2016] 1 W.L.R. 2829; *LR Avionics Technologies Ltd v Federal Republic of Nigeria* [2016] EWHC 1761 (Comm), [2016] 4 W.L.R. 120; *London Steamship Owners Mutual Insurance Ltd v Spain* [2020] EWHC 1582 (Comm), [2020] 1 W.L.R. 4943; [2021] EWCA Civ 1589, [2022] 1 W.L.R. 3434. This is a distinct question from that of immunity from execution: see Dicey, Morris and Collins on the Conflict of Laws, 15th edn (2012), para.10-014. See above para.14-021.

①892 s.18(2)(e) (definition of “judgment”) and Schs 6 or 7. See Dicey, Morris and Collins on the Conflict of Laws, 15th edn (2012), para.16-157; *Shone* (2005) 71 Arbitration 46.

①893 See above para.34-053.

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- Arab Business Consortium International Finance and Investment Co v Banque Franco-Tunisienne [1996] 1 Lloyd's Rep. 485; affirmed [1997] 1 Lloyd's Rep. 531; London Steamship Owners Mutual Insurance Ltd v Spain (C-700/20) [2022] I.L.Pr. 28.
- 895 London Steamship Owners Mutual Insurance Ltd v Spain (C-700/20) [2022] I.L.Pr. 28.
- 896 *Ministry of Trade of the Republic of Iraq v Tsavliris Salvage (International) Ltd* [2008] EWHC 612 (Comm), [2008] 2 Lloyd's Rep. 90. But see *Rosseel NV v Oriental Commercial Shipping (UK) Ltd* [1990] 1 W.L.R. 1387 (world-wide freezing order refused where award foreign). A freezing order ought ordinarily to contain an “ordinary course of business” exception: *Mobile Telesystems Finance SA v Nomihold Securities Inc* [2011] EWCA Civ 1040, [2012] 1 Lloyd's Rep. 6. See also above, para.34-190.
- 897 cf. *Deutsche Schachtbau-und Tiefbohrgesellschaft mbH v R'as al-Khaimah National Oil Co* [1990] 1 A.C. 295.
- 898 Limitation Act 1980 s.7. But see (extension of the period) Vol.I, Ch.31, and see the Foreign Limitation Periods Act 1984, Vol.I, para.33-278.
- 899 *International Bulk Shipping and Services Ltd v Minerals and Metals Trading Corp of India* [1996] 1 All E.R. 1017.
- 900 *International Bulk Shipping and Services Ltd v Minerals and Metals Trading Corp of India* [1996] 1 All E.R. 1017. But see *Agromet Motoimport v Maulden Engineering Co (Beds) Ltd* [1985] 1 W.L.R. 762 (date of defendant's failure to honour award when called upon to do so); *Good Challenger Navigante SA v Metalexportimport SA* [2003] EWCA Civ 1668, [2004] 1 Lloyd's Rep. 67 at [9] (date of defendant's breach of implied obligation to pay the award); *National Ability SA v Tinna Oils and Chemicals Ltd* [2009] EWCA Civ 1330, [2010] 1 Lloyd's Rep. 222 at [4] (date the award should have been paid).
- 901 *ED & F Man Sugar Ltd v Lendoudis* [2007] EWHC 2268 (Comm), [2007] 2 Lloyd's Rep. 579 at [53].

## Section 12. - Miscellaneous

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Chapter 34 - Arbitration<sup>1</sup>

Section 12. - Miscellaneous

### Arbitration and exemption clauses compared

- 34-197 An arbitration clause differs from an exemption clause in that it is inserted as machinery for settling disputes and is not a term which excludes or restricts the liability of one or both parties.<sup>902</sup> Accordingly, it is not to be treated as an exemption clause at common law,<sup>903</sup> nor is an agreement in writing to submit present or future disputes to arbitration subject to the control of the [Unfair Contract Terms Act 1977](#).<sup>904</sup> However, arbitration clauses may in some circumstances be detrimental to the interests of consumers in that legal aid is not available for arbitration proceedings, and such proceedings may involve greater expense than, e.g. proceedings in the county court. Moreover, the arbitration agreement may provide for the appointment of an arbitrator designated by the supplier of the goods or services to the consumer. In consequence, the application of the [Unfair Terms in Consumer Contracts Regulations 1999](#) and (for contracts made on or after 1 October 2015) [Pt 2 of the Consumer Rights Act 2015](#)<sup>905</sup> is extended in relation to a term which constitutes an arbitration agreement.<sup>906</sup>

### Valuers, experts, etc.

- 34-198 An agreement to refer a price to a valuer or a question to an expert for decision is, as a general rule,<sup>907</sup> not an arbitration agreement<sup>908</sup> and the provisions of the [Arbitration Act 1996](#) do not apply.<sup>909</sup> A valuation or expert's certificate cannot be challenged or appealed as if it were an award<sup>910</sup> nor can it be enforced as if it were a judgment of a court. Nevertheless the court has, under its inherent jurisdiction, a discretionary power to stay an action brought contrary to a dispute resolution agreement which is nearly an effective agreement to arbitrate, but not quite,<sup>911</sup> or which submits the dispute to the decision of an expert.<sup>912</sup> The court also has jurisdiction to determine an

issue of construction before the valuer or expert has made his decision,<sup>913</sup> but must be satisfied that the issue is a real one (and not hypothetical) and that it is in the interests of justice and convenience to determine the matter itself rather than allowing the expert to determine it first.<sup>914</sup>

- 34-199 The function of an architect in certifying payments due under a building contract from the employer to the contractor is not to be equated with that of an arbitrator.<sup>915</sup>
- 34-200 A person appointed in an agreement as “sole judge” of matters of fact is not an arbitrator. His decision is binding and not reviewable, provided that he acts fairly and not perversely in making his determination.<sup>916</sup>

## Adjudication

- 34-201 The [Housing Grants, Construction and Regeneration Act 1996](#)<sup>917</sup> provides that a party to a construction contract<sup>918</sup> has the right to refer a dispute arising under the contract for adjudication under a procedure provided by the Act.<sup>919</sup> The purpose of this measure is to establish, in the construction industry, a procedure for the speedy and inexpensive resolution of disputes on a provisional interim basis, and for enabling the adjudicator’s decisions to be enforced pending the final determination of such disputes.

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**U** But adjudication differs from arbitration in that it does not involve a final disposal of the dispute between the parties. The adjudicator does not perform an arbitral function<sup>921</sup> and does not make any final award definitive of the parties’ rights. His decision is, however, binding until the dispute is finally determined by legal proceedings, by arbitration or by agreement.<sup>922</sup> But it cannot be enforced as if it were an arbitral award.<sup>923</sup> Adjudication is dealt with in Ch.39 of this book.<sup>924</sup>

## Mediation

- 34-202 Mediation (or conciliation) is distinct from arbitration. The role of the mediator or conciliator is to make proposals for a settlement and not to render an award. He assists the parties in their attempt to reach an amicable settlement of their dispute. It is inadvisable, if the mediation fails, for the mediator to become an arbitrator (a process known as “Med/Arb”). There are too many obstacles,

with respect to the need for impartiality and a fair hearing, for a mediator to change roles and reappear as an arbitrator.

## Immunity of arbitrators and arbitral institutions, etc

- 34-203 At common law, the extent of the immunity of an arbitrator was not free from doubt.<sup>925</sup> Section 29 of the 1996 Act resolved that uncertainty.<sup>926</sup> An arbitrator is not liable for anything done or omitted in the discharge or purported discharge of his functions as arbitrator unless the act or omission is shown to have been in bad faith, and the same immunity attaches to his employees or agents.<sup>927</sup> This immunity does not affect any liability incurred by an arbitrator by reason of his resigning.<sup>928</sup>
- 34-204 A similar immunity attaches to an arbitral institution or person responsible for the appointment or nomination of an arbitrator in the discharge or purported discharge of its function in that respect.<sup>929</sup> Nor is such an institution or person vicariously liable for the acts or omissions of the arbitrator nominated or appointed.<sup>930</sup>
- 34-205 On the other hand, a valuer, expert or adjudicator enjoys no statutory immunity. A valuation or expert certification which is made negligently may give rise to an action in damages at the suit of the party injured thereby.<sup>931</sup> An adjudicator, however, is under the terms of the construction contract to have immunity (subject to an exception in case of bad faith) in the discharge or purported discharge of his functions.<sup>932</sup>

## Footnotes

- 1 For a more detailed account of arbitration, and practice and procedure, the reader should consult: Merkin, Arbitration Law (2007); Merkin and Flannery, Arbitration Act 1996, 5th edn (2014); Russell on Arbitration, 24th edn (2015); Tweeddale and Tweeddale, Arbitration of Commercial Disputes, 2nd edn (2012); Harris, Planterose and Tecks, Arbitration Act 1996, 5th edn (2014); Mustill and Boyd, Commercial Arbitration, 2nd edn (1989) and Supplement (2001); Redfern and Hunter, Law and Practice of International Arbitration, 5th edn (2009); Park, Arbitration of International Business Disputes, 2nd edn (2012).
- 902 *Heyman v Darwins Ltd [1942] A.C. 356, 373–375, 400; Woolf v Collis Removal Service [1948] 1 K.B. 11.*
- 903 *Woolf v Collis Removal Service [1948] 1 K.B. 11.* But see above, para.34-075 (note).
- 904 s.13(2); *Kaye v Nu Skin UK Ltd [2009] EWHC 3509 (Ch), [2011] 1 Lloyd's Rep. 40.*

- 905 See below, para.40-324.
- 906 See above, para.34-013.
- 907 cf. *Re Carus-Wilson and Greene* (1886) 18 Q.B.D. 7, 9; *Leigh v English Property Corp Ltd* [1976] 2 Lloyd's Rep. 298 and above, para.34-021.
- 908 *Re Dawdy and Hartcup* (1885) 15 Q.B.D. 426; *Re Carus-Wilson and Greene* (1886) 18 Q.B.D. 7. See also *Leeds v Burrows* (1810) 12 East 1; *Goodyear v Simpson* (1845) 15 M. & W. 16; *Re Hammond and Waterton* (1890) 62 L.T. 808; *Campbell v Edwards* [1976] 1 W.L.R. 403; *Arenson v Arenson* [1977] A.C. 405; *Wilky Property Holdings Plc v London & Surrey Investments Ltd* [2011] EWHC 2226 (Ch).
- 909 *Collins v Collins* (1858) 26 Beav. 306; *Bos v Helsham* (1866) L.R. 2 Ex. 72; *Turner v Goulden* (1873) L.R. 9 C.P. 57; *Re Dawdy and Hartcup* (1885) 15 Q.B.D. 426; *Re Hammond and Waterton* (1890) 62 L.T. 808; *Cott (UK) Ltd v FE Barber Ltd* [1997] 3 All E.R. 540; *British Telecommunications Plc v SAE Group Inc* [2009] EWHC 252 (TCC), [2009] B.L.R. 231.
- 910 *Campbell v Edwards* [1976] 1 W.L.R. 403; *Baber v Kenwood Manufacturing Co* [1978] 1 Lloyd's Rep. 175. For the limited grounds, and method of impeaching a valuation or expert's certificate, see, e.g. *Collier v Mason* (1858) 25 Beav. 200; *Finnegan v Allen* [1943] K.B. 425; *Dean v Prince* [1954] Ch. 409; *Frank H Wright (Construction) Ltd v Froodoor* [1967] 1 W.L.R. 506; *Jones (H) v Jones (RR)* [1971] 1 W.L.R. 840, 856; *Smith v Gale* [1974] 1 W.L.R. 9; *Burgess v Purchase & Sons (Farms) Ltd* [1983] Ch. 216; *Jones v Sherwood Computer Services Plc* [1992] 1 W.L.R. 277; *Nikko Hotels (UK) v MEPC* (1991) 28 E.G. 86; *Pontsarn Investments v Kasallis-Osako-Pankki* (1992) 22 E.G. 103; *Mercury Communications Ltd v Director General of Communications* [1996] 1 W.L.R. 48, 58; *British Shipbuilders v VSEL Consortium Plc* [1997] 1 Lloyd's Rep. 106, 109; *Shell UK Ltd v Enterprise Oil Plc* [1999] 2 Lloyd's Rep. 456, 469; *Galaxy Energy International Ltd (PVI) v Eurobunter SpA* [2001] 2 All E.R. (Comm) 912; *Veba Oil Supply and Trading GmbH v Petrotrade Inc* [2001] EWCA Civ 1832, [2002] 1 Lloyd's Rep. 295; *Invensys Plc v Automotive Sealing Systems Ltd* [2002] 1 All E.R. (Comm) 222; *Bernhard Schulte GmbH & Co KG v Nile Holdings Ltd* [2004] EWHC 977 (Comm), [2004] 2 Lloyd's Rep. 352; *Barclays Bank Plc v Nylon Capital LLP* [2011] EWCA Civ 826, [2011] 2 Lloyd's Rep. 347; see also below, para.46-053. But the court has power to order the expert to give further reasons for his determination: *Halifax Life Ltd v Equitable Life Assurance Society* [2007] EWHC 503 (Comm), [2007] 1 Lloyd's Rep. 528. See also *Homepace Ltd v SITA South East Ltd* [2008] EWCA Civ 1 (criticised by *Dundas* (2008) 74 Arbitration 188); *Owen Pell Ltd v Bindi (London) Ltd* [2008] EWHC 1420 (TCC), [2008] Build. L.R. 436.
- 911 *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] A.C. 334. cf. *Halifax Financial Services Ltd v Intuitive Systems Ltd* Unreported 21 December 1998.
- 912 *Cott (UK) Ltd v FE Barber Ltd* [1997] 3 All E.R. 540; *Thames Valley Power Ltd v Total Gas & Power Ltd* [2005] EWHC 2208 (Comm), [2006] 1 Lloyd's Rep. 441 at [43].
- 913 *Barclays Bank Plc v Nylon Capital LLP* [2011] EWCA Civ 826, [2011] 2 Lloyd's Rep. 347.
- 914 *Mercury Communications Ltd v Director General of Communications* [1994] C.L.C. 1125, 1140, CA, [1996] 1 W.L.R. 48 (HL); *Barclays Bank Plc v Nylon Capital LLP* [2011] EWCA Civ 826, [2011] 2 Lloyd's Rep. 347 at [42]; *Wilky Property Holdings Plc v London & Surrey Investments Ltd* [2011] EWHC 2226 (Ch).

- Investments Ltd [2011] EWHC 2226 (Ch). cf. *British Shipbuilders v VSEL Consortium Plc* [1997] 1 Lloyd's Rep. 106 at 109.
- 915 *Sutcliffe v Thackrah* [1974] A.C. 727. cf. *John Barker Construction Ltd v London Portman Hotel Ltd* (1996) 12 Const. L.J. 277.
- 916 *West of England Ship Owners Mutual Insurance Assn (Luxembourg) v Cristal* [1996] 1 Lloyd's Rep. 370.
- 917 As amended by the Local Democracy, Economic Development and Construction Act 2009 Pt 8: see SI 2011/1569 (c.58), SI 2011/1582 (c.59).
- 918 Defined in s.104(1).
- 919 ss.108 (as amended), 114; Scheme for Construction Contracts (England and Wales) Regulations 1998 (SI 1998/649). See below, paras 39-273—39-274.
- 920 *Macob Civil Engineering Ltd v Morrison Construction Ltd* [1999] Build. L.R. 93. See also *MBE Electrical Contractors Ltd v Honeywell Control Systems Ltd* [2010] EWHC 2244 (TCC), [2010] B.L.R. 561 (party seeking to refer jurisdictional issues concerning adjudicator to arbitration: stay refused). In *Sefton MBC v Allenbuild Ltd* [2022] EWHC 1443 (TCC) at [37]–[65], the Court held that adjudication enforcement proceedings could not be stayed pursuant to the Arbitration Act 1996 s.9. In *RMC Building & Civil Engineering Ltd v UK Construction Ltd* [2016] EWHC 241 (TCC), [2016] B.L.R. 264 at [56], the Court said that the provisions introduced by the 1996 Act and the Scheme are all about maintaining cash flow.
- 921 *A Cameron Ltd v John Mowlem & Co Plc* (1990) 52 Build. L.R. 30; *Drake & Scull Engineering Ltd v McLaughlin & Harvey Plc* (1992) 60 B.L.R. 107. cf. *Cape Durasteel Ltd v Rosser & Russell Building Services Ltd* (1996) 46 Con. L.J. 75.
- 922 Housing Grants, Construction and Regeneration Act 1996 s.108(3). But the parties may agree to accept the decision of the adjudicator as finally determining the dispute.
- 923 *A Cameron Ltd v John Mowlem & Co Plc* (1990) 52 Build. L.R. 30. But it can be enforced by an application for summary judgment or possibly under s.42 of the 1996 Act: see para.24 of Sch. Pt I to the Scheme for Construction Contracts (England and Wales) Regulations 1998 (SI 1998/649), and *Macob Civil Engineering Ltd v Morrison Construction Ltd* [1999] Build. L.R. 93; see also below, para.39-275.
- 924 See below, paras 39-269—39-279.
- 925 *Arenson v Arenson* [1977] A.C. 405, 431, 432, 440, 442.
- 926 It is a mandatory provision: s.4(1) and Sch.1.
- 927 s.29(1)(2). See (1996) 62 Arbitration 202.
- 928 s.29(3). See *C Ltd v D* [2020] EWHC 1283 (Comm), [2020] 2 Lloyd's Rep. 119. But see s.25; above, para.34-098.
- 929 s.74(1), (3). This will, it is submitted, include a decision by an arbitral institution whether to accept or decline to administer an arbitration: see *Global Gold Mining LLC v Peter M Robinson* 533 F. Supp. 2d 442 (S.D.N.Y. 2008).
- 930 s.74(2)(3).
- 931 *Sutcliffe v Thackrah* [1974] A.C. 727; *Arenson v Arenson* [1977] A.C. 405.
- 932 Housing Grants Construction and Regeneration Act 1996 s.108(4).

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## Section 1. - In General

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 35 - Bailment

### Section 1. - In General<sup>1</sup>

*E. G. Kendrick*

## Definition of bailment

- 35-001 In many respects bailment “stands at the point at which contract, property and tort converge”.<sup>2</sup> It is a subject which it is difficult both to classify and to define. Indeed, it is easier to give examples of bailment than to define its scope. A simple example of a bailment is a contract of hire of goods. Possession of the goods is handed over to someone who is not their owner and that person (“the bailee”) is subject to certain obligations in relation to the goods which obligations are owed to their owner (“the bailor”). At a high level of abstraction, it can be said that bailment “denotes a separation of the actual possession of goods from some ultimate or reversionary possessory right”.<sup>3</sup> Possession is therefore central to bailment<sup>4</sup>: its essence involves the transfer of possession of a chattel<sup>5</sup> to the bailee<sup>6</sup> (or the acquisition<sup>7</sup> of possession by him) so that the bailee becomes subject to certain obligations in relation to the goods and in turn is entitled to possessory remedies (such as trespass or conversion) against all strangers, and even, in many cases, against the bailor himself.<sup>8</sup>

## Bailment and contract

- 35-002 The relationship between bailment and contract is a close one, hence the inclusion of bailment within this volume. Many bailments arise out of, or are founded upon, a contract between the bailor and the bailee, as in the case of a contract of hire.<sup>9</sup> For many years it was believed that bailment was founded on contract so that the existence of a valid and enforceable contract was an essential pre-requisite to the creation of a bailment.<sup>10</sup> This view no longer holds good today. It is now clear

that a contract is not essential for bailment.<sup>11</sup> The clearest illustration is a gratuitous bailment,<sup>12</sup> where it is clear that the bailment is independent of the law of contract.<sup>13</sup> Other illustrations can be found.<sup>14</sup> Thus a bailment created by contract is not necessarily terminated by the contract coming to an end<sup>15</sup> and, conversely, the withdrawal by the bailor of consent to the bailee continuing in possession of the goods does not necessarily operate to terminate the contractual relationship which exists between bailor and bailee.<sup>16</sup> There may also be a valid bailment even though the contract from which it arises is invalid or voidable, as where the bailee is a minor,<sup>17</sup> or where the bailee obtains goods by false pretences.<sup>18</sup> Bailment cannot be explained entirely in contractual terms for the further reason that a bailment is more than a contract in that possession, a proprietary interest less than ownership, is transferred to, or acquired by, the bailee<sup>19</sup> and many remedies in tort and crime become available to the bailee because he enjoys possession.

## Bailment and consent

- 35-003 The contractual analysis of bailment was replaced by an analysis of bailment which sought to explain it in what might be called consensual terms. Thus Pollock and Wright famously stated that:

“Any person is to be considered as a bailee who otherwise than as a servant<sup>20</sup> either receives possession of a thing from another or consents to receive or hold possession of a thing for another upon an understanding with the other person either to keep and return or deliver to him the specific thing or to (convey and) apply the specific thing according to the directions antecedent or future of the other person.”<sup>21</sup>

While this statement continues to be cited in the courts,<sup>22</sup> the attempt to explain bailment entirely in consensual terms has “been overtaken by events”<sup>23</sup> because it now seems clear that the creation of a bailment does not require the consent of the bailor.<sup>24</sup> While it is true that in many, if not most cases, the bailor does consent to the bailee taking possession of the goods, cases can be found in which the bailor clearly does not consent to the bailee taking possession of the goods but a bailment is nevertheless found to exist (where, for example, the finder of a chattel is held to be a bailee notwithstanding the fact that the bailor was wholly unaware of the intervention of the bailee<sup>25</sup> or where the bailor does not consent to a sub-bailment or the terms of a sub-bailment but is nevertheless held to be bound by it).<sup>26</sup>

## Bailment and tort

- 35-004

The demise of the consent theory of bailment may herald a move towards the law of tort and the eventual absorption of bailment into the mainstream of the law of tort. It is suggested that this is an unlikely development. Although liability in tort and in bailment may overlap<sup>27</sup> the two sources of liability are in fact independent and the “common law liabilities of a bailee … appear both independent of, and significantly different from, those that would apply under the general law of tort”.<sup>28</sup> The clearest example of this is the fact that the burden of proof in a negligence case rests upon the claimant, whereas in a bailment case the burden of proof is upon the bailee to show that he has discharged his duties.<sup>29</sup> Although liability in tort and in bailment are conceptually distinct, the failure of parliamentary draftsmen to recognise a distinct head of liability based on breach of bailment has meant that, in some contexts, the courts have construed a reference to “tort” as including a reference to “breach of bailment”.<sup>30</sup> On the other hand, claims by a bailor against his bailee which are based on breach of bailment (e.g. breach of his common law duty of care)<sup>31</sup> may not fall within the overall category of “wrongful interference with goods” defined in [s.1 of the Torts \(Interference with Goods\) Act 1977](#).<sup>32</sup> Each case turns on the construction of the particular statute and, while in some cases the courts have strained for instrumental reasons to encompass a bailment action within the fold of tort, the cases cannot be used to construct a more general argument in support of the assimilation of bailment to tort. They are authority only in relation to the particular statute under consideration.

## Bailment and property<sup>33</sup>

- 35-005 As has been noted, a transfer of possession to the bailee is an essential pre-requisite of a bailment and possession, of course, constitutes a proprietary interest. Thus it can be said that a bailment creates or gives rise to a property interest but it cannot be said that bailment lies in the law of property and not in the law of obligations. While a bailment gives rise to proprietary rights (viz possessory rights which may be vindicated against a third party or, indeed, against the bailor himself), it also creates personal rights and obligations and these rights and obligations cannot be located within the law of property. Although the language of the law of trusts is employed in many of the early definitions of bailment, there are in fact many distinctions between a bailment and a trust,<sup>34</sup> e.g. trusts may cover realty as well as personalty; the beneficiary under a trust has an equitable interest only, whereas a bailee has a legal interest (viz various possessory rights); a trustee has the legal title or ownership, and so has power to convey a good title to a bona fide purchaser for value, whereas the bailee has only possessory rights.

## No one unifying theory

- 35-006

The reality of the matter is that there is no one theory which seems to be capable of providing a comprehensive definition of bailment. It consists of an amalgam of different ideas.<sup>35</sup> Thus, “the judicial analysis of bailment seems to have reached the stage at which any person who voluntarily assumed possession of goods belonging to another would be held to owe at least the principal duties of the bailee at common law”.<sup>36</sup> Within this broad definition of bailment, certain key ideas can be identified. The first is that the bailee must be in possession of the goods. The second is that there must have been a “voluntary assumption” of possession; in other words, the consent of the bailee is necessary. The third is that the bailee must be aware of the existence of the bailor.<sup>37</sup> Finally, it would appear that it is no longer necessary that the bailor consent to the bailee taking possession of the goods; a bailment can exist even when the bailor is unaware of the fact that the bailee has possession of his goods.

## Bailment and statute

- 35-007 Notwithstanding the claim which bailment has to recognition as an independent source of obligations, statute has consistently refused to recognise the independence of bailment. One consequence of this has been that the courts have been compelled to squeeze bailment claims into legislation designed to regulate other categories of liability, principally contract and tort. A classic example of this phenomenon is provided by the law relating to limitation of actions. There is no limitation period prescribed for bailment claims and so the courts have applied the limitation periods for contract or tort. Whether the claim is brought in contract or in tort, the bailor cannot sue to recover the thing bailed more than six years after his cause of action accrued.<sup>38</sup> The regulation of the limitation period applicable to contractual claims is dealt with in Vol.I.<sup>39</sup> Where the claim is brought by the bailor in conversion, the cause of action accrues at the date of conversion, irrespective of the bailor’s knowledge of the conversion.<sup>40</sup> If there have been successive conversions (or wrongful detentions) of the same chattel, the period of limitation runs from the original conversion.<sup>41</sup> If the bailee has fraudulently concealed the bailor’s right of action, the period of limitation runs from the time the fraud was discovered, or could by reasonable diligence have been discovered.<sup>42</sup> If the bailor fails to commence an action to recover the chattel before the expiration of the period of limitation, both his right of action and his title to the chattel are extinguished.<sup>43</sup>

## Classification of bailments

- 35-008 Roman law has had considerable influence on the English law of bailment<sup>44</sup> and in the leading authority of *Coggs v Bernard*<sup>45</sup> Holt CJ classified bailments into six classes by analogy with

Roman law. Other writers<sup>46</sup> have reduced the number of classes in their classifications, and in the present chapter a simple classification into two classes will be adopted: (a) gratuitous bailments; and (b) bailments for valuable consideration.<sup>47</sup> In the first category, some bailments are for the benefit of the bailor (e.g. deposit and mandate), while some are for the benefit of the bailee (e.g. gratuitous loan for use); similarly in the second category the valuable consideration may be received either by the bailee (e.g. custody) or by the bailor (e.g. hire for use). The Court of Appeal has held that there is no difference between these two classes of bailments as far as the standard of care required of the bailee is concerned: whether the bailment is gratuitous or for reward, the bailee must take reasonable care of the chattel according to the circumstances of the particular case.<sup>48</sup> (The fact that the bailment is gratuitous is, however, a relevant circumstance.<sup>49</sup>) The existence of the duty, and the standard of care required, are to be judged objectively.<sup>50</sup> The classification into the two classes is retained in this chapter because other aspects of the relationship between bailor and bailee vary from one type of bailment to the other, e.g. exemption clauses may operate contractually if the bailment is for reward; and the *Supply of Goods and Services Act 1982*<sup>51</sup> applies to many contractual bailments, but not to gratuitous bailments. There appears to be no advantage in making a more complicated classification than that based on the twofold division proposed above. Bailment in contracts of carriage will be considered in Chs 37 and 38, below, and hire-purchase agreements in Ch.41, below. Before turning to a consideration of this twofold division, it is necessary to explore in more detail the significance of possession and related matters.

## Footnotes

- 1 On bailment in general, see Palmer on Bailment, 3rd edn (2009); N. Palmer, “Bailment”, in A Burrows (ed.), English Private Law, 3rd edn (Oxford, 2013), Ch.16; Bell, Modern Law of Personal Property in England and Ireland (1989); Paton, Bailment in the Common Law (1952); Jones on Bailments, 4th edn (1833); Story on Bailments, 9th edn (1878); Wyatt Paine, Bailments (1901); *Laidlaw (1930–1931) 16 Corn. L.Q. 286*; Bell in Palmer and McKendrick (eds), Interests in Goods, 2nd edn (1998), p.461. For a more sceptical view of bailment, see *McMeel [2003] L.M.C.L.Q. 169* where he concludes (at 199) that bailment is, at best, a “useful shorthand for all those situations where there is a transfer of possession of tangible personal property short of outright sale”.
- 2 Palmer on Bailment (hereafter, Palmer) at para.1-001.
- 3 Palmer at para.1-001.
- 4 Palmer at para.1-001.
- 5 The law of bailment is confined to personal chattels. See Palmer at paras 1-006—1-009.
- 6 Winfield, Province of the Law of Tort (1931), pp.101–102; *Tay (1966) 5 Sydney L. Rev. 239*. See also *Fairline Shipping Corp v Adamson [1975] Q.B. 180, 189–190* (defendant did not have exclusive possession of the goods at the relevant time and thus was not bailee of them) and *Kamidian v Holt [2008] EWHC 1483 (Comm), [2009] Lloyd's Rep. I.R. 242* (physical custody by employee was only fleeting and for the purposes of handling; it did not amount to

a transfer of possession so that the employee was not a bailee of the goods). On attornment, see below, para.35-030. cf. *Stoljar* (1958) 21 M.L.R. 27 and see below, para.46-241. A person may leave a chattel on another's premises without transferring possession to the latter: see below, para.35-061.

7 In some circumstances the bailee "acquires" possession without any "transfer" of possession, e.g. bailment by finding a lost chattel (below, para.35-037); involuntary bailment (below, para.35-036); or where a seller continues in possession pending delivery to the buyer (below, paras 46-214 et seq.). So the relationship of bailment may arise without the bailor having consented to the bailee having possession of the goods: *The Pioneer Container* [1994] 2 A.C. 324, 341–342. But the bailee must have had some knowledge of the existence of his bailor: *Marcq v Christie, Manson & Woods Ltd* [2003] EWCA Civ 731, [2004] Q.B. 286 at [49]–[50].

8 Holmes, The Common Law (1882), p.175. See below, paras 35-019, 35-024.

9 *Sandeman Coprimar SA v Transitos y Transportes Integrales SL* [2003] EWCA Civ 113, [2003] Q.B. 1270 at [63] ("the principles of the law of bailment have always overlapped with those of the law of contract, for bailment and contract often go hand in hand").

10 See, for example, *R. v Ashwell* (1885) 16 Q.B.D. 190, 223; *Banbury v Bank of Montreal* [1918] A.C. 626, 657; *Rosenthal v Alderton and Sons Ltd* [1946] 1 All E.R. 583, 584.

11 *East West Corp v DKBS 1912 and Akts Svendborg* [2003] EWCA Civ 83, [2003] 1 Lloyd's Rep. 239 at [24]; *Yearworth v North Bristol NHS Trust* [2009] EWCA Civ 37, [2010] Q.B. 1 at [48].

12 See below, paras 35-032 et seq.

13 See, for example, *Morris v CW Martin & Sons Ltd* [1966] 1 Q.B. 716, 731–732; *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] A.C. 465, 526.

14 See further Palmer at paras 1-027—1-035.

15 *Laidlaw* (1930–1931) 16 Corn. L.Q. 286, 292. See (1903) 19 T.L.R. 534 and below, paras 41-334—41-345.

16 *Perdana Properties Bhd v United Orient Leasing Co Sdn Bhd* [1981] 1 W.L.R. 1496.

17 *R. v McDonald* (1885) 15 Q.B.D. 323. See further Palmer at para.1-027. cf. *Mills v Graham* (1804) 1 Bos. & Pul. 140; *Fawcett v Smethurst* (1914) 31 T.L.R. 68; and *Ballett v Mingay* [1943] K.B. 281.

18 *London Jewellers Ltd v Attenborough* [1934] 2 K.B. 206.

19 *Bristol Airport Plc v Powdrill* [1990] Ch. 744 (the lessee's interest under a chattel lease was "property" within s.436 of the Insolvency Act 1986).

20 An employee obtains mere custody (not possession) of his employer's goods entrusted to his control: Pollock and Wright at pp.58–60; *Kamidian v Holt* [2008] EWHC 1483 (Comm), [2009] Lloyd's Rep. I.R. 242 at [77]. This exception in favour of a servant does not extend to agents, especially in the commercial sphere: *The Rigoletto* [2000] 2 Lloyd's Rep. 532, 539.

21 Possession in the Common Law (1888), p.163. The distinction between a consensual bailment and a contractual bailment was noted by Lord Sumption in *ENE Kos 1 Ltd v Petroleo Brasileiro SA (No.2)* [2012] UKSC 17, [2012] 2 A.C. 164 at [20].

22 See, for example, *Sutcliffe v Chief Constable of West Yorkshire* [1996] R.T.R. 86, 90.

- 23 Palmer at para.1-036. While it is correct to say that it has “been overtaken by events” it probably remains true to say that “bailment typically stems from the mutual consent of bailor and bailee”: *Tongue v Royal Society for the Prevention of Cruelty to Animals [2017] EWHC 2508 (Ch), [2018] B.P.I.R. 229* at [72].
- 24 *The Pioneer Container [1994] 2 A.C. 324*. The context of the decision of the Privy Council was whether or not it was necessary for the bailor to have consented to the terms on which the bailee was prepared to assume possession, but the reasoning seems equally applicable to the case where the issue is whether or not the bailor was prepared to allow the bailee to assume possession at all. However, it has been stated that it is the consent of the bailee, rather than the bailor, which is fundamental: *East West Corp v DKBS 1912 and Akts Svendborg [2003] EWCA Civ 83, [2003] 1 Lloyd's Rep. 239* at [24]; *Kamidian v Holt [2008] EWHC 1483 (Comm), [2009] Lloyd's Rep. I.R. 242* at [76].
- 25 Palmer at para.1-037.
- 26 *The Pioneer Container [1994] 2 A.C. 324*.
- 27 See below, paras 35-010—35-014.
- 28 Palmer at para.1-047. For example, in the case of a gratuitous bailment, it does not follow from the fact that the bailment is not contractual that the liability of the bailee must lie in tort. The liability of the bailee is best seen as being *sui generis*: *Yearworth v North Bristol NHS Trust [2009] EWCA Civ 37, [2010] Q.B. 1* at [48].
- 29 See, e.g. *British Road Services Ltd v Arthur V Crutchley & Co Ltd [1968] 1 All E.R. 811, 822* and *Volcafe Ltd v Cia Sud Americana de Vapores SA (trading as CSAV) [2018] UKSC 61, [2019] A.C. 358* at [8]–[9]. Further examples of the differences between an action in bailment and an action in tort are provided by Palmer at paras 1-048—1-071.
- 30 *American Express Co v British Airways Board [1983] 1 W.L.R. 701* (s.29(1) of the Post Office Act 1969 which provided that “no proceedings in tort shall lie against the Post Office ...” in respect of loss or damage to mail): cf. *Chesworth v Farrar [1967] 1 Q.B. 407* (see below, para.35-007).
- 31 See below, paras 35-032, 35-049. See also below, para.35-026 in the context of sub-bailment.
- 32 See Palmer (1978) 41 M.L.R. 629. cf. *Harold Stephen & Co Ltd v Post Office [1977] 1 W.L.R. 1172, 1177–1178, 1179–1180*. A claim arising from a contractual bailment has been held not to fall within the definition of “wrongful interference” in the Act and a similar conclusion may be reached in the case of contractual claims where concurrent liability exists in contract and tort or bailment: *Scipion Active Trading Fund v Vallis Group Ltd [2020] EWHC 1451 (Comm)* at [107]–[108].
- 33 See Palmer at paras 1-106—1-130.
- 34 e.g. Paton at pp.5–6; Palmer at paras 3-089 and 32-001—32-002. Although there are many differences between bailment and trust, the relationship between a bailor and bailee may nonetheless be fiduciary in nature; *Matthew v TM Sutton Ltd [1994] 1 W.L.R. 1455* (see below, para.35-144).
- 35 It is largely on this basis that bailment is attacked as a “redundant” concept by *McMeel [2003] L.M.C.L.Q. 169*. A more charitable view is that the law has simply become more complex as new variations on the basic model of bailment are developed. In *TRM Copy Centres (UK) Ltd v Lanwall Services Ltd [2009] UKHL 35, [2009] 1 W.L.R. 1375* Lord Hope

of Craighead (at [10]–[11]) noted the different ways in which bailments can be classified, and that many examples of bailments do not fit precisely into any particular category, but it was not necessary for him to resolve these classificatory issues in order to decide the case and he did not do so. The label which the parties have attached to their relationship is not decisive, so the fact that the parties have expressly stated that there is no bailment cannot in itself resolve the question of the existence or otherwise of a bailment.

36 Palmer at para.1-041.

37 *Marcq v Christie, Manson & Woods Ltd* [2003] EWCA Civ 731, [2004] Q.B. 286 at [49]–[50].

38 Limitation Act 1980 ss.2, 5. The period may be extended in certain circumstances: ss.1(2), 28–33. See Vol.I, paras 31-073 et seq. The old rule that an “action in tort” lay against the estate of a deceased tortfeasor only if proceedings were brought not later than six months after his personal representatives took out representation was later repealed by s.1 of the *Proceedings Against Estates Act 1970*; under the former rule, it had been held that a claim against the estate of a deceased bailee in respect of his obligations as bailee at common law was (despite the existence of a contract giving rise to the bailment) in substance “a cause of action in tort”: *Chesworth v Farrar* [1967] 1 Q.B. 407.

39 See Ch.31, above.

40 *RB Policies at Lloyds v Butler* [1950] 1 K.B. 76. Before the abolition of detinue (see below, para.35-010) the action was held to accrue upon the refusal to return the chattel: *Miller v Dell* [1891] 1 Q.B. 468. See now below, paras 35-011, 35-014.

41 Limitation Act 1980 s.3(1) (reversing, on this point, *Spackman v Foster* (1883) 11 Q.B.D. 99, and *Miller v Dell*, above). The effect of s.3 is uncertain in regard to *Wilkinson v Verity* (1871) L.R. 6 C.P. 206; cf. *Beaman v ARTS Ltd* [1948] 2 All E.R. 89, 93; reversed on another point: [1949] 1 K.B. 550.

42 Limitation Act 1980 s.32; *Beaman v ARTS Ltd*, above.

43 Limitation Act 1980 s.3(2).

44 Paton at Ch.2 (History of Bailment).

45 (1703) 2 Ld. Raym. 909.

46 Palmer at Ch.3; Story at para.3; Jones, 1st edn, at pp.35, 36. The five-fold classification adopted in Jones and the six-fold classification adopted by Holt CJ in *Coggs v Barnard* (1703) 2 Ld. Raym. 909 was referred to by Lord Hope of Craighead in *TRM Copy Centres (UK) Ltd v Lanwall Services Ltd* [2009] UKHL 35, [2009] 1 W.L.R. 1375 at [10]–[11]. However, it was not necessary for him to choose between the different classificatory schemes and he did not do so.

47 There may be bailment “for reward” without a special payment being made in respect of the bailment: see below, para.35-057.

48 *Houghland v RR Low (Luxury Coaches) Ltd* [1962] 1 Q.B. 694, 698; *Sutcliffe v Chief Constable of West Yorkshire* [1996] R.T.R. 86, 90. (A similar duty of care “that which may reasonably be expected of him in all the circumstances”, applies in the analogous situation of a gratuitous agent: *Chaudhry v Prabhakar* [1989] 1 W.L.R. 29). cf. *Hunt & Winterbotham (West of England) Ltd v BRS (Parcels) Ltd* [1962] 1 Q.B. 617; *Morris v CW Martin & Sons Ltd* [1966] 1 Q.B. 716, 737. cf. also below, para.35-032.

49 Paton at p.110.

50 *Chaudhry v Prabhakar*, above (an analogous case). If the defendant represents himself as possessing a particular skill or experience, on which the claimant reasonably relies, he will be held to it.

51 See below, para.35-044.

## Section 2. - Possession and Related Matters

Chitty on Contracts 34th Ed.

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Volume II - Specific Contracts

Chapter 35 - Bailment

Section 2. - Possession and Related Matters

### Possession, not ownership

- 35-009 A conveyance which transfers both possession and ownership to the transferee cannot be a bailment. The essence of bailment is the transfer of possession, not ownership. The fact that possession is transferred to the bailee is of significance both in terms of the relationship between the bailor and the bailee and in terms of its impact on the relationship between the bailor and third parties and between the bailee and third parties. The impact of the transfer of possession and not ownership on the various parties is considered in the following paragraphs.

### The obligation to return the goods

- 35-010 In the first place, the fact that the bailee is given possession of the goods and not ownership means that he cannot keep the goods. They must be returned to the bailor at the end of the period of the bailment. The bailee is therefore normally<sup>52</sup> under an obligation to return the bailed chattel to the bailor at the end of the period of the bailment,<sup>53</sup> unless he can show good cause for not returning it.<sup>54</sup> Before the tort of detinue was abolished in 1977,<sup>55</sup> the bailee was liable in detinue at the suit of the bailor where the bailee had unequivocally<sup>56</sup> and wrongfully refused or failed to comply with the bailor's demand for the return of the chattel.<sup>57</sup> Detention by the bailee, after a demand by the bailor and a refusal to return on the part of the bailee, could also be evidence of a denial of the bailor's title, which would entitle the bailor to sue in conversion.<sup>58</sup> Since the 1977 Act, it has been held that a refusal to permit the bailor to enter the bailee's premises in order to collect the chattel is conversion.<sup>59</sup>

## Section 2(2) of the 1977 Act

- 35-011 **Section 2(2) of the Torts (Interference with Goods) Act 1977** now provides that: “An action lies in conversion for loss or destruction of goods which a bailee has allowed to happen in breach of his duty to his bailor (that is to say it lies in a case which is not otherwise conversion, but would have been detinue before detinue was abolished)”. Before this subsection, there was considerable overlap between the scope of detinue and that of conversion but that overlap was not complete; in particular, it was not clear that conversion could encompass all cases of wrongful detention of goods by the bailee. **Section 2(2)** now extends the scope of conversion to cover many of these cases. In order to establish liability for wrongful detention of goods, there must have been deliberate withholding of the goods or interference with them<sup>60</sup> and such conduct is commonly, but not invariably, found in a demand for the goods followed by their retention.<sup>61</sup> Although the demand and the refusal need not be express, they must be unequivocal<sup>62</sup>: for example, in an appropriate case, an unequivocal refusal may be inferred from a delay in responding to a demand beyond a reasonable time.<sup>63</sup> But it has been argued<sup>64</sup> persuasively that in many situations in which a bailor could previously have claimed in detinue, he could also have claimed in contract, or for breach of his common law rights as bailor, and that these claims fall outside the scope of s.2.

## Accidental loss of goods

- 35-012 If the bailee has wrongfully parted with the chattel<sup>65</sup> or lost it by negligence, it is no defence for him to show that he is unable to return it<sup>66</sup>; but the accidental loss or destruction of the chattel, without default on the part of the bailee, will excuse his failure to return it.<sup>67</sup> The loss of, or injury to, the chattel while it is in the bailee’s possession places the onus of proof on the bailee to show that it occurred without his fault.<sup>68</sup>

## Power of the court to order specific delivery

- 35-013 Although the bailor’s claim against the bailee who wrongfully detains the chattel cannot now be in detinue,<sup>69</sup> he may still be able to recover the chattel itself from the bailee. **Section 3 of the Torts (Interference with Goods) Act 1977** provides that, in proceedings for wrongful interference against a person who is in possession or in control<sup>70</sup> of the goods, the court may make an order for delivery of the goods which does not give the defendant the alternative of retaining them on

payment of their value as assessed by the court.<sup>71</sup> But the court has a discretion whether or not to make such an order,<sup>72</sup> and may impose conditions.<sup>73</sup> The court:

“... in particular, where damages by reference to the value of the goods would not be the whole of the value of the goods, may require an allowance to be made by the claimant to reflect the difference. For example, a bailor’s action against the bailee may be one in which the measure of damages is not the full value of the goods, and then the court may order delivery of the goods, but require the bailor to pay the bailee a sum reflecting the difference”.<sup>74</sup>

## Conversion of the chattel by the bailee

- 35-014 In addition to his obligation to return the goods, the bailee is under a duty to his bailor not to convert the chattel, i.e. not to do intentionally in relation to the chattel an act inconsistent with the bailor’s right of property in it and which excludes him from use and possession of the chattel<sup>75</sup>; thus a sale,<sup>76</sup> pledge,<sup>77</sup> or offering for sale,<sup>78</sup> of the chattel terminates the bailment forthwith, and the immediate right to the possession of the chattel reverts in the bailor.<sup>79</sup> The assessment of the bailor’s damages is discussed below.<sup>80</sup>

## Jus tertii

- 35-015 Given that the bailor does not transfer ownership in the chattel to the bailee, he retains a proprietary interest in the chattel. He is said to retain the “general” property in the chattel, while the bailee obtains a “special” property in it. In litigation between the bailor and the bailee, the latter was, at common law, estopped from questioning the bailor’s title to the chattel bailed to him, and the bailee could not set up the title of a third person in reply to the bailor’s demand for redelivery of the chattel.<sup>81</sup> But s.8(1) of the Torts (Interference with Goods) Act 1977 abolished this rule (known as the *jus tertii*):

“The defendant in an action for wrongful interference shall be entitled to show, in accordance with rules of court,<sup>82</sup> that a third party has a better right than the plaintiff as respects all or any part of the interest claimed by the plaintiff, or in right of which he sues, and any rule of law (sometimes called *jus tertii*) to the contrary is abolished.”<sup>83</sup>

## Section 8(1) of the Torts Interference with Goods Act 1977

- 35-016 The main effect of s.8(1) will be where the bailor is suing the bailee: an illustration would be where a warehouseman could show that, since the goods were delivered to him by the bailor, a change in their ownership had taken place so that a third party now had acquired either a partial interest in them or had become their full owner.<sup>84</sup> If the bailee can prove that a third party has, at the time of the suit, a partial interest in the chattel, leaving the bailor with only a partial interest, the bailor's damages recoverable from the bailee for his failure to redeliver the chattel will be, not for its full value, but only in respect of the bailor's remaining interest in it.<sup>85</sup> It should be noted, however, that s.8 applies only to claims for wrongful interference with goods; if the bailor sues, not in tort, but in contract or for breach of the bailee's common law obligations arising from the bailment, it appears<sup>86</sup> that the bailee could not avail himself of the protection of the section.<sup>87</sup>

## Avoidance of double liability

- 35-017 As a result of s.7 of the Torts (Interference with Goods) Act 1977, the bailee need no longer fear "double liability",<sup>88</sup> both to his bailor, and to a third party who can prove a better title (either full or partial) to the goods than the bailor. By s.7(2) of the Act, where two or more claimants are parties to proceedings for wrongful interference,<sup>89</sup> the court is to grant relief so as to avoid double liability of the wrongdoer. By s.7(3), on satisfaction of his claim, a claimant is liable to account over to another claimant to such extent as will avoid double liability; while by s.7(4), any claimant who is unjustly enriched to any extent (viz beyond the value of his own interest in the chattel) is liable to reimburse the wrongdoer to the extent of that unjust enrichment. Thus, if the bailee pays damages, first to his bailor, and then to the true owner, the bailor is unjustly enriched unless he accounts to the true owner under s.7(3); and the true owner then would be unjustly enriched and would be liable to reimburse the bailee under s.7(4).<sup>90</sup>

## Bailor's damages against the bailee<sup>91</sup>

- 35-018 The preceding paragraphs have dealt with the bailor's damages when a third party has an interest in the chattel. But it could be the defendant bailee himself who has an outstanding interest in the chattel, which should be deducted from the full value of the chattel when the bailor's damages are assessed,<sup>92</sup> e.g. if the bailee had paid in advance for the contractual right to retain the chattel for a given period, but the bailor was entitled to terminate the bailment prematurely and to sue for damages, the assessment should allow for the value of the bailee's interest during the unexpired

part of that period.<sup>93</sup> The bailor may also have remedies in restitution, e.g. to recover the proceeds of a wrongful sale by the bailee.<sup>94</sup>

## The bailee's claim against his bailor

- 35-019 The fact that the bailee has a possessory interest in the chattel has an impact on the bailee's remedies against the bailor and against third parties. A bailee for a term (as distinct from a bailee at will) may maintain a possessory action against the bailor himself, if the bailor interferes with the bailee's possession of the chattel during the term.<sup>95</sup> If the bailor wrongfully retakes possession of the chattel, the bailee may seek the exercise of the court's discretion to make an order for specific delivery of the chattel to him.<sup>96</sup> The bailee's damages for any wrongful interference of his possession by the bailor will reflect only the extent of the injury to the bailee's interest in the chattel.<sup>97</sup>

## The effect of bailment on third parties<sup>98</sup>

- 35-020 The impact of bailment on third parties is a complex issue. The remedies which the law makes available to protect the possessory interest of the bailee and the reversionary interest of the bailor have an obvious impact on third parties. Where the bailee himself bails the chattel to a third party, the sub-bailee, difficult issues have arisen in relation to the entitlement of the bailor to sue the third party and in relation to the entitlement of the sub-bailee to rely on the terms of the bailment between the bailor and the bailee by way of defence to the bailor's claim.

## Entitlement to sue

- 35-021 Where the bailment is for reward and for a period to be determined in accordance with the agreed terms (as in hire or pledge) the bailee enjoys both possession and the immediate right to possession during the period; hence the bailee can,<sup>99</sup> and the bailor cannot,<sup>100</sup> sue a third person for trespass or conversion during that period.<sup>101</sup> However, if a third person destroys or permanently injures the chattel while it is in the possession of the bailee, the bailor may have an action against the third party for the injury to his reversionary interest.<sup>102</sup> But attempts to extend the protection of the law of torts to other interests in chattels (viz those not based on possession, or the immediate or reversionary right to possess at the relevant time) have failed. So where a third person negligently

causes loss or damage to a chattel in which a claimant has only a contractual interest<sup>103</sup> at the time of the loss or damage, the claimant cannot sue the third person under the tort of negligence.<sup>104</sup>

## Bailment at will

35-022 Where the bailment is at will (as in gratuitous bailments) the bailor retains the immediate right to possession of the chattel, and may therefore bring an action for conversion against any stranger who wrongfully takes the chattel out of the possession of the bailee.<sup>105</sup> The bailor at will may demand the return of the chattel at any time, and so there is a tendency to attribute "possession" to him as well, so that he may exercise the possessory remedies which are available to the possessor.<sup>106</sup> If a bailor at will does recover damages from a tortfeasor for the loss of the chattel and for loss of its use, the bailee no longer has any claim against the tortfeasor<sup>107</sup> but if in this situation the bailee at will has some interest in the chattel enforceable against the bailor, the latter must account appropriately to the bailee.<sup>108</sup>

## Effect of act inconsistent with bailment

35-023 The bailment may be determined prematurely by the bailee dealing wrongfully with the chattel in a manner wholly inconsistent with the bailment; in this event, the immediate right to possession reverts in the bailor, who may then bring an action for conversion against any person dealing with the chattel,<sup>109</sup> as well as against the bailee.<sup>110</sup>

## The bailee's claim against a third party

35-024 Since a bailment always gives the bailee possession of the chattel, he may maintain any possessory action against a stranger.

<sup>111</sup>

 As against a mere stranger, possession always imparts a better right to possession

<sup>112</sup>

 ; hence, the bailee may also bring against such a stranger an action which is based on the immediate right to possession, such as conversion.

<sup>113</sup>

**U** Under the common law, the bailee could recover from a stranger who destroyed or detained the chattel, damages assessed at its full value, as if he were its absolute owner.

<sup>114</sup>

**U** But the third party can now avail himself of s.8(1) of the 1977 Act, and prove the outstanding interest of the bailor

<sup>115</sup>

**U**; if the third party fails to do so, he will be liable to the bailee for damages assessed at the full value. But in the latter situation, the operation of s.7 of the Act will ultimately prevent double recovery if the bailor (or the true owner) later also recovers damages from the third party.

<sup>116</sup>

**U**

## Insurable interest

35-025 A bailee has an insurable interest in the goods bailed to him, and is entitled to insure them for their full value <sup>117</sup>; if the insurers make a payment under such a policy, the bailee may retain so much as would cover his own interest, and is a trustee for the bailor in respect of the balance. <sup>118</sup>

## Sub-bailment

35-026 If, without the express or implied consent of the bailor, the bailee himself bails the chattel to a third person, the bailor might, in appropriate circumstances, have an action in tort for conversion against the third person, <sup>119</sup> as well as against the bailee <sup>120</sup>; if, through the negligence of the third person, the chattel is lost or damaged, the bailor may have an action in tort for negligence against the third person. <sup>121</sup> The bailor may, however, have given the bailee actual <sup>122</sup> or ostensible <sup>123</sup> authority to sub-bail the chattel to the third person, in which case the mere fact that the third person has taken possession of the chattel under the sub-bailment will not constitute a tort as against the original bailor, because the latter will be taken to have consented to the sub-bailment. Such authority to sub-bail may be inferred from the parties' knowledge of ordinary commercial practices, e.g. that a carrier who carries goods over a long distance may engage a sub-contractor as his local delivery agent <sup>124</sup>; or that the Post Office may engage an airline to carry airmail. <sup>125</sup> Where there is such actual or apparent consent to the sub-bailing, the relationship of bailment will arise directly between the original bailor and the sub-bailee <sup>126</sup>; hence, the original bailor may take advantage of rules of bailment against the sub-bailee, <sup>127</sup> instead of relying on the ordinary rules of the law of tort. The original bailor need not rely on any *contract* of sub-bailment: the relationship

of bailment will arise between the original bailor and the sub-bailee where the latter voluntarily received the goods from the bailee, knowing that another person “is interested in the goods”.<sup>128</sup> Thus, by relying on the fact that there is a sub-bailment, the original bailor need<sup>129</sup> not prove a duty of care owed by the sub-bailee under the ordinary tort of negligence, since the sub-bailee will owe him all the duties of a bailee,<sup>130</sup> including the duty to take reasonable care of the chattel<sup>131</sup>; again, when the chattel is lost or damaged while in the possession of the sub-bailee, the onus of proof may be on him to show that the loss or damage occurred without any failure on his part to take reasonable care<sup>132</sup>; similarly, if the original bailor sues the sub-bailee for conversion, he need prove only that the act of the sub-bailee was wholly inconsistent with the sub-bailee’s duties qua bailee or with his contractual duties under the contract of sub-bailment,<sup>133</sup> i.e. he will not be obliged to prove conversion according to the ordinary principles of the law of tort. (But since the **Supply of Goods and Services Act 1982**<sup>134</sup> applies only where there is a contract for the supply of a service, no terms implied by that Act will affect the position of a sub-bailee vis-à-vis the head bailor, unless a contract between them is proved.)

## The sub-bailee and protective clauses

- 35-027 There may also be advantages from the point of view of the sub-bailee in relying, as against the original bailor, on the fact that the sub-bailment was made with the actual or ostensible authority of the original bailor. Thus, by the terms of the contract of sub-bailment the sub-bailee may be protected from certain liabilities towards the original bailor if the contract of sub-bailment was made by the bailee as agent of the bailor.<sup>135</sup> Even if there was no agency, so that the exempting terms do not bind the original bailor in contract (because of the lack of a contract between them),<sup>136</sup> he will be bound<sup>137</sup> where he has consented to them: where the original bailor consents (whether expressly, impliedly or under the principle of ostensible authority) to the bailee sub-bailing the goods,<sup>138</sup> the original bailor’s:

“rights against the sub-bailee will only be subject to terms of the sub-bailment if he has consented to them, i.e., if he has authorised the bailee to entrust the goods to the sub-bailee on those terms ...<sup>139</sup> [terms which the original bailor] has actually (expressly or impliedly) or even ostensibly authorised.”<sup>140</sup>

Similarly, where the original bailor consents to the bailee sub-bailing the goods on terms which include a term conferring a lien on the sub-bailee, the sub-bailee may be entitled to rely on the lien as against the original bailor.<sup>141</sup>

## Imposing more onerous obligations on the sub-bailee

- 35-028 Sub-bailment may operate to the disadvantage of the sub-bailee in the sense that some of the terms agreed between the bailee and the sub-bailee may increase the liability of the sub-bailee beyond that which would otherwise have arisen under the common law. The bailor may be entitled to enforce such conditions against the sub-bailee where the bailee has the consent, and thus the authority, of the bailor to enter into a sub-bailment on such terms. In such a case, “all the terms agreed between the bailee and the sub-bailee, in so far as these are applicable to the relationship of the bailor and the sub-bailee, apply as between the bailor and the sub-bailee”.<sup>142</sup>

## Duty of care apart from sub-bailment

- 35-029 Even in the absence of sub-bailment to a third person, the owner of the goods may be owed, under the tort of negligence, a duty of care by the person in actual control of the goods. Thus, where goods were agreed to be stored by a company but were in the actual control of the managing director in a store owned by him, he was held liable in tort for negligently allowing them to be damaged, despite the fact that he did not have exclusive possession of them and accordingly could not be treated as a bailee.<sup>143</sup>

## Attornment<sup>144</sup>

- 35-030 If the bailor directs the bailee (e.g. a warehouseman) to hold the chattel<sup>145</sup> in his possession<sup>146</sup> on behalf of a third person (the claimant) and the bailee thereupon attorns to the claimant by accepting the bailor's direction,<sup>147</sup> or by acknowledging to the claimant that the claimant now has title to the chattel,<sup>148</sup> the bailee will become the bailee of the claimant.<sup>149</sup> At common law, the bailee was also estopped from denying the claimant's title, but by statute the bailee may now set up the title of a third person in reply to the bailor's demand for redelivery of the chattel.<sup>150</sup> However, a delivery order given by the bailor to a third person directing the bailee to deliver the goods to the third person is a mere authority to receive possession, and does not of itself imply an undertaking by the bailor that the bailee will deliver the goods.<sup>151</sup>

## Vicarious liability

- 35-031 The bailee is not normally the agent of the bailor, so as to render the bailor vicariously liable to a third person who is injured by the negligence or wrongful act of the bailee in the management of the thing bailed.<sup>152</sup> But the bailor may be so liable if the bailee is acting on behalf of the bailor as his agent and for his purposes, or the bailor retains some control over the management of the chattel.<sup>153</sup>

## Footnotes

- 52 If it is the obligation of the bailor to collect the chattel from the bailee, the latter may be entitled to the statutory remedy of sale when the bailor neglects to collect it: see below, paras 35-095—35-100. On the effect of delay by the bailor in collecting the goods, see *Palmer [1987] L.M.C.L.Q. 43*.
- 53 *British Crane Hire Corp Ltd v Ipswich Plant Hire Ltd [1975] Q.B. 303, 311, 313; Scipion Active Trading Fund v Vallis Group Ltd [2020] EWHC 1451 (Comm)* at [93]. (See also below, para.35-064.) On the termination of a bailment see below, para.35-014. cf. the cases on the termination of the hiring under a hire-purchase agreement, see below, paras 41-334—41-342; see also Vol.I, para.18-235. On the measure of damages in conversion (which now includes former cases of detinue: see later in this paragraph), see *Rosenthal v Alderton & Sons Ltd [1946] K.B. 374; Sachs v Miklos [1948] 2 K.B. 23; Munro v Willmott [1949] 1 K.B. 295; Strand Electric and Engineering Co Ltd v Brisford Entertainments Ltd [1952] 2 Q.B. 246; General and Finance Facilities Ltd v Cooks Cars (Romford) Ltd [1963] 1 W.L.R. 644; Hillesden Securities Ltd v Ryjak Ltd [1983] 1 W.L.R. 959*. See McGregor on Damages, 21st edn (2021), Ch.38; Clerk & Lindsell on Torts, 23rd edn (2020), paras 16-95 et seq.; and see for damages in similar hire-purchase cases, below, paras 41-345, 41-430.
- 54 *British Crane Hire Corp Ltd v Ipswich Plant Hire Ltd*, above, at 311–312, 313. The possession of a bailee may change to possession as donee under an immediate gift or as donee under a donatio mortis causa: *Woodard v Woodard [1995] 3 All E.R. 980*.
- 55 By s.2(1) of the Torts (Interference with Goods) Act 1977. (For its replacement, see below.)
- 56 cf. a temporary refusal in order to clear up a doubt: *Clayton v Le Roy [1911] 2 K.B. 1031; Strand Electric and Engineering Co Ltd v Brisford Entertainments Ltd*, above, at 252, 253.
- 57 *Miller v Dell [1891] 1 Q.B. 468*. In the absence of any specific contractual provision, the bailee is not bound to deliver the chattel to the bailor's address when the latter demands its return; the bailee's only obligation is not to prevent the bailor from taking it: *Capital Finance Co Ltd v Bray [1964] 1 W.L.R. 323*.
- 58 *Pillot v Wilkinson (1863) 2 H. & C. 72; (1864) 3 H. & C. 345; Howard E Perry & Co Ltd v British Railways Board [1980] 1 W.L.R. 1375*. (cf. s.11(3) of the 1977 Act.) The bailor can

- sue in conversion without making a demand if the bailee commits a definite act of conversion: *Grainger v Hill* (1838) 4 Bing. N.C. 212.
- 59     Howard E Perry & Co Ltd v British Railways Board, above (fear of industrial action by the bailee's employees). See *Palmer* (1980) 9 An.-Am.L.R. 279.
- 60     *Clayton v Le Roy* [1911] 2 K.B. 1031; R. (on the application of Atapattu) v Secretary of State for the Home Department [2011] EWHC 1388 (Admin), [2011] All E.R. (D) 20 (Jun) at [89].
- 61     *Barclays Mercantile Business Finance Ltd v Sibec Developments Ltd* [1992] 1 W.L.R. 1253, 1257–1258. In the case where the goods have been lost by the bailee, there is no need for a refusal by the bailee. It suffices that there has been a demand for the return of the goods which has not been satisfied: *Mitchell v Ealing London BC* [1979] Q.B. 1.
- 62     R. (on the application of Atapattu) v Secretary of State for the Home Department [2011] EWHC 1388 (Admin), [2011] All E.R. (D) 20 (Jun) at [89].
- 63     However, the courts may be slow to draw such an inference, given that delay in many cases is likely to be equivocal: *Schwarzschild v Harrods Ltd* [2008] EWHC 521 (QB), [2008] All E.R. (D) 299 (Mar).
- 64     Palmer at para.1-089 (also in (1978) 41 M.L.R. 629, where other arguments on the scope of s.2 are deployed).
- 65     e.g. *Alexander v Railway Executive* [1951] 2 K.B. 882; and see below, para.35-052.
- 66     *Jones v Dowle* (1841) 9 M. & W. 19, 20; *Reeve v Palmer* (1858) 5 C.B. N.S. 84; *Genn v Winkel* (1912) 107 L.T. 434, 437. On exemption clauses, see Vol.I, Ch.17, especially para.17-037.
- 67     *Taylor v Caldwell* (1863) 3 B. & S. 826, 833; *British Crane Hire Corp Ltd v Ipswich Plant Hire Ltd* [1975] Q.B. 303, 311–312, 313. Accidental loss or destruction is, however, no defence if it occurred while the bailee was wrongfully detaining the chattel: *Shaw & Co v Symmons & Sons* [1917] 1 K.B. 799; *Mitchell v Ealing London BC* [1979] Q.B. 1 (see below, para.35-032). On frustration, see *British Berna Motor Lorries Ltd v Inter-Transport Co Ltd* (1915) 31 T.L.R. 200; Vol.I, Ch.25, especially paras 26-041—26-046 (analogous cases on charterparties).
- 68     See below, para.35-050 and cases cited in the final two footnotes of that paragraph; also *British Crane Hire Corp Ltd v Ipswich Plant Hire Ltd*, above, at 311–312, 313.
- 69     See above, para.35-010.
- 70     A bailee who had sub-bailed the goods may still be in “control” of them.
- 71     This section is based on the common law rules governing detinue: see *General and Finance Facilities v Cooks Cars (Romford)* [1963] 1 W.L.R. 644. (s.4 of the 1977 Act provides for interlocutory relief where goods are wrongfully detained.) See CPR Pt 25 r.25.1(1)(c). See also above, para.35-010.
- 72     1977 Act ss.3(3)(b) and 3(6). For an illustration, see *Howard E Perry & Co Ltd v British Railways Board* [1980] 1 W.L.R. 1375. By CPR Pt 40 r.40.14, a claimant who is only a partial owner of the goods, and who has no immediate right to the possession of them, is confined to a remedy in damages for the injury to his reversionary interest unless the claimant has the written authority of all other part-owners of the goods to make the claim on his behalf as well as for himself.
- 73     s.3(6). By ss.3(7) and 6(4), the court may also make an allowance under s.6(1) or (2) in respect of an improvement to the goods made by the defendant.

- 74 s.3(6).
- 75 *Caxton Publishing Co Ltd v Sutherland Publishing Co Ltd* [1939] A.C. 178, 202; *Morris v CW Martin & Sons Ltd* [1966] 1 Q.B. 716, 732; *Garnham, Harris & Elton Ltd v Alfred W Ellis (Transport) Ltd* [1967] 1 W.L.R. 940; *Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5)* [2002] UKHL 19, [2002] 2 A.C. 833 at [39]–[42] (on which see *Cane* (2002) 118 L.Q.R. 544); *Sang Stone Hamoon Jonoub Co Ltd v Baoyue Shipping Co Ltd (The Bao Yue)* [2015] EWHC 2288 (Comm), [2016] 1 Lloyd's Rep. 320 (although goods may be converted by a person who creates a lien without the authority of the owner, an owner who authorises a bailee to deliver goods into storage must be taken to authorise the creation of a lien where that is a reasonable and foreseeable incident of the storage contract which the bailee is authorised to conclude). The requirement that there must be a sufficient encroachment on the rights of the owner as to exclude him from use and possession of the goods assumed importance in *Marcq v Christie, Manson & Woods Ltd* [2003] EWCA Civ 731, [2004] Q.B. 286, especially at [13]–[24]. See also s.2(2) of the Torts (Interference with Goods) Act 1977 (above, para.35-011); and s.11(3) (below, para.35-135).
- 76 See the cases cited below in the first footnote to para.35-023.
- 77 *Nyberg v Handelaar* [1892] 2 Q.B. 202.
- 78 *North General Wagon & Finance Co Ltd v Graham* [1950] 2 K.B. 7.
- 79 See below, paras 35-023, 41-337.
- 80 See below, para.35-018.
- 81 *Gosling v Birnie* (1831) 7 Bing. 337; *Biddle v Bond* (1865) 6 B. & S. 225; *Tongue v Royal Society for the Prevention of Cruelty to Animals* [2017] EWHC 2508 (Ch), [2018] B.P.I.R. 229 at [76]. The House of Lords has (obiter) referred to this common law rule, without adverting to the 1977 Act (see below): *China Pacific SA v Food Corp of India* [1982] A.C. 939, 959. The bailee could set up the *jus tertii* against his bailor only where he had been actually evicted by title paramount (*Biddle v Bond*, above, at 234), or where he defended on behalf of, and with the express authority of the third person (*Rogers, Sons & Co v Lambert & Co* [1891] 1 Q.B. 318, 325). Arguments which would have extended the scope of the bailee's estoppel were rejected by the Privy Council in *Re Goldcorp Exchange* [1995] 1 A.C. 74.
- 82 The power to create rules of court is contained in s.8(2) of the Torts (Interference with Goods) Act 1977. The rules were formerly contained in RSC Ord.15 r.10A, which has not been retained in the current version of the CPR. The position therefore remains uncertain. The defendant's entitlement is stated clearly in s.8(1), but the rules which give effect to it are not readily apparent.
- 83 Even before the 1977 Act, the bailee could interplead between the bailor and a third party claimant to the chattel: RSC Ord.17; CCR Ord.33 rr.6–12.
- 84 The warehouseman would also be able to delay proceedings against him by requiring the third party to be made a party to the proceedings.
- 85 This result is produced by s.7 of the 1977 Act (see below, para.35-017), in combination with s.8.
- 86 *Scipion Active Trading Fund v Vallis Group Ltd* [2020] EWHC 1451 (Comm) at [102]–[113]. One interpretation of the section might be that it covers a situation where the bailor *could* have sued for wrongful interference, e.g. where there was overlapping liability in tort or

- in contract. But liability in contract could arise in circumstances in which no tort had been committed: Palmer at para.[4-062](#).
- 87 Palmer at paras [4-057](#)—[4-063](#).
- 88 Defined in [s.7\(1\)](#).
- 89 On the question of joining in the action any third party who claims an interest in the chattel, see [s.8](#) (see above, para.[35-015](#)). **Section 9** provides machinery for allowing concurrent proceedings for wrongful interference with the same goods to be heard together, even where they originated in different courts.
- 90 This example is adapted from that given in [s.7\(4\)](#) itself.
- 91 Rules on the assessment of damages in conversion must be sought elsewhere, e.g. Clerk & Lindsell on Torts, 23rd edn (2020), paras 16-95 et seq.; *Tettenborn [1993] C.L.J. 128*. For an example, see *IBL Ltd v Coussens [1991] 2 All E.R. 133* (especially on the date at which damages are to be assessed).
- 92 cf. the analogous situation in [s.3\(6\) of the 1977 Act](#) (above, para.[35-013](#)). Similarly, where a pledgee is liable to the pledgor in damages for conversion, the amount of the debt should be deducted from the damages: below, para.[35-136](#).
- 93 cf. the analogous situation in hire-purchase: below, paras [41-345](#), [41-430](#).
- 94 *Chesworth v Farrar [1967] 1 Q.B. 407*. (On the particular situation in this case see the discussion of *Chesworth* above in the first footnote to para.[35-007](#).) On restitution in general, see Vol.I, Ch.32.
- 95 *Roberts v Wyatt (1810) 2 Taunt. 268*; *Turner v Hardcastle (1862) 11 C.B. N.S. 683*; *Johnson v Stear (1863) 15 C.B. N.S. 330*; *Halliday v Holgate (1868) L.R. 3 Ex. 299, 301*. cf. *Rose v Matt [1951] 1 K.B. 810*. See also the implied warranty of quiet possession in a contract for the hire of goods, below, para.[35-067](#).
- 96 See above, para.[35-013](#).
- 97 cf. [s.3\(6\) of the Torts \(Interference with Goods\) Act 1977](#) (above, para.[35-013](#)).
- 98 See also above, paras [35-015](#)—[35-017](#). On distress, see below, paras [41-431](#) et seq.
- 99 *Lee v Atkinson & Brook (1609) Yel. 172*. See also *The Winkfield [1902] P. 42*; *Scipion Active Trading Fund v Vallis Group Ltd [2020] EWHC 1451 (Comm)*.
- 100 *Gordon v Harper (1796) 7 Term Rep. 9*; *Ferguson v Cristall (1829) 5 Bing. 305*. cf. the decision in *O'Sullivan v Williams [1992] 3 All E.R. 385* which can only be justified on the ground that it was a bailment at will: see below, para.[35-022](#). Apart from a special contractual term, the bailor cannot compel the bailee to sue a third party for loss of, or damage to the goods: *The Albazero [1977] A.C. 774, 846*. The proposition that the bailor cannot sue rests on the assumption that the bailor does not have the immediate right to possession of the goods. Where, however, the bailor can demonstrate that it does have an immediate right to possession of the goods, it can bring a claim in conversion. When determining whether or not someone has possession of goods, a court must have regard to all the facts and circumstances of the case. Thus it cannot universally be the case that a person who receives goods for storage for reward obtains possession of them: *Mainland Private Hire Ltd v Nolan [2011] EWCA Civ 189, [2011] C.T.L.C. 145*.

- 101 The bailee may also sue a third party who has negligently damaged the chattel while it is in the possession of the bailee: *The Winkfield [1902] P. 42*. See also below, paras 35-026, 35-027.
- 102 *Mears v LSW Ry (1862) 11 C.B. N.S. 850; Dee Trading Co Pty Ltd v Baldwin [1938] V.L.R. 173; Moukataff v BOAC [1967] 1 Lloyd's Rep. 396, 415–416* (below, para.35-026); *HSBC Rail (UK) Ltd v Network Rail Infrastructure Ltd [2005] EWCA Civ 1437, [2006] 1 Lloyd's Rep. 358*. See *Fleming (1958) 32 A.L.J. 267; Tettenborn [1994] C.L.J. 326*. cf. *Meux v GE Ry [1895] 2 Q.B. 387*. See also Palmer at paras 4-066—4-076 and s.1(d) of the Torts (Interference with Goods) Act 1977.
- 103 e.g. the goods being transported under a c.i.f. contract are at the risk of the buyer at a time when he has neither the possession of, nor any proprietary interest in the goods: *Leigh and Sillavan Ltd v Aliakmon Shipping Co Ltd [1986] A.C. 785*.
- 104 *The Aliakmon* case, above; *Candlewood Navigation Corp Ltd v Mitsui OSK Lines Ltd [1986] A.C. 1, PC*.
- 105 *Manders v Williams (1849) 4 Exch. 339, 344*. Alternatively, the bailee at will may sue, basing his claim to sue upon his possession: cf. *Nicolls v Bastard (1835) 2 Cr. M. & R. 659, 660*. For the assessment of damages in the bailee's claim against a third party, see below, para.35-024.
- 106 *United States of America and Republic of France v Dollfus Mieg et Cie SA [1952] A.C. 582, 605, 611*. See also *Lotan v Cross (1810) 2 Camp. 464; Nicolls v Bastard*, above; *Wilson v Lombank Ltd [1963] 1 W.L.R. 1294; Perpetual Trustees and National Executors of Tasmania Ltd v Perkins (1989) Aust. Tort Rep. 80–295*. cf. *Towers & Co Ltd v Gray [1961] 2 Q.B. 351*. The decision in *O'Sullivan v Williams [1992] 3 All E.R. 385*, can be justified only on the ground that the bailment was at will: see at 388; and cf. the text at the second footnote in para.35-021, above.
- 107 *O'Sullivan v Williams*, above. It is submitted that this decision cannot apply to a bailment for a term where it is the bailee who is in possession and is therefore entitled to sue the tortfeasor (see the first sentence of para.35-021 above): in such a bailment the bailor may sue the tortfeasor only in respect of any injury to his reversionary interest (see para.35-021 above; also CPR Pt 40 r.40.14).
- 108 *O'Sullivan v Williams*, above. cf. *The Winkfield [1902] P. 42* (below, para.35-024). See also above, paras 35-015—35-018.
- 109 *Cooper v Willomatt (1845) 1 C.B. 672* (sale); *Bryant v Wardell (1848) 2 Exch. 479; Fenn v Battleson (1851) 7 Ex. 152, 159* (sale); *Consolidated Co v Curtis & Son [1892] 1 Q.B. 495; North General Wagon & Finance Co Ltd v Graham [1950] 2 K.B. 7* (giving auctioneer possession, with instructions to sell); *Moorgate Mercantile Co Ltd v Finch and Read [1962] 1 Q.B. 701; Union Transport Finance Ltd v British Car Auctions Ltd [1978] 2 All E.R. 385*. However, an auctioneer who receives goods from their apparent owner and simply redelivers them to him when they are unsold is not liable in conversion provided that he has acted in good faith and without knowledge of any adverse claim to them: *Marcq v Christie, Manson & Woods Ltd [2003] EWCA Civ 731, [2004] Q.B. 286*. See also above, para.35-014; and below, para.35-130. See also Pollock and Wright, Possession in the Common Law (1888), p.132. cf. *Rogers v Arnott [1960] 2 Q.B. 244*.

- 110 cf. *Shell International Petroleum Co Ltd v Gibbs (The Salem)* [1982] 1 All E.R. 225, 240–241. See above, para.35-014.
- ①111 *The Winkfield* [1902] P. 42; *Scipion Active Trading Fund v Vallis Group Ltd* [2020] EWHC 1451 (Comm); *Armstead v Royal and Sun Alliance Insurance Co Ltd* [2022] EWCA Civ 497 at [40]. See also *Rooth v Wilson* (1817) 1 B. & Ald. 59 (gratuitous bailee); *Swaffer v Mulcahy* [1934] 1 K.B. 608 (replevin by bailee).
- ①112 *Armory v Delamirie* (1722) 1 Str. 505; *Jeffries v GW Ry* (1856) 5 El. & Bl. 802, 806; *The Winkfield*, above, at 60; Pollock and Wright at pp.22, 91 et seq.
- ①113 *Rooth v Wilson*, above; *The Winkfield*, above. Hence, a pledgee (below, para.35-121) may sue a stranger who tortiously interferes with his rights to the chattel: *Chabba Corp Pte Ltd v Jag Shakti (Owners)* [1986] A.C. 337. In such a claim, the bailee may seek an order for specific delivery of the chattel, which does not give the defendant the option of paying damages assessed at the value of the chattel: above, para.35-013. But the defendant is able to rely on ss.7 and 8 of the 1977 Act (above, paras 35-015, 35-017).
- ①114 *The Winkfield*, above; *The Jag Shakti*, above (below, para.35-133); *Obestain Inc v National Mineral Development Corp Ltd* [1987] 1 Lloyd's Rep. 465. The fact that the bailee may not be responsible to the bailor for loss of or damage to the chattel does not prevent the bailee recovering full damages from a stranger who causes such loss or damage: *The Winkfield*, above. The bailee is under an obligation to account to the bailor for the damages recovered beyond the bailee's own interest: *The Winkfield*, above, at 60–61; *Eastern Construction Co Ltd v National Trust Co Ltd* [1914] A.C. 197, 210; *The Joannis Vatis* [1922] P. 92; *The Albazero* [1977] A.C. 774, 846; *The Jag Shakti*, see above; *Armstead v Royal and Sun Alliance Insurance Co Ltd* [2022] EWCA Civ 497 at [41]; cf. *O'Sullivan v Williams* [1992] 3 All E.R. 385 (above, para.35-022). While the bailee may be entitled to bring a claim in respect of economic losses which are consequential to physical loss or damage suffered by the bailee, a claim for pure economic loss is less likely to succeed: *Armstead v Royal and Sun Alliance Insurance Co Ltd* [2022] EWCA Civ 497 at [44]–[47].
- ①115 See above, para.35-015. Section 8 applies in cases of damage to the chattel, as well as its total loss.
- ①116 See above, para.35-017.
- 117 The extent of the bailee's insurance cover is a question of construction of the particular policy and it is not the case that the bailee will in all cases be entitled to recover the full value of the goods lost or damaged. In particular, the policy may be held to cover only the legal liabilities of the bailee towards the bailor or a third party: see *Ramco (UK) Ltd v International Insurance Co of Hanover* [2004] EWCA Civ 675, [2004] 2 All E.R. (Comm) 866.
- 118 *Hepburn v A Tomlinson (Hauliers) Ltd* [1966] A.C. 451 (below, paras 44-008–44-010; Vol.I, paras 20-141, 32-178–32-179. cf. the situation where the insurance policy expressly

- covers the respective interests of both the bailor and the bailee: *Amev Finance Ltd v Mercantile Mutual Insurance (Workers' Compensation) Ltd* [1988] 1 Qd. R. 487.
- 119 See Clerk & Lindsell on Torts, 23rd edn (2020), paras 16-16 et seq. *Palmer and Murdoch* (1983) 46 M.L.R. 73.
- 120 See above, para.35-014, for the bailor's right of action against the bailee in these circumstances.
- 121 *Lee Cooper Ltd v CH Jeakins & Sons Ltd* [1967] 2 Q.B. 1. But the terms of the contract between the original bailor and bailee are relevant to the extent of any tortious duty owed by the sub-bailee to the original bailor: see *Mitsui & Co Ltd v Novorossiysk Shipping Co (The Gudermes)* [1993] 1 Lloyd's Rep. 311, 327–328. cf. *Bart v British West Indian Airways Ltd* [1967] 1 Lloyd's Rep. 239 (no liability on sub-bailee for delay). cf. also *Fairline Shipping Corp v Adamson* [1975] Q.B. 180, 190–191 (see para.35-027 below). cf. also *Balsamo v Medici* [1984] 1 W.L.R. 951 (no direct claim in tort for negligence against sub-agent).
- 122 *The Pioneer Container* [1994] 2 A.C. 324, PC; *Morris v CW Martin & Sons Ltd* [1966] 1 Q.B. 716.
- 123 “Ostensible authority” from the original bailor (in addition to actual or implied authority) is recognised by the Privy Council in *The Pioneer Container*, above, at 341, 342.
- 124 *Learoyd Bros & Co v Pope & Sons Ltd* [1966] 2 Lloyd's Rep. 142, 148 (the sub-bailees were treated as bailees of the original bailor although the latter did not know that his bailee, a carrier, might sub-bail by engaging another carrier as sub-contractor). See the footnote immediately following the next footnote below. cf. *Garnham, Harris & Elton Ltd v Alfred W Ellis (Transport) Ltd* [1967] 1 W.L.R. 940.
- 125 *Moukataff v BOAC* [1967] 1 Lloyd's Rep. 396. See also below, para.35-052; see *American Express Co v British Airways Board* [1983] 1 W.L.R. 701 (above, para.35-004).
- 126 *The Pioneer Container*, above, at 336–338, 341, 342; *China Pacific SA v Food Corp of India* [1982] A.C. 939, 957–959; *Morris v CW Martin & Sons Ltd*, above, at 729, 732; *Gilchrist Watt & Sanderson Pty Ltd v York Products Pty Ltd* [1970] 1 W.L.R. 1262. See also Pollock and Wright at p.169; below, para.35-031 and cf. *Hooper v LNW Ry* (1880) 50 L.J. Q.B. 103 (below, para.38-044). It is, however, necessary to distinguish between consent to a sub-bailment and consent to the creation of a direct contractual relationship between the bailor and the sub-bailee. The two are “conceptually different”: see *Targe Towing Ltd v Marine Blast Ltd* [2004] EWCA Civ 346, [2004] 1 Lloyd's Rep. 721 at [28].
- 127 *The Pioneer Container*, above. On the question of the sub-bailee denying the bailor's title to the goods, above, para.35-015.
- 128 *The Pioneer Container*, above, at 342 (at 340–341, the Privy Council overruled *Johnson Matthey & Co Ltd v Constantine Terminals Ltd* [1976] 2 Lloyd's Rep. 215). On the sub-bailee's knowledge, see *Palmer and Murdoch* (1983) 46 M.L.R. 73; also *Carnegie, 3 Adelaide L.R. 7* (1967).
- 129 Although the original bailor seems to have assumed the onus of proving this in *Moukataff v BOAC*, above, at 416.
- 130 *Learoyd Bros & Co v Pope & Sons Ltd* [1966] 2 Lloyd's Rep. 142, 149 (“negligence ... attributable to the defendants in their character of bailees”); *Moukataff v BOAC*, above, at 414; *Gilchrist Watt & Sanderson Pty Ltd v York Products Pty Ltd*, above; *The Pioneer*

*Container*, above, at 336–338 (“... if the sub-bailment is for reward, the obligation owed by the sub-bailee to the owner must likewise be that of a bailee for reward, notwithstanding that the reward is payable not by the owner but by the bailee” (at 338)).

- 131 *James Buchanan & Co Ltd v Hay's Transport Services Ltd* [1972] 2 *Lloyd's Rep.* 535; *Homburg Houtimport BV v Agrosin Private Ltd (The Starsin)* [2003] UKHL 12, [2004] 1 A.C. 705 at [136]. See also below, para.35-049.
- 132 *Nippon Yusen Kaisha v International Import and Export Co Ltd* [1978] 1 *Lloyd's Rep.* 206. See below, para.35-050. cf. *Thomas National Transport Ltd v May & Baker Ltd* [1966] 2 *Lloyd's Rep.* 347, 352, 365.
- 133 *Morris v CW Martin & Sons Ltd*, above; *Moukataff v BOAC*, above, at 414.
- 134 See below, paras 35-044 et seq.
- 135 *Hall v NE Ry* (1875) L.R. 10 Q.B. 437; *Barratt v GN Ry* (1904) 20 T.L.R. 175. (The bailee might also be treated as the agent of the sub-bailee for the purpose of making a contract with the bailor.) cf. *New Zealand Shipping Co Ltd v AM Satterthwaite & Co Ltd* [1975] A.C. 154; *Port Jackson Stevedoring Pty Ltd v Salmond and Spraggon (Australia) Pty Ltd* [1981] 1 W.L.R. 138. cf. also *Junior Books Ltd v Veitchi Co Ltd* [1983] 1 A.C. 520, 546; *Leigh and Sillavan Ltd v Aliakmon Shipping Co Ltd* [1986] A.C. 785, 817 (in this case there was no bailment between the plaintiff and the defendant). Different principles apply when the sub-bailee seeks to take advantage of the terms of the head bailment. In such a case the ability of the sub-bailee to invoke the terms depends upon the scope of the agreement between the bailor and the sub-bailee, entered into by the bailee as agent for the sub-bailee: see *The Mahkutai* [1996] A.C. 650. The fact that there is a Himalaya clause in the contract between the goods owner and the bailee does not, however, oust the sub-bailee's right to rely upon the terms of the sub-bailment: *Homburg Houtimport BV v Agrosin Private Ltd (The Starsin)* [2003] UKHL 12, [2004] 1 A.C. 705 at [136].
- 136 *Midland Silicones Ltd v Scruttons Ltd* [1962] A.C. 446. (But cf. the *New Zealand Shipping* case, above; the *Port Jackson* case, see above). The bailee has often been held to have made the contract of sub-bailment as principal: *L Harris (Harella) Ltd v Continental Express Ltd* [1961] 1 *Lloyd's Rep.* 251, 259; *Learoyd Bros & Co v Pope & Sons Ltd* [1966] 2 *Lloyd's Rep.* 142; *Lee Cooper Ltd v CH Jeakins & Sons Ltd* [1967] 2 Q.B. 1; *Moukataff v BOAC* [1967] 1 *Lloyd's Rep.* 396, 416–418.
- 137 On the effect of the Unfair Contract Terms Act 1977, see *Palmer* (1978) 128 New L.J. 887, 915.
- 138 See above, para.35-026.
- 139 *The Pioneer Container* [1994] 2 A.C. 324, 341, discussed in more detail by *Palmer and Merkin* [1994] All E.R. Annual Review 28–35; and *Phang* (1995) 58 M.L.R. 422. For earlier authority, see *Morris v CW Martin & Sons Ltd*, above, at 729–730 (cf. at 731, 741); *Singer Co (UK) v Tees and Hartlepool Port Authority* [1988] 2 *Lloyd's Rep.* 164; *Hispanica de Petroleos SA v Veucedora Oceanic Navegacion SA* [1987] 2 *Lloyd's Rep.* 321, 336, 340; *Compania Portorafiti Commerciale SA v Ultramar Panama Inc (The Captain Gregos) (No.2)* [1990] 2 *Lloyd's Rep.* 395; *Mitsui & Co Ltd v Novorossiysk Shipping Co (The Gudermes)* [1993] 1 *Lloyd's Rep.* 311, 327–328; *Spectra International Plc v Hayesoak Ltd* [1997] 1 *Lloyd's Rep.* 153, 155; *Palmer and Murdoch* (1983) 46 M.L.R. 73. The court may, in its

- discretion, stay the bailor's action against the sub-bailee, if it is brought in breach of the contract with the bailee: *Nippon Yusen Kaisha v International Import and Export Co Ltd [1978] 1 Lloyd's Rep. 206*.
- 140 *The Pioneer Container*, above, at 342 (the original bailor, the owner of the goods, was bound by an "exclusive jurisdiction" clause in the contract between the bailee and the sub-bailee). *Homburg Houtimport BV v Agrosin Private Ltd (The Starsin) [2003] UKHL 12, [2004] 1 A.C. 705* at [136]; *East West Corp v DKBS 1912 and Akts Svendborg [2003] EWCA Civ 83, [2003] 1 Lloyd's Rep. 239* at [24].
- 141 *Jarl Tra Ab v Convoys Ltd [2003] EWHC 1488 (Comm), [2003] 2 Lloyd's Rep. 459.*
- 142 *Sandeman Coprimar SA v Transitos y Transportes Integrales SL [2003] EWCA Civ 113, [2003] Q.B. 1270* at [62]. See also Palmer at para.23-038.
- 143 *Fairline Shipping Corp v Adamson [1975] Q.B. 180, 190–191.*
- 144 Palmer at Ch.25. Arguments which would have extended the scope of attornment were rejected by the Privy Council in *Re Goldcorp Exchange [1995] 1 A.C. 74.*
- 145 For attornment to operate, the chattel must be specific, e.g. a specific appropriation may be necessary: *Unwin v Adams (1858) 1 F. & F. 312*; *Laurie and Morewood v Dudin & Sons [1926] 1 K.B. 223*. cf. *Re London Wine Co (Shippers) Ltd [1986] P.C.C. 121.*
- 146 If the bailee agrees to attorn before the chattel comes into his possession, the attornment will take effect as soon as the chattel does come into his possession: *Holl v Griffin (1833) 10 Bing. 246, 248.*
- 147 *Gosling v Birnie (1831) 7 Bing. 337*; *Laurie and Morewood v Dudin & Sons*, above (receipt, but not "acceptance", of the delivery order). cf. below, paras 35-123, 46-254.
- 148 cf. *Re Savoy Estate Ltd [1949] Ch. 622.*
- 149 *Henderson & Co v Williams [1895] 1 Q.B. 521*; *Dublin City Distillery Ltd v Doherty [1914] A.C. 823, 847–848*. cf. below, para.35-058. The bailee apparently holds the chattel on the same terms as under the original bailment: *Leigh and Sillavan v Aliakmon Shipping Co Ltd [1986] A.C. 785, 812*; *Compania Portorafiti Commerciale SA v Ultramar Panama Inc (The Captain Gregos) (No.2) [1990] 2 Lloyd's Rep. 395, 404–405*; *Mitsui & Co Ltd v Novorossiysk Shipping Co (The Gudermes) [1993] 1 Lloyd's Rep. 311, 324*. The claimant may be bound by an exemption clause in the contract between the bailee and the original bailor, if the claimant is treated as an assignee of the benefit of this contract: *HMF Humphrey Ltd v Baxter, Hoare & Co Ltd (1933) 149 L.T. 603*; *Britain & Overseas Trading (Bristles) Ltd v Brooks Wharf & Bull Wharf Ltd [1967] 2 Lloyd's Rep. 51, 60.*
- 150 See above, paras 35-015—35-017.
- 151 *Alicia Hosiery Ltd v Brown Shipley & Co Ltd [1970] 1 Q.B. 195.*
- 152 *Morgans v Launchbury [1973] A.C. 127*; *Smith v Bailey [1891] 2 Q.B. 403*; *Britt v Galmoye and Nevill (1928) 44 T.L.R. 294*; *Hewitt v Bonvin [1940] 1 K.B. 188*; *Klein v Caluori [1971] 1 W.L.R. 619*. See Atiyah, Vicarious Liability (1967), Ch.13.
- 153 *Sampson v Aitchison [1912] A.C. 844*; *Pratt v Patrick [1924] 1 K.B. 488*; *Ormrod v Crosville Motor Services Ltd [1953] 1 W.L.R. 1120*. cf. *Morgans v Launchbury*, above.

## **(a) - Deposit**

**Chitty on Contracts 34th Ed.**

**Consolidated Mainwork Incorporating First Supplement**

**Volume II - Specific Contracts**

**Chapter 35 - Bailment**

**Section 3. - Gratuitous Bailment**

### **(a) - Deposit**

#### **Deposit <sup>154</sup>**

- 35-032 Deposit is the bailment of a chattel to be kept by the bailee without reward<sup>155</sup> and to be returned upon demand to the bailor or his nominee.<sup>156</sup> The obligation of the gratuitous bailee arises only upon actual delivery of the chattel to him and his acceptance of the deposit<sup>157</sup>; he then must take reasonable care of the chattel, and the standard of care required of him will depend on all the circumstances of the particular case.<sup>158</sup> The onus of proof is on the bailee to show that he was not negligent in his care of the chattel.<sup>159</sup> The fact that the bailment is gratuitous is one of the circumstances affecting the standard of care required of the bailee<sup>160</sup>; other relevant circumstances would include the nature and value of the chattel,<sup>161</sup> and the manner in which the bailee keeps his own chattels<sup>162</sup>; but he cannot show that he took reasonable care of the chattel merely by showing that he kept the goods deposited with him in the same manner as he kept his own.<sup>163</sup> The liability of the gratuitous bailee is probably best classified as *sui generis* and it should not be assumed that it follows from the fact that the bailment is not contractual that the liability of the gratuitous bailee must lie in tort.<sup>164</sup> Indeed, where the gratuitous bailee has extended, and broken, a particular promise to his bailor, the measure of damages "may be more akin to that referable to breach of contract rather than to tort".<sup>165</sup>

#### **Expenses**

- 35-033

The House of Lords has held that if the gratuitous bailee fulfils his duty of care, he has a correlative right to charge the bailor with the expenses reasonably incurred by him in doing so.<sup>166</sup>

## Use of the chattel by the bailee

- 35-034 A gratuitous bailee is not permitted to use the chattel bailed for his own personal advantage in any way at all (without the express or implied consent of the bailor) unless such use is necessary for its preservation<sup>167</sup>; if he wrongfully makes use of the chattel he will be responsible for any loss or injury resulting from the use unless he can show that the loss or damage did not arise from his breach of duty.<sup>168</sup> If the bailee's act is wholly inconsistent with his obligations as bailee, as where the bailee, in the absence of any emergency or necessity, sells the chattel,<sup>169</sup> the bailment is terminated forthwith and the right to immediate possession reverts to the bailor, who may sue the bailee for conversion.<sup>170</sup>

## Deposits with bankers

- 35-035 Where a customer deposits valuables or securities with a banker for safe custody and the banker makes no special charge, the bailment has sometimes been held to be gratuitous<sup>171</sup> and sometimes for reward.<sup>172</sup> It is submitted that the latter is the better opinion: it is based on the view that the banker might indirectly benefit from the bailment, in that it induces the customer to continue to keep his account with the banker.<sup>173</sup> It has been held, even on the basis that the bankers are gratuitous bailees, that where valuables or securities in a locked box or sealed parcel are deposited for safe custody with the bankers, they have no right to open the box or parcel, and its contents are not subject to any lien for previous or subsequent debts of the customer.<sup>174</sup>

## Footnotes

154 Palmer at Ch.10; also (1978) 128 *New L.J.* 791.

155 cf. Custody, below, para.35-049. Since there is no consideration in deposit, it is an instance of bailment without a contract. A bailment may be for reward, although no consideration moves from the bailor: *Andrews v Home Flats Ltd* [1945] 2 All E.R. 698. cf. *Oliver v Sadler & Co* [1929] A.C. 584, 596; *Collett v National Fur Co* (1945) 78 *L.I.L. Rep.* 1. As to the efforts of the courts to "invent" consideration so as to find a contract of bailment, see Vol.I, paras 6-210—6-213.

- 156 If a gratuitous bailee fails to return the goods on demand, he may become an insurer and hold them at his peril: *Mitchell v Ealing London BC [1979] Q.B. 1*. (See *Palmer (1978) 128 New L.J. 791*.) It is not, however, necessary for the bailor expressly to reserve a right to require that the chattel ultimately be restored to his own possession or to his order, provided that it is established that what was intended was a bailment and not a donation: *Yearworth v North Bristol NHS Trust [2009] EWCA Civ 37, [2010] Q.B. 1* at [48].
- 157 e.g. *Blount v War Office [1953] 1 W.L.R. 736*.
- 158 *Houghland v RR Low (Luxury Coaches) Ltd [1962] 1 Q.B. 694* (above, para.35-008); *Graham v Voigt (1989) 89 A.L.R. 11*; *Sutcliffe v Chief Constable of West Yorkshire [1996] R.T.R. 86*; *City Television v Conference and Training Office Ltd [2001] EWCA Civ 1770*; *Grocott v Khan [2002] EWCA Civ 1945, [2003] R.T.R. 22* at [23]. But see the House of Lords in *China Pacific SA v Food Corp of India [1982] A.C. 939* at 960, where (obiter) the older formulation of the test was referred to, viz that the bailee in gratuitous deposit must show that degree of diligence which men of common prudence generally exercise about their own affairs or would take for the preservation of their own property; *Giblin v McMullen (1869) 2 P.C. 317, 337–338*; *Bullen v Swan Electric Engraving Co (1907) 23 T.L.R. 258*; *Blount v War Office*, above, at 739. But the line between the two standards is very fine: *Port Swettenham Authority v TW Wu and Co (M) Sdn Bhd [1979] A.C. 580, 589*. See also Palmer at paras 10-005—10-021; Paton at pp.101–110; Story at para.62; *Coggs v Bernard (1703) 2 Ld. Raym. 909, 913–915*; *Mytton v Cock (1738) 2 Str. 1099*; *Martin v LCC [1947] K.B. 628, 631*. If a gratuitous bailee holds himself out to the bailor as able to deploy some special skill in relation to the chattel, his duty is to take such care of it as is reasonably to be expected of a person with such skill: *Wilson v Brett (1843) 11 M. & W. 113*; *Yearworth v North Bristol NHS Trust [2009] EWCA Civ 37, [2010] Q.B. 1* at [48].
- 159 *Houghland v RR Low (Luxury Coaches) Ltd*, above; *Port Swettenham Authority v TW Wu and Co (M) Sdn Bhd*, above; *Sutcliffe v Chief Constable of West Yorkshire*, above; *Pennington v De Wan [2017] EWHC 4 (Ch)* at [22]. See also *Coggs v Bernard*, above, at 913–915; *Doorman v Jenkins (1834) 2 A. & E. 256*; *Giblin v McMullen*, above, at 339; *Treffitz v Canelli (1872) L.R. 4 P.C. 277, 284*. And see below, para.35-050.
- 160 Paton at p.110.
- 161 *Sutcliffe v Chief Constable of West Yorkshire*, above; *Grocott v Khan [2002] EWCA Civ 1945, [2003] R.T.R. 22* at [23].
- 162 *Giblin v McMullen*, above, at 339.
- 163 *Giblin v McMullen*, above, at 339; *Coggs v Bernard*, above, at 914, 915. cf. *Doorman v Jenkins*, above. Some old authorities suggest that if the bailor knows that the bailee is a negligent or imprudent man, the latter may be liable only if he fails to take the same care as he usually does for his own chattels of a similar kind: *Coggs v Bernard*, above, at 914–915; *The William (1806) 6 Ch. Rob. 316*.
- 164 *Yearworth v North Bristol NHS Trust [2009] EWCA Civ 37, [2010] Q.B. 1* at [48].
- 165 *Yearworth v North Bristol NHS Trust [2009] EWCA Civ 37, [2010] Q.B. 1* at [48].
- 166 *China Pacific SA v Food Corp of India*, above. (At 964, Lord Simon said that the bailee “incurred reasonable expenses in safeguarding and preserving the goods, to the benefit of the bailor”; in this case, the expenses were storage charges paid by the bailee.) The Supreme

Court has left open the question whether the bailee can recover remuneration in respect of the services rendered: *ENE Kos 1 Ltd v Petroleo Brasileiro SA (No.2) [2012] UKSC 17, [2012] 2 A.C. 164* at [29] and [35]. A similar doubt exists in relation to the recovery of storage charges, as opposed to storage expenses. The former may not be recoverable: *Garside v Black Horse Ltd [2010] EWHC 190 (QB), [2010] All E.R. (D) 98 (Mar)* at [122]. A shipowner in the exercise of his lien for general average contribution may be entitled to recover the costs involved in exercising that lien in terms of the continuing expense of looking after the cargo instead of being able to discharge it: *Metall Market OOO v Vitorio Shipping Co Ltd (The “Lehmann Timber”) [2013] EWCA Civ 650, [2014] Q.B. 760*. However, a right to be reimbursed will not arise in every case: *Tongue v Royal Society for the Prevention of Cruelty to Animals [2017] EWHC 2508 (Ch), [2018] B.P.I.R. 229* at [78]–[84] (where the relationship between the parties was not commercial and it was held not to be apparent to the alleged bailor that the bailee who was a charity would seek to charge for the services that it had provided).

- 167 Bac.Abr. Bailment A. cf. *Re Tidd [1893] 3 Ch. 154*.
- 168 *Lilley v Doubleday (1881) 7 Q.B.D. 510, 511*. cf. *Coldman v Hill [1919] 1 K.B. 443*.
- 169 *Sachs v Miklos [1948] 2 K.B. 23, 36; Munro v Willmott [1949] 1 K.B. 295*.
- 170 *Fenn v Bittleston (1851) 7 Ex. 152, 159; North General Wagon and Finance Co Ltd v Graham [1950] 2 K.B. 7, 15*. See above, para.35-014.
- 171 *Giblin v McMullen (1869) L.R. 2 P.C. 317* (which was, however, “gravely doubted” by the Privy Council in *Port Swettenham Authority v TW Wu and Co (M) Sdn Bhd [1979] A.C. 580, 589*); *Bullen v Swan Electric Engraving Co (1906) 22 T.L.R. 275; affirmed (1907) 23 T.L.R. 258*.
- 172 *Re United Service Co (1870) L.R. 6 Ch. App. 212*. See below, paras 36-449—36-451; and Paget’s Law of Banking, 15th edn (2018), para.7.2.
- 173 *Bullen v Swan Electric Engraving Co*, above, at 277 (affirmed; above); the *Port Swettenham* case, above, at 589. It has even been contended that the mere entrusting with the property is sufficient consideration: see *Banbury v Bank of Montreal [1917] 1 K.B. 409, 439; affirmed [1918] A.C. 626*.
- 174 *Leese v Martin (1873) L.R. 17 Eq. 224* (following *Branda v Barnett (1846) 12 Cl. & F. 787*); *R. v Robson (1861) 31 L.J.M.C. 22*. On a banker’s lien, see below, paras 36-557—36-560.

## (b) - Involuntary Bailees

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### (b) - Involuntary Bailees

#### Involuntary bailees <sup>175</sup>

- 35-036 Normally, “a man cannot without his knowledge and consent be considered as a bailee of property ...”,<sup>176</sup> but circumstances may arise where a person finds that, without any consent on his part, he has another’s chattel in his control or on his premises.<sup>177</sup> The legal position of an involuntary bailee is by no means clear, but the balance of authority suggests that, although gross negligence or deliberate injury will make him liable,<sup>178</sup> mere negligence will not.<sup>179</sup> Thus, where an author sent a manuscript of a play to the defendant (the lessee of a theatre) who lost it, it was held that no duty of any kind was imposed on the defendant by receipt of something he had not asked for.<sup>180</sup> The ruling has, however, been questioned<sup>181</sup> in another case,<sup>182</sup> where a customer accidentally left her brooch behind in the defendants’ shop, and it was handed by an assistant to a shopwalker, who put it in his desk instead of taking it to the lost property office; the brooch was then stolen from the desk, and the defendants were held liable because they had not exercised reasonable care. There was in this case, however, some assumption of control over the brooch by the defendants’ employee.<sup>183</sup> In a further case,<sup>184</sup> the judge held that, “If persons were involuntary bailees *and had done everything reasonable* they were not liable to pay damages if something which they did resulted in the loss of the property”.<sup>185</sup> Where an involuntary bailee wrote to the bailor saying that he was no longer willing to hold the goods and wanted them removed but the bailor did nothing even after receiving a second letter which stated that the goods would be sold unless removed, the court may infer that the bailor impliedly consented to the sale.<sup>186</sup> But this view is not without difficulty because of the principle, applicable at least to the analogous situation of offer and acceptance, that silence is not consent.<sup>187</sup> The involuntary bailee may now, however, be able to avail himself of the wide powers of sale conferred by ss.12 and 13 of the Torts (Interference with Goods) Act 1977.<sup>188</sup> The duty of

an involuntary bailee in possession of goods will be enlarged, and he will become responsible for failure to take reasonable care, if he spontaneously and officially proposes to keep the goods<sup>189</sup>; or if he changes his character as gratuitous bailee, by taking charge of the goods for reward.<sup>190</sup>

## Finding

- 35-037 The question whether a person who finds goods is a bailee of them is one which admits of no easy answer. It has been argued that “cases in finding give rise to a bailment, at least to the extent that the finder owes substantially the same common law duties in relation to the chattel as an ordinary consensual bailee”.<sup>191</sup> While dicta can be found to support this proposition,<sup>192</sup> there are also dicta which are hostile to the equation of finding and bailment.<sup>193</sup> The equation of finding and bailment is acceptable provided that it is accepted that bailment rules cannot be translated wholesale into the law of finding.<sup>194</sup> The law on finding should be sought elsewhere.<sup>195</sup>

## Unsolicited goods

- 35-038 The [Unsolicited Goods and Services Act 1971](#) was passed to deal with the problem of goods being delivered or sent by post to recipients who did not order them, but might be subjected by the sender to some pressure to pay for them. The Act has since been supplemented by [reg.27M of the Consumer Protection from Unfair Trading Regulations 2008](#)<sup>196</sup> as amended by the [Consumer Contracts \(Information, Cancellation and Additional Charges\) Regulations 2013](#).<sup>197</sup>

## Inertia selling

- 35-039 It is an unfair commercial practice for a trader to demand immediate or deferred payment for or the return or safekeeping of products supplied by the trader, but not solicited by the consumer.<sup>198</sup> In such a case the consumer is exempted from any obligation to provide consideration for the product supplied by the trader<sup>199</sup> and the absence of a response from the consumer following the supply does not constitute consent to the provision of consideration for, or the return or safekeeping of, the products.<sup>200</sup> Further, in the case of an unsolicited supply of goods, the consumer may, as between the consumer and the trader, use, deal with or dispose of the goods as if they were an unconditional gift to the consumer.<sup>201</sup>

## Footnotes

- 175 Palmer at Ch.13 (also in (1978) *128 New L.J.* 763). Bailment may arise without the bailor having consented to the bailee having possession of the goods: *The Pioneer Container [1994] 2 A.C. 324, 341–342* (above, para.35-026).
- 176 Winfield, Province of the Law of Tort, p.100. See *Lethbridge v Phillips (1819) 2 Stark. 544; Neuwith v Over Darwen Industrial Co-operative Society (1894) 63 L.J. Q.B. 290*. cf. *R. v Ashwell (1885) 16 Q.B.D. 190*. In the case of sub-bailment, the Privy Council said that “They incline to the opinion that a sub-bailee can only be said for these purposes to have voluntarily taken into his possession the goods of another if he has sufficient notice that a person other than the bailee is interested in the goods …”: *The Pioneer Container*, above, at 342.
- 177 e.g. carriers may become involuntary bailees when the goods are not accepted at the consignee’s address: *Heugh v LNW Ry (1870) L.R. 5 Ex. 51* (at 56, Kelly C.B. apparently approved of the practice of the carrier to charge the consignee with the cost of keeping the goods thereafter).
- 178 *Hiort v Bott (1874) L.R. 9 Ex. 86, 90* (obiter, since this was a case of conversion and the defendant did not acquire possession of the goods).
- 179 Paton at pp.113–117; Palmer at paras 13-005—13-021; Winfield and Jolowicz on Tort, 20th edn (2020) paras 18-017—18-018. But see *Houghland v RR Low (Luxury Coaches) Ltd [1962] 1 Q.B. 694, 698* (see above, para.35-008). See also *Burnett (1960) 76 L.Q.R. 364; Tay (1966) 5 Sydney L.Rev. 239*.
- 180 *Howard v Harris (1884) Cab. & El. 253*.
- 181 cf. *Summer v Challenor (1926) 70 S.J. 760*, where an actor wrote acknowledging and promising to read a play and was held liable for its safe custody.
- 182 *Newman v Bourne & Hollingsworth (1915) 31 T.L.R. 209*.
- 183 *Gilchrist Watt and Sanderson Pty Ltd v York Products Pty Ltd [1970] 1 W.L.R. 1262, 1268* (“the taking of possession in the circumstances involves an assumption of responsibility for the safe keeping of the goods”).
- 184 *Elvin & Powell Ltd v Plummer Roddis Ltd (1933) 50 T.L.R. 158*. cf. *Hiort v Bott (1874) L.R. 9 Ex. 86*.
- 185 (1933) 50 T.L.R.158 at 159 (emphasis added); *Scotland v Solomon [2002] EWHC 1886 (Ch); Da Rocha-Afodu v Mortgage Express Ltd [2014] EWCA Civ 454, [2014] All E.R. (D) 212 (Mar); Campbell v Redstone Mortgages Ltd [2014] EWHC 3081 (Ch), [2014] All E.R. (D) 193 (Oct)*.
- 186 *Sachs v Miklos [1948] 2 K.B. 23, 37*.
- 187 *Sachs v Miklos*, above.
- 188 See below, paras 35-095—35-100. Since there is no definition of “bailment” or “bailee” in the Act, it is not clear whether involuntary bailees are included.
- 189 Jones at p.48; see also *Nelson v Macintosh (1816) 1 Stark. 237*.
- 190 Jones at p.49.

- 191 Palmer at para.1-037.
- 192 See, for example, *Morris v CW Martin & Sons Ltd [1966] 1 Q.B. 716, 731–732*; and *Gilchrist Watt and Sanderson Pty Ltd v York Products Pty Ltd [1970] 3 All E.R. 825, 831–832*.
- 193 See, e.g. *Newman v Bourne and Hollingsworth Ltd (1915) 31 T.L.R. 209*.
- 194 An obvious example is that the rule that the bailee is estopped from denying his bailor's title cannot apply to cases of finding.
- 195 Pollock and Wright, Possession in the Common Law, pp.171–187; Palmer at Ch.26; Paton at pp.118–129. See *Parker v British Airways Board [1982] Q.B. 1004*; *Waverley BC v Fletcher [1996] Q.B. 334*. See also the Report of the Law Reform Committee on Conversion and Detinue, Cmnd.4774 (1971), App.I.
- 196 SI 2008/1277.
- 197 SI 2013/3134 Pt 4. The 2008 Regulations (in Pt 2) superseded the Consumer Protection (Distance Selling) Regulations 2000 (SI 2000/2334) reg.24 of which dealt with inertia selling and made more complete provision than that to be found in the current Regulations.
- 198 Consumer Protection from Unfair Trading Regulations 2008 (SI 2008/1277) Sch.1 para.29.
- 199 SI 2008/1277 reg.27M(2).
- 200 SI 2008/1277 reg.27M(3).
- 201 SI 2008/1277 reg.27M(4).

## **(c) - Mandate**

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**(c) - Mandate**

### **Mandate**

- 35-040 Mandate is the bailment of a specific chattel in respect of which the bailee undertakes to perform a gratuitous act.<sup>202</sup> In deposit the main object is the safe custody of the chattel, whereas in mandate it is some service or labour to be performed by the bailee in connection with the chattel.<sup>203</sup> As in gratuitous deposit, above, the bailor derives an advantage from the gratuitous exertions of the bailee; but despite the absence of reward to the bailee, he must take reasonable care of the chattel according to the circumstances of the case, once he begins his task.<sup>204</sup> In the older cases, the absence of reward led the courts to hold that the mandatary was only bound to exercise ordinary diligence, and was not liable unless gross negligence, breach of orders, or fraud was proved against him.<sup>205</sup> In the present law, the fact that the bailment is gratuitous is only one of the relevant circumstances affecting the standard of care required of the mandatary.<sup>206</sup> Similarly, if the situation or profession of the gratuitous mandatary implies<sup>207</sup> special skill in the task he undertakes, his omission to employ that skill will be treated as negligence on his part.<sup>208</sup> The mandatary is liable to the bailor for the loss of, or damage to, the chattel bailed, arising from any breach of the mandatary's duty. He is, however, entitled to be reimbursed by the bailor in respect of his expenses incurred in executing the mandate.<sup>209</sup> If the mandatary does some act to or with the chattel which is unauthorised by the terms of the bailment, he is responsible for any resulting loss or damage.<sup>210</sup> If the bailor refuses or neglects to take redelivery of the chattel, the mandatary will be able to avail himself of statutory powers of sale.<sup>211</sup>

## Footnotes

- 202 Palmer at Ch.11; Story on Bailments, 9th edn, para.137.
- 203 *Coggs v Bernard (1703) 2 Ld. Raym. 909, 918.*
- 204 *Houghland v RR Low (Luxury Coaches) Ltd [1962] 1 Q.B. 694, 698.* The standard of care is to be judged objectively: above, para.35-008.
- 205 Jones on Bailments, p.120; *Mytton v Cock (1738) 2 Str. 1099; Shiells v Blackburne (1789) 1 H. Bl. 158; Dartnall v Howard (1825) 4 B. & C. 345, 350; Doorman v Jenkins (1834) 2 A. & E. 256; Parry v Roberts (1835) 3 A. & E. 118.* See also *Moffat v Bateman (1869) L.R. 3 P.C. 115, 122* (a case on gratuitous carriage of a person, which is criticised by Paton at pp.140–144).
- 206 cf. *Southcote's Case (1600) 4 Co. Rep. 83b; Beauchamp v Powley (1831) 1 Moo. & R. 38;* but see *Copland v Brogan, 1916 S.C. 277.*
- 207 The same position would hold where the mandatary represents to the bailor that he possesses particular skill or experience, and the bailor reasonably relies on that representation: *Chaudhry v Prabhakar [1989] 1 W.L.R. 29,* an analogous case of gratuitous agency.
- 208 *Shiells v Blackburne*, above, at 162; *Wilson v Brett (1843) 11 M. & W. 113; O'Hanlon v Murray (1860) 12 Ir.C.L.R. 161; Fish v Kelly (1864) 17 C.B. N.S. 194, 206;* Story at para.182a. cf. *Harmer v Cornelius (1858) 5 C.B. N.S. 236; Banbury v Bank of Montreal [1918] A.C. 626, 657.*
- 209 Story at para.154. cf. the analogous case of gratuitous deposit: see above, para.35-032. cf. Vol.I, paras 32-129 et seq.
- 210 *Nelson v Macintosh (1816) 1 Stark. 237; Miles v Cattle (1830) 4 Moo. & P. 630.*
- 211 Torts (Interference with Goods) Act 1977 ss.12 and 13 (see below, paras 35-095—35-100). But as there is no definition of “bailment” or “bailee” in the Act, it is not certain that the mandatary is included.

## **(d) - Gratuitous Loan for Use**

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**(d) - Gratuitous Loan for Use**

### **Obligations of the borrower <sup>212</sup>**

- 35-041 A gratuitous <sup>213</sup> bailment where the benefit is conferred upon the bailee arises when a chattel is bailed to be used by the bailee without charge, and without any advantage to the bailor (commodatum). Since the lender intends the borrower to use the chattel, the borrower is not liable for reasonable wear and tear. <sup>214</sup> But he is liable for negligence, <sup>215</sup> for fraud, for misuse and for his failure to exercise reasonable skill in using the chattel. <sup>216</sup> The standard of care required of the borrower will depend upon all the circumstances, including the nature of the chattel, and the occupation of the borrower; but since the bailment is gratuitous, the standard will usually be a high one (exactissima diligentia of Roman law). If the borrower represents to the lender that he possesses a particular skill in regard to the use of the chattel, and the lender reasonably relies on that representation, the borrower will be held to that standard. <sup>217</sup> The borrower, in the absence of agreement, must bear any usual or ordinary expense arising from his use of the chattel. <sup>218</sup> The borrower must also return the chattel to the lender at the appointed time and place: if the lender refuses or neglects to take redelivery, the borrower will be entitled to avail himself of statutory powers of sale. <sup>219</sup>

### **Limits upon the borrower's right to use the chattel**

- 35-042 The borrower has no right to deviate from the conditions of the loan, and if the goods are used for a materially different purpose he becomes an insurer, liable for any loss of or injury to the chattel. <sup>220</sup> Thus, if a horse is lent to a person to ride, this will not entitle him to allow the horse to be ridden

by his employee<sup>221</sup>; for the borrower has no right, without the consent of the lender, to lend the goods to a third person, since the lender grants a purely personal permission to the borrower. If the borrower lends the chattel to a third person, without the consent of the lender, the bailment is determined, and the borrower is liable for any loss suffered by the lender.<sup>222</sup> However, delegation may be permitted where in the ordinary course of business the custody would naturally devolve upon, or the act be performed by, some employee or agent of the bailee, and in such a case the bailee is not liable if loss or damage to the chattel occurs during the period of delegation, without any negligence on the part of his substitute.<sup>223</sup> For instance, where a horse was for sale and the vendor allowed the defendant to have the horse in order to try it, the defendant was entitled to allow a competent person to ride the horse for that purpose.<sup>224</sup>

## Liability of the lender

<sup>35-043</sup> If the lender knows<sup>225</sup> of defects in the chattel which are not apparent to the borrower and which make it unfit for the borrower's purpose, he is under a duty to inform the borrower of the defects; if he fails to do so, and the borrower suffers injury through such defects, the lender is liable.<sup>226</sup> Thus, if the chattel has not been used for years, and is out of repair, a warning ought to be given to the borrower.<sup>227</sup>

## Footnotes

<sup>212</sup> Palmer at Ch.12.

<sup>213</sup> See above, para.35-032.

<sup>214</sup> *Blakemore v Bristol and Exeter Ry* (1858) 8 El. & Bl. 1035, 1050. See also *Pomfret v Ricroft* (1669) 1 Saund. 321, 323; *Coggs v Bernard* (1704) 2 Ld. Raym. 909, 915; *Vaughan v Menlove* (1837) 3 Bing.N.C. 468, 475; Jones at pp.50, 65.

<sup>215</sup> *Houghland v RR Low (Luxury Coaches) Ltd* [1962] 1 Q.B. 694, 698 (above, para.35-008). The standard to be applied to the borrower is objective, depending on all the circumstances: *Chaudhry v Prabhakar* [1989] 1 W.L.R. 29 (the analogous situation of gratuitous agency).

<sup>216</sup> See *Blakemore v Bristol and Exeter Ry* (1858) 8 El. & Bl. 1035, 1050; *Pomfret v Ricroft* (1669) 1 Saund. 321, 323; *Coggs v Bernard* (1704) 2 Ld. Raym. 909, 915; *Vaughan v Menlove* (1837) 3 Bing.N.C. 468, 475; also Palmer at paras 12-022 et seq.

<sup>217</sup> *Chaudhry v Prabhakar*, above.

<sup>218</sup> *Handford v Palmer* (1820) 2 Brod. & Bing. 359. (cf. below, para.35-082.) The legal position is doubtful when extraordinary expense, arising from circumstances beyond the borrower's control, is incurred to preserve the chattel: Story at paras 273–274. See also Vol.I, para.32-147.

- 219 Torts (Interference with Goods) Act 1977 ss.12 and 13 (see below, paras 35-095—35-100). But the absence of a definition of “bailment” or “bailee” in the Act means that it is not certain that a borrower is included.
- 220 *Coggs v Bernard*, above, at 915; *Wilson v Shepherd*, 1913 S.C. 300.
- 221 *Bringloe v Morrice* (1676) 1 Mod. 210. cf. *Ballett v Mingay* [1943] K.B. 281 (minor borrower); *Gwilliam v Twist* [1895] 2 Q.B. 84.
- 222 *Bringloe v Morrice* (1676) 1 Mod. 210.
- 223 *Camoys v Scurr* (1840) 9 Car. & P. 383; Story at para.234. cf. above, paras 35-026—35-029.
- 224 *Camoys v Scurr*, above.
- 225 If the lender is unaware of the defect, he is not liable: *MacCarthy v Young* (1861) 6 H. & N. 329; *Coughlin v Gillison* [1899] 1 Q.B. 145. cf. *Longmeid v Holliday* (1851) 6 Ex. 761, 767–768. However, since *Donoghue v Stevenson* [1932] A.C. 562, the lender may now be liable in negligence: see *Hawkins v Coulsdon and Purley UDC* [1954] 1 Q.B. 319, 333; Clerk & Lindsell on Torts, 23rd edn (2020), para.11-09; *Marsh* (1950) 66 L.Q.R. 39.
- 226 *Coughlin v Gillison*, above, at 147, approving *Blakemore v Bristol and Exeter Ry* (1858) 8 El. & Bl. 1035, 1051 (crane); *MacCarthy v Young*, above. For an extension of the principle, see *Oliver v Saddler & Co* [1929] A.C. 584, 596. The lender is not liable to a third person injured through the borrower’s negligence in using the chattel: *Hewitt v Bonvin* [1940] 1 K.B. 188 (approved in *Launchbury v Morgans* [1973] A.C. 127); *Norwood v Nevan* [1981] R.T.R. 457. cf. *Ormrod v Crosville Motor Services Ltd* [1953] 1 W.L.R. 1120.
- 227 *Coughlin v Gillison*, above, at 148.

## (a) - The Supply of Services: Statutory Provisions

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 35 - Bailment

Section 4. - Bailments for Valuable Consideration

### (a) - The Supply of Services: Statutory Provisions

## The Supply of Goods and Services Act 1982

- 35-044 This Act, by Pt II, codified certain terms<sup>228</sup> implied at common law into contracts<sup>229</sup> for the supply of services.<sup>230</sup> These implied terms are not exhaustive, since Pt II has effect “subject to any other enactment which defines or restricts the rights, duties or liabilities” of the parties.<sup>231</sup> But (subject to the provisions of the Unfair Contract Terms Act 1977)<sup>232</sup> the Act permits the implied terms<sup>233</sup> to be negated or varied by express agreement, by the course of dealing between the parties or by “such usage as binds” them.<sup>234</sup> The term “service” is not defined in the Act.<sup>235</sup> So far as bailment is concerned, it would seem to cover all types of bailments for valuable consideration (where there is a contract).

## The Consumer Rights Act 2015

- 35-045 This Act, by Ch.4 of Pt 1, treats contracts under which a trader<sup>236</sup> agrees to supply a service to a consumer<sup>237</sup> as including a number of terms. These terms are also not exhaustive, since Ch.4 provides that it does not affect “any enactment or rule of law that imposes a stricter duty on the trader”.<sup>238</sup> But the ability of a trader to exclude the operation of these terms is extremely limited.<sup>239</sup> The term “service” is not defined in the Act.<sup>240</sup> As is the case with the Supply of Goods and Services Act 1982, so far as bailment is concerned, Ch.4 would seem to cover all types of bailment between a trader and a consumer for valuable consideration (where there is a contract).

## Standard of workmanship and care of the chattel

- 35-046 Section 13 of the Supply of Goods and Services Act 1982 provides that:

“In a contract for the supply of a service where the supplier is acting in the course of a business,<sup>241</sup> there is an implied term that the supplier<sup>242</sup> will carry out the service with reasonable care and skill.”<sup>243</sup>

The common law decisions before the Act will obviously be relevant in deciding the standard of care and skill to be expected of the bailee/supplier of services. The reference to skill will apply whenever the bailee holds himself out as professing a particular skill or expertise (in which case he will be held to the standard of the reasonably competent member of the class professing that skill or expertise).<sup>244</sup>

## The time for performance

- 35-047 Where the bailee (supplier of a service) acts in the course of a business, s.14(1) of the Supply of Goods and Services Act 1982 provides<sup>245</sup> that where the contract does not fix or stipulate a method for determining the time for performance (and that time cannot be determined by a course of dealing between the parties), there is an implied term that the service will be carried out within a reasonable time; and under s.14(2), what is a reasonable time is a question of fact.<sup>246</sup> Where, however, the bailee’s obligation to perform depends on the cooperation of the bailor, the time implied at common law will be that each party will “use reasonable diligence in performing his part”.<sup>247</sup>

## Price for the service

- 35-048 Under s.15(1) of the Supply of Goods and Services Act 1982, where the consideration to be paid by the customer (bailor) is not provided for by the contract (or determined by a course of dealing between the parties) he must pay a reasonable charge<sup>248</sup> (which is “a question of fact”).<sup>249</sup> Where the bailee refuses to return the chattel to the bailor unless he pays a charge which is unreasonably high (not being expressly provided for in the contract), the bailor who pays it under protest in order

to obtain the release of the chattel may have a claim in restitution to recover the excess above a reasonable charge.<sup>250</sup>

## Footnotes

- 228 The Act leaves it to the common law to determine the status of these “terms”, viz whether the remedy includes termination of the contract: see Vol.I, paras 27-013 et seq.
- 229 It is a contract “whatever is the nature of the consideration ...” (s.12(3)). Sch.1 para.38 of the Consumer Rights Act 2015 inserts the word “relevant” before the words “contract for the supply of a service” in the Supply of Goods and Services Act 1982. Sch.1 para.51 further amends s.12(1) of the 1982 Act by providing that a contract to which Ch.4 of Pt 1 of the Consumer Rights Act 2015 applies shall not fall within the scope of the 1982 Act. Thus a contract under which a trader agrees to supply a service to a consumer will, if the contract was made on or after 1 October 2015, be governed by the 2015 Act and not the 1982 Act.
- 230 A review of the Act and its operation is found in the Law Commission’s Report on Implied Terms in Contracts for the Supply of Services (1986) Law Com. No.156. See also Palmer (1983) 46 M.L.R. 619, 627–631; Woodroffe, Goods and Services—The New Law (1982), Chs 6, 7. In the case of a contract for a trader to supply a service to a consumer (as defined in the Consumer Rights Act 2015, on which see below, paras 40-467 et seq.), the statutory rights of the consumer and the remedies available to the consumer are to be found in ss.48–57 of the Act.
- 231 s.16(4). By s.16(3)(b), other terms not inconsistent with Pt II of the Act may continue to be implied into such contracts.
- 232 See below, paras 35-054, 35-078.
- 233 Those implied by ss.13 to 15 (below).
- 234 s.16(1). On exclusion of liability, below, paras 35-053—35-054. Pt II of the Law Commission report on Implied Terms in Contracts for the Supply of Services (1986) Law Com. No.156 reviews the power of the supplier to exclude his liability towards consumers.
- 235 But a “contract of service or apprenticeship” is excluded (s.12(2)). The Secretary of State is empowered by Order to exempt specified services from any of ss.13–15 (s.12(4)) but no Orders affecting bailments have been made under this power.
- 236 As defined in s.2(1) of the Act.
- 237 As defined in s.2(3) of the Act.
- 238 s.53(1).
- 239 See s.57, on which see further para.40-590.
- 240 But a “contract of employment or apprenticeship” is excluded (s.48(2)). The Secretary of State is empowered by Order to exempt specified services from Ch.4 (s.48(5)).
- 241 Partly defined in s.18(1) as including a profession and the activities of government departments and of local or public authorities. It is submitted that the term “business” would extend to regular, part-time work conducted for profit. On the work of charities, see Law Com. Report No.156 (above), para.2.27.

- 242 s.13 probably does not affect the common law rules as to when the bailee may delegate performance of his duty of care: para.2.25 of Law Com. Report No.156 ( above): cf. *Palmer (1983) 46 M.L.R. 619, 628–629*.
- 243 *Wilson v Best Travel Ltd [1993] 1 All E.R. 353* (duty of care of travel agent in inspecting foreign hotel). This implied term will obviously not prevent the implication of a term (in appropriate cases) that the supplier has undertaken to produce a stated result (which implies strict liability if that result is not produced). See s.16(3)(a) of the Act which preserves any rule of law which imposes on the supplier a duty stricter than that imposed by ss.13 or 14 (below), e.g. innkeepers (below, para.35-103). The equivalent term in a contract between a trader and a consumer to supply a service is to be found in s.49(1) of the Consumer Rights Act 2015.
- 244 The standards generally practised by the class will normally apply, but it is possible for the court to find that such a standard fails to meet the statutory standard.
- 245 See also s.16(3)(a) of the Act which preserves any rule of law which imposes on the supplier a duty stricter than that imposed by s.14.
- 246 The equivalent term in a contract between a trader and a consumer to supply a service is to be found in s.52 of the Consumer Rights Act 2015.
- 247 *Ford v Cotesworth (1868) L.R. 4 Q.B. 127, 134* (not a bailment case).
- 248 This provision (unlike ss.13 and 14, above) is not confined to where the supplier acts in course of a business.
- 249 s.15(2). The equivalent term in a contract between a trader and a consumer to supply a service is to be found in s.51 of the Consumer Rights Act 2015 cf. s.8 of the Sale of Goods Act 1979 (below, para.46-051).
- 250 See Vol.I, paras 32-108 et seq. See also CPR Pt 25 r.25.1(1)(m).

## **(i) - In General**

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**Volume II - Specific Contracts**

**Chapter 35 - Bailment**

**Section 4. - Bailments for Valuable Consideration**

### **(b) - Custody for Reward**

#### **(i) - In General**

#### **Custody for reward <sup>251</sup>**

- 35-049 Where goods are delivered to a bailee to be taken care of by him in return for remuneration to be paid by the bailor, the contract is one of custody for reward.<sup>252</sup> Possession of the chattel must be transferred to the bailee.<sup>253</sup> By s.13 of the Supply of Goods and Services Act 1982<sup>254</sup> (covering bailments where the bailee acts in the course of a business), s.49(1) of the Consumer Rights Act 2015 (covering bailments between a trader and a consumer<sup>255</sup>) and by the common law (applicable to other cases) the bailee must take reasonable care of the chattel, according to the circumstances of the particular case.<sup>256</sup> Thus, the bailee must take reasonable care to see that the place<sup>257</sup> where the chattel is kept is fit for the purpose of custody.<sup>258</sup> But there is no authority “to hold that a depositor of goods for safe custody, who, by himself or his servants, has had an opportunity of observing certain defects in the storehouse, must be taken to have agreed that any risk of injury to his goods which might possibly be occasioned by these defects should be borne by him, and not by his paid bailee ... the duty is incumbent on the latter, in the due fulfilment of his contract, of considering whether his premises can be safely used for the storage of [the goods bailed], and, if they cannot, to take immediate steps for placing the goods in a position of safety”.<sup>259</sup> The bailee must also take reasonable care to protect the chattel against any imminent danger<sup>260</sup>; this may include a duty to take reasonable precautions against arson or vandalism by third parties.<sup>261</sup> He must take all proper measures to protect the bailor’s interests when the chattel is stolen<sup>262</sup> or when claims adverse to the bailor are made to the chattel.<sup>263</sup> The bailee is not, however, an insurer and

he will not be liable (apart from a special obligation undertaken in the contract)<sup>264</sup> where the loss or damage occurred without negligence on his part.<sup>265</sup>

## The onus of proof and the scope of the duty

35-050 The loss of, or injury to, the chattel while in the bailee's possession places the onus of proof on the bailee to show that it was not caused

**U** 266

**U** by any failure on his part to take reasonable care

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**U**; but he need not show exactly how the loss or injury occurred.

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**U** The bailee's duty to take reasonable care may include the duty to prevent damage to the chattel by the deliberate act of a third party.

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**U** If the bailee relies on an exemption clause

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**U** he must prove facts which bring him within the exemption.

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**U** The bailee is liable to the bailor for loss of or injury to the chattel caused by the negligence of the bailee's employees or agents

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**U** acting within the course of their employment or the apparent scope of their authority.

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**U** If the bailee entrusts the performance of his duty to take reasonable care of the chattel to an employee, then the bailee is liable, not only for the employee's negligence which injures the chattel, but also for the employee's fraud or dishonesty in making away with the chattel.

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**U**

## Damages

- 35-051 Where the bailee is liable for loss of the chattel, the bailor can recover as damages the actual value of the chattel, but he can recover further damages for consequential loss only if it was within the reasonable contemplation of the parties at the time the bailment was made.<sup>275</sup> The bailee has an insurable interest in the chattel, and may insure it for its full value.<sup>276</sup>

## Unauthorised dealings

- 35-052 The bailee must deal with the chattel in the manner authorised by the bailor.<sup>277</sup> Thus, the bailee may not delegate the storage to a third person without the bailor's permission, since personal considerations are involved in the bailor's choice of a bailee with whom to store his goods.<sup>278</sup> If the bailee deals with the chattel in an unauthorised manner, he takes upon himself the risk of loss and will be liable unless he shows that the loss occurred independently of his own acts.<sup>279</sup> So where the bailee delivers the chattel to a person not authorised by the bailor to receive it, he is liable in conversion for the misdelivery, and the question of reasonable care is irrelevant.<sup>280</sup>

## Exemptions from liability

- 35-053 Subject to the provisions of the *Unfair Contract Terms Act 1977* and the *Consumer Rights Act 2015*,<sup>281</sup> the bailee may exempt himself from his common law liability by special conditions in the contract,<sup>282</sup> but the exempting words must be express, unambiguous and adequate in all the circumstances<sup>283</sup> since they are likely to be construed strictly against the bailee.<sup>284</sup> Although the scope of an exemption clause is a question of construction, depending on the intention of the parties,<sup>285</sup> the courts will generally be slow to infer that a bailee is entitled to rely on his exemption clause if he deals with the chattel in an unauthorised manner<sup>286</sup> and it will require clear words for an exemption clause to be construed as wide enough to cover a fundamental breach<sup>287</sup> of the contract of bailment<sup>288</sup>; nor can the bailee rely on an exemption clause if he orally misrepresents the scope of the clause at the time when the contract is made.<sup>289</sup> A sub-bailee may rely on exempting conditions as against the original bailor but only if the latter has actually (expressly or impliedly) or ostensibly authorised the bailee to make a sub-bailment containing those conditions.<sup>290</sup>

## Statutory control of exemption clauses

- 35-054 The main provisions of the [Unfair Contract Terms Act 1977](#) apply (inter alia) to contracts of bailment.<sup>291</sup> Thus, where one party is dealing on the other's written standard terms of business the other party cannot, by reference to any contract term,<sup>292</sup> when himself in breach of contract exclude or restrict any business<sup>293</sup> liability of his in respect of breach,<sup>294</sup> or claim to be entitled (inter alia) "to render a contractual performance substantially different from that which was reasonably expected of him, or, in respect of the whole or any part of his contractual obligation, to render no performance at all",<sup>295</sup> except insofar as the term satisfies the requirement of reasonableness.<sup>296</sup> Similarly, a contract term or notice<sup>297</sup> purporting to exclude or restrict business liability for loss or damage to property resulting from negligence must, to be effective, satisfy the requirement of reasonableness.<sup>298</sup> These provisions will therefore apply to the obligations of warehousemen, dry-cleaners and other business custodians for reward. In the case of bailments between a trader and a consumer, the [Consumer Rights Act 2015](#) places substantial limits on the extent to which a trader can exclude liability to consumers in respect of a breach of the terms which the Act states are included in contracts of bailment.<sup>299</sup>

## Lien of custodian

- 35-055 Normally, a custodian for reward has no lien for his charges upon the chattel bailed with him<sup>300</sup> except where there is a special agreement granting him a lien.<sup>301</sup> Special categories of custodians, however, have, by custom, acquired such a lien.<sup>302</sup>

## Statutory power to sell uncollected goods

- 35-056 Since 1977 there has been a wide statutory power conferred on bailees to sell the goods when the bailor is in breach of an obligation to take delivery of them.<sup>303</sup> These powers clearly extend to cases of custody of the goods.<sup>304</sup> The bailee, in appropriate circumstances, may follow the prescribed procedure and sell without the authority of the court<sup>305</sup>; but, in some circumstances, he must (and in others he may) apply to the court to authorise a sale of the goods.<sup>306</sup> The details of these powers are examined later in this chapter.<sup>307</sup>

## Custody without special reward

- 35-057 Custody for reward may arise despite the absence of valuable consideration specifically allocated to the custody. For instance, where the wife of a tenant in a block of flats deposited a trunk in the room provided for storage by the landlords, it was held, notwithstanding that the rent was paid by the husband and that the wife made no special payment for the storage, that the relationship between the landlords and at least the families of tenants of the flats, if not also guests, was a business arrangement and not a gratuitous bailment.<sup>308</sup> Similarly, a hospital authority which is under a statutory duty to receive a patient, whose estate is liable for the cost of his maintenance, is a bailee for reward; therefore, when it takes possession of a patient's chattels upon his admission to the hospital, it must take reasonable care of them, e.g. it will be liable if valuable jewellery is lost through its failure to deposit the jewellery in a safe.<sup>309</sup> A banker who holds his customer's securities and valuables for safe custody may receive no special remuneration for doing so; but the better view, it is submitted, is that he should be treated as a bailee for reward.<sup>310</sup>

## Footnotes

- 251 Palmer at Ch.14. See below for the special cases of warehousemen (para.35-058), agisters (para.35-059), garaging of vehicles (para.35-060), railway cloakrooms (para.35-062), innkeepers (paras 35-101 et seq.) and lodging-house keepers (para.35-120).
- 252 In deposit (above, para.35-032) there is no reciprocal advantage enjoyed by the bailee. As to custody "for reward" where there is no special payment for the custody, see below, para.35-057.
- 253 cf. *Ashby v Tolhurst [1937] 2 K.B. 242*; *Tinsley v Dudley [1951] 2 K.B. 18*. (See below, para.35-061.)
- 254 See above, paras 35-044 and 35-046.
- 255 See below, para.40-575.
- 256 *Houghland v RR Low (Luxury Coaches) Ltd [1962] 1 Q.B. 694*; *Morris v CW Martin & Sons Ltd [1966] 1 Q.B. 716, 726*. (The older formulation of the standard was that the custodian for reward must exercise the care and diligence exercised by a careful man in the custody of his own chattels of a similar kind: see *Coggs v Bernard (1703) 2 Ld. Raym. 909, 916*; *Dean v Keate (1811) 3 Camp. 4*; Jones at pp.86, 87.) It is not a defence that the bailee treated the chattel with the same care as he treated his own chattels: *Re United Service Co (1870) L.R. 6 Ch. App. 212*.
- 257 The bailee must also take care that any equipment used in connection with the chattel (e.g. tackle) is adequate for the purpose: *Thomas v Day (1803) 4 Esp. 262*.

- 258 *Searle v Laverick* (1874) *L.R.* 9 *Q.B.* 122; *Brabant & Co v King* [1895] *A.C.* 632; *Turner v Stallibrass* [1898] 1 *Q.B.* 56; *Martin v LCC* [1947] *K.B.* 628. But the bailee's duty is reduced if the bailor directs where the goods are to be placed: *Harper v Jones* (1879) 4 *V.L.R.* (L) 536.
- 259 *Brabant & Co v King*, above, at 641 (on the facts the goods bailed were explosive goods).
- 260 *Brabant & Co v King*, above, at 641 (flood).
- 261 *Lockspeiser Aircraft Ltd v Brooklands Aircraft Co Ltd* [1990] *C.L.Y.* 250 (examined in detail by Palmer at para.14-032); *2 Entertain Video Ltd v Sony DADC Europe Ltd* [2020] *EWHC* 972 (*TCC*), [2021] 1 *All E.R.* 527. But the duty is only one to take reasonable care: *Sutcliffe v Chief Constable of West Yorkshire* [1996] *R.T.R.* 86; *Rana v Tears of Sutton Bridge* [2015] *EWHC* 2597 (*QB*).
- 262 *Coldman v Hill* [1919] 1 *K.B.* 443.
- 263 *Ranson v Platt* [1911] 2 *K.B.* 291. See above, para.35-015.
- 264 A contractual obligation upon the bailee to insure the goods may justify the implication of an implied term making the bailee fully liable for loss of, or damage to, the goods: *Roberts* (1973) 124 *New L.J.* 849. On an undertaking to insure, see *Lockspeiser Aircraft Ltd v Brooklands Aircraft Co Ltd*, above.
- 265 *Searle v Laverick* (1874) *L.R.* 9 *Q.B.* 122; *Chapman v GW Ry* (1880) 5 *Q.B.D.* 278; *Fagan v Green and Edwards Ltd* [1926] 1 *K.B.* 102; *Volcafe Ltd v Cia Sud Americana de Vapores SA* [2018] *UKSC* 61, [2019] *A.C.* 358 at [8]. The position is different where the bailee delivers the chattel to an unauthorised person: see below, para.35-052. It is not, however, necessary in order to avoid liability for a bailee to show what caused the loss: the bailee must show either that he took reasonable care of the goods or that his failure to do so did not contribute to the damage: *Coopers Payen Ltd v Southampton Container Terminal Ltd* [2003] *EWCA Civ* 1223, [2004] 1 *Lloyd's Rep.* 331 at [28].
- ②266 The onus is on the bailee to prove the absence of any causal connection between a negligent act on his part and the loss of or damage to the chattel: *Coldman v Hill*, above, at 458; *British Road Services Ltd v Arthur V Crutchley & Co Ltd* [1968] 1 *All E.R.* 811, 820, 824; *Piper v Hales* [2013] *All E.R.* (D) 257 (Jan) at [30].
- ②267 *Brook's Wharf and Bull Wharf Ltd v Goodman Bros* [1937] 1 *K.B.* 534, 538–539; *Gutter v Tait* (1947) 177 *L.T.* 1; *Houghland v RR Low (Luxury Coaches) Ltd* [1962] 1 *Q.B.* 694; *Global Dress Co Ltd v WH Boase & Co Ltd* [1966] 2 *Lloyd's Rep.* 72; *Transmotors Ltd v Robertson, Buckley & Co Ltd* [1970] 1 *Lloyd's Rep.* 224; *Port Swettenham Authority v TW Wu and Co (M) Sdn Bhd* [1979] *A.C.* 580, 590; *Volcafe Ltd v Cia Sud Americana de Vapores SA* [2018] *UKSC* 61, [2019] *A.C.* 358 at [9]; *Huntsworth Wine Co Ltd v London City Bond Ltd* [2021] *EWHC* 2831 (*Comm*) at [95]–[97]. See also above, paras 35-012, 35-032 (deposit); see below, para.35-064, 35-079 (hire), 37-071—37-072, 38-018 (carriage). cf. *Phipps v New Claridge's Hotel Ltd* (1905) 22 *T.L.R.* 49.
- ②268 *Bullen v Swan Electric Engraving Co* (1907) 23 *T.L.R.* 258. cf. *Phipps v New Claridge's Hotel Ltd*, above; *Joseph Travers & Sons Ltd v Cooper* [1915] 1 *K.B.* 73. While it is not necessary as a matter of law for a bailee to show what the cause of the damage was, the identification

of the cause may be a “significant pointer as to whether or not the bailee has exercised reasonable care”: *Coopers Payen Ltd v Southampton Container Terminal Ltd [2003] EWCA Civ 1223, [2004] 1 Lloyd's Rep. 331* at [29].

- ②69 *Lockspeiser Aircraft Ltd v Brooklands Aircraft Co Ltd*, above. cf. *Sutcliffe v Chief Constable of West Yorkshire [1996] R.T.R. 86* and *Rana v Tears of Sutton Bridge [2015] EWHC 2597 (QB)*.

- ②70 See below, para.35-053; also Vol.I, Ch.17.

- ②71 *LNW Ry v JP Ashton & Co [1920] A.C. 84*; *Levison v Patent Steam Carpet Cleaning Co Ltd [1978] Q.B. 69, 82, 83, 85*. cf. *Re S Davis & Co Ltd [1945] Ch. 402*; *Richmond Metal Co Ltd v J Coales & Son Ltd [1970] 1 Lloyd's Rep. 423*. *Euro Cellular (Distribution) Plc v Danzas Ltd t/a Danzas AEI Intercontinental [2003] EWHC 3161 (Comm), [2004] 1 Lloyd's Rep. 521* at [60]–[66].

- ②72 The bailee may be vicariously liable for the negligence of his independent contractor to whom he has delegated part of his duty to take care of the chattel: *British Road Services Ltd v Arthur V Crutchley & Co Ltd [1968] 1 All E.R. 811, 820, 824*; *Bosman (Transport) Ltd v LKW Walter International Transportorganisation AG [2002] EWCA Civ 850*; *East West Corp v DKBS 1912 and Akts Svendborg [2003] EWCA Civ 83*, [2003] 1 Lloyd's Rep. 239 at [29].

- ②73 *Randleson v Murray (1838) 8 A. & E. 109*; *Beard v London General Omnibus Co [1900] 2 Q.B. 530*. The custodian may be personally liable for negligence in choosing the employee in question: *Williams v Curzon Syndicate Ltd (1919) 35 T.L.R. 475*; *John Carter (Fine Worsteds) Ltd v Hanson Haulage (Leeds) Ltd [1965] 2 Q.B. 495*.

- ②74 *Morris v CW Martin & Sons Ltd [1966] 1 Q.B. 716* (approved by the House of Lords in *Photo Production Ltd v Securicor Transport Ltd [1980] A.C. 827, 846, 852*; and in *Lister v Hesley Hall Ltd [2001] UKHL 22, [2002] 1 A.C. 215* at [19]–[20], [44]–[46], [55]–[60] and [71]–[76]; and by the Privy Council in the *Port Swettenham* case, above, at 591). cf. *Leesh River Tea Co Ltd v British India SN Co Ltd [1967] 2 Q.B. 250*. See also *Brink's Global Services Inc v Igrox Ltd [2010] EWCA Civ 1207, [2011] I.R.L.R. 343*, *Huntsworth Wine Co Ltd v London City Bond Ltd [2021] EWHC 2831 (Comm)* at [106]–[110] and Atiyah, *Vicarious Liability* (1967), pp.268–272.

- 275 *Anderson v NE Ry (1861) 4 L.T. 216*. cf. *Strand Electric and Engineering Co Ltd v Brisford Entertainments Ltd [1952] 2 Q.B. 246, 253–254*. For the general principles of remoteness of damage in contract, see Vol.I, paras 29-124 et seq.

- 276 *Hepburn v A Tomlinson (Hauliers) Ltd [1966] A.C. 451* (see above, para.35-025). The extent of the bailee's insurance cover is a question of construction of the particular policy and it is not the case that the bailee will in all cases be entitled to recover the full value of the goods lost or damaged. In particular, the policy may be held to cover only the legal liabilities of

- the bailee towards the bailor or a third party: see *Ramco (UK) Ltd v International Insurance Company of Hanover* [2004] EWCA Civ 675, [2004] 2 All E.R. (Comm) 866.
- 277 *Lilley v Doubleday* (1881) 7 Q.B.D. 510, 511. cf. *Davies v Collins* [1945] 1 All E.R. 247; *Tappenden v Artus* [1964] 2 Q.B. 185 (see below, paras 35-079—35-080); see also above, paras 35-026—35-029.
- 278 *Edwards v Newland & Co* [1950] 2 K.B. 534; *Metaalhandel JA Magnus BV v ArdfIELDS Transport Ltd* [1987] 2 F.T.L.R. 319 (a “quasi-bailee” (who had contracted to collect and store goods) cannot avoid responsibility for their care by delegating their care to a subcontractor). See *Palmer* (1978) 128 New L.J. 863.
- 279 *James Morrison & Co Ltd v Shaw Savill and Albion Co Ltd* [1916] 2 K.B. 783, 795, 796, 800; *Lilley v Doubleday*, above; *Edwards v Newland & Co*, above.
- 280 *Jackson v Cochrane* [1989] 2 Qd. R. 23. See also *Ashby v Tolhurst* [1937] 2 K.B. 242; *Hollins v Davy Ltd* [1963] 1 Q.B. 844.
- 281 See below, para.35-054.
- 282 See Vol.I, Ch.17 and see below, paras 41-394—41-395; Coote, Exception Clauses (1964), Ch.2; *Laskin* (1956) 11 Univ. of Toronto L.J. 202. See, in addition to the cases cited below, *Harris v GW Ry* (1876) 1 Q.B.D. 515; *Joseph Travers & Sons Ltd v Cooper* [1915] 1 K.B. 73; *Turner v Civil Service Supply Association* [1926] 1 K.B. 50; *British Traders and Shippers Ltd v Ubique Transport and Motor Engineering Co (London) Ltd* [1952] 2 Lloyd's Rep. 236; *Hollins v J Davy Ltd* [1963] 1 Q.B. 844.
- 283 *Alderslade v Hendon Laundry Ltd* [1945] K.B. 189; *Olley v Marlborough Court Ltd* [1949] 1 K.B. 532; *Canada SS Lines Ltd v R* [1952] A.C. 192 (cf. *Gillespie Bros & Co Ltd v Roy Bowles Transport Ltd* [1973] Q.B. 400); *Hollier v Rambler Motors (AMC) Ltd* [1972] 2 Q.B. 71. cf. exemption clauses in hiring agreements, see below, para.35-078.
- 284 cf. *Price & Co v Union Lighterage Co* [1904] 1 K.B. 412; *Rutter v Palmer* [1922] 2 K.B. 87, 94.
- 285 *Photo Production Ltd v Securicor Transport Ltd* [1980] A.C. 827 (explaining *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 A.C. 361). See Vol.I, paras 17-007 et seq.
- 286 *Gibaud v GE Ry* [1921] 2 K.B. 426, 431, 435; *LNW Ry v Neilson* [1922] 2 A.C. 263, 273–274; *Cunard SS Co v Buerger* [1927] A.C. 1; *Alexander v Railway Executive* [1951] 2 K.B. 882; *Sydney City Council v West* (1965) 114 C.L.R. 481; *Mendelssohn v Normand Ltd* [1970] 1 Q.B. 177; cf. *J Evans & Son (Portsmouth) Ltd v Andrea Merzario Ltd* [1976] 1 W.L.R. 1078. See also above, para.35-052.
- 287 The “doctrine” of fundamental breach was rejected by the House of Lords in the *Photo Production* case, above. For earlier cases on what amounts to a fundamental breach by the bailee, see *Kenyon, Son & Craven Ltd v Baxter Hoare & Co Ltd* [1971] 1 W.L.R. 519; *United Fresh Meat Co Ltd v Charterhouse Cold Storage Ltd* [1974] 2 Lloyd's Rep. 286. See now Vol.I, paras 17-023—17-027, 27-038.
- 288 The following decisions on this point must now be read in the light of the more recent House of Lords decisions such as *Photo Production Ltd v Securicor Transport Ltd* [1980] A.C. 827; *Martin v N Negin Ltd* (1945) 172 L.T. 275; *Alexander v Railway Executive*, above; *Adams (Durham) Ltd and Day v Trust Houses Ltd* [1960] 1 Lloyd's Rep. 380. cf. *J Spurling Ltd v*

- Bradshaw [1956] 1 W.L.R. 461*; and *John Carter (Fine Worsteds) Ltd v Hanson Haulage (Leeds) Ltd [1965] 2 Q.B. 495*; *Levison v Patent Steam Carpet Cleaning Co Ltd [1978] Q.B. 69*. See Vol.I, paras 17-037—17-041.
- 289 *Curtis v Chemical Cleaning and Dyeing Co [1951] 1 K.B. 805*; *Mendelsohn v Normand Ltd*, above; *J Evans & Son (Portsmouth) Ltd v Andrea Merzario Ltd [1976] 1 W.L.R. 1078*.
- 290 *The Pioneer Container [1994] 2 A.C. 324, 341–342*; *Morris v CW Martin & Sons Ltd [1966] 1 Q.B. 716, 729–730* (cf. at 731, 741). See Vol.I, paras 17-037—17-041.
- 291 For a fuller treatment of the Act, see Vol.I, paras 17-075 et seq. For the effect of the Act on exclusions of liability under non-contractual bailments, see *Palmer (1978) 28 New L.J. 887, 915*.
- 292 It seems that gratuitous bailments are outside the protection of this section (s.3), as is a bailor's claim against a sub-bailee (above, para.35-026) which does not depend on a contract between the parties. cf. however, s.2(2) and the discussion later in this paragraph.
- 293 s.1(3); see Vol.I, para.17-083.
- 294 s.3(2)(a).
- 295 s.3(2)(b).
- 296 See Vol.I, para.17-099.
- 297 Non-contractual bailments could be caught by this provision, e.g. even car park operators who operate under “licences” rather than bailments: see below, para.35-061.
- 298 s.2(2).
- 299 See below, para.40-590.
- 300 *Hatton v Car Maintenance Co Ltd [1915] 1 Ch. 621*; *Gordon v Gordon [2002] EWCA Civ 1884* at [8]. cf. the lien of a person who expends skill or labour upon the chattel (see below, para.35-093). See generally Palmer at paras 14-096—14-103.
- 301 e.g. *Jowitt & Sons v Union Cold Storage Co [1913] 3 K.B. 1*.
- 302 See *Bock v Gorrisen (1860) 2 De G.F. & J. 434, 443* (wharfingers); *Re Witt (1876) 2 Ch. D. 489* (packers); *Re London and Globe Finance Corp [1902] 2 Ch. 416* (factors, bankers and stockbrokers). cf. *Singer Manufacturing Co v LSW Ry [1894] 1 Q.B. 833, 836, 837* (railway cloakrooms: see below, para.35-062).
- 303 Torts (Interference with Goods) Act 1977 ss.12 and 13 (see below, paras 35-095—35-100).
- 304 e.g. Sch.1 Pt I para.4(1) expressly covers the situation where “a bailee is in possession of goods which he has held as custodian ...”.
- 305 s.12.
- 306 s.13.
- 307 See below, paras 35-095—35-100.
- 308 *Andrews v Home Flats (1945) 173 L.T. 408*. cf. *The Pioneer Container [1994] 2 A.C. 324, 338*. (See above, para.35-026.)
- 309 *Martin v LCC [1947] K.B. 628*.
- 310 See above, para.35-035, and below, paras 36-449—36-451.

## **(ii) - Illustrations of Custody for Reward**

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**(b) - Custody for Reward**

**(ii) - Illustrations of Custody for Reward**

### **Warehousemen**

35-058 A warehouseman is liable <sup>311</sup> for any loss caused by want of reasonable care on his part or on the part of an agent or independent contractor to whom he has delegated performance of part of his duty to take reasonable care of the chattel. <sup>312</sup> When the chattel is lost, the onus is on the warehouseman to acquit himself by showing that he was not in default. <sup>313</sup> He may, however (subject to statutory controls), <sup>314</sup> contract out of his liability. <sup>315</sup> It has been held that where a wharfinger negligently makes a representation to a third party as to certain goods being in his custody when, in fact, such goods have long since disappeared, he is estopped from denying that he has such goods in his possession, if, by reason of his negligence, the third party suffers damage. <sup>316</sup>

### **Agisters**

35-059 The common law duty of a bailee with whom cattle are left to be fed for reward on a contract called agistment is to take reasonable care of them. <sup>317</sup> Thus, an agister has been held to be in breach of his duty where the cattle are stolen through his negligence, <sup>318</sup> or where he put the animal in a field knowing that there was not a sufficient fence to keep out a bull kept on the adjoining land. <sup>319</sup> He does not discharge his duty as a bailee by proving that they were stolen without his default, if by using reasonable diligence he could have recovered them. <sup>320</sup> Further, if they are put in a place

where by reason of their surroundings they are liable to suffer injury,<sup>321</sup> or if they escape through the negligence of the bailee or his employee and in consequence of the escape are injured,<sup>322</sup> the bailee will be liable. He has no lien, for he merely feeds without expending skill.<sup>323</sup> But if a lien is actually acquired by special agreement, and the owner for the purpose of defeating such lien gets the cattle away by fraud, the agister has a right to resume possession of the cattle and for so doing is not answerable in conversion.<sup>324</sup>

## Stabling of horses and garaging of vehicles

- 35-060 Where a horse is stabled or a vehicle is garaged in the bailee's building, he is obliged not only to take reasonable care of the horse or vehicle itself, but also to take reasonable care to see that the building is reasonably safe for the purpose of stabling or garaging.<sup>325</sup>

## Bailment distinguished from licence.<sup>326</sup>

- 35-061 The circumstances of a particular case may show that, although one person permits another to leave his chattel on land in the possession of the former, there is no bailment. Thus, where the owner of a motorcar left it in an open car park and, upon payment of a shilling to the car park attendant, received a ticket on which were printed words negativing liability and stating that all cars were left at owners' risk, it was held that the relationship between the owners of the car park and the owner of the car was that of licensor and licensee and not that of bailor and bailee.<sup>327</sup> Similarly, where a motorbicycle was left in a covered yard forming part of the premises of a public house the publican was not liable for its loss through theft by a third party; he was not a bailee, since the motorbicycle had not been delivered into his possession and he was unaware that it was on his premises.<sup>328</sup> There was no duty at common law owed to the owner of the chattel in these circumstances to take reasonable care to protect him and his chattel from the risk of the chattel being stolen by some third party.<sup>329</sup> But under ss.12 and 13 of the Supply of Goods and Services Act 1982, there may be a duty on the defendant as a person who "agrees to carry out a service" in the course of a business<sup>330</sup> and a similar duty may arise when a trader contracts to supply a service to a consumer under s.49(1) of the Consumer Rights Act 2015.

## Railway warehouses and cloakrooms

- 35-062

The National Rail Conditions of Travel, published in December 2019, no longer indicate when transport begins and ends.<sup>331</sup> According to these Conditions, a train company or rail service provider will only be liable for any loss or damage to luggage, articles, animals or cycles in its trains or on its premises if the loss or damage was caused by the fault of a member of staff of the train company or rail service provider.<sup>332</sup> The maximum liability of a train company or rail service provider with regard to these matters is £1,500 per passenger.<sup>333</sup> Property found on a train or on a train company's or rail service provider's premises must be handed over as soon as possible to a member of staff of the train company or rail service provider and is not to be treated as the property of the finder.<sup>334</sup> In the case of such property, the train company may (i) open it and examine its contents before removing it to a secure place and (ii) without being liable, remove or dispose of any property which might in its opinion cause damage or injury or inconvenience to staff or passengers<sup>335</sup> and (iii) within prescribed limits, make a charge for retrieval of the property by the owner.<sup>336</sup> The Conditions further state that a train company or rail service provider will take reasonable care of any luggage, articles, animals or cycles which are taken into its safekeeping after being left in its trains or on its premises and will make a reasonable effort to contact the owner.<sup>337</sup> However, a train company or a rail service provider may limit access to retrieve any property left in its trains or on its premises but will, if necessary, make alternative arrangements for it to be recovered.<sup>338</sup> It has been held that a train company must redeliver the goods to the person producing the ticket on a reasonable request and within a reasonable time.<sup>339</sup>

- 35-063 The train company may vary their liabilities as bailees by special clauses in the contract<sup>340</sup> or in a ticket handed to the bailor.<sup>341</sup> The train company has a lien for its charges on goods deposited in a cloakroom, and the lien will prevail against the owner of the goods even where the person depositing them was only a hirer, e.g. under a hire-purchase agreement.<sup>342</sup>

## Footnotes

- 311 Both under s.13 of the Supply of Goods and Services Act 1982 (covering cases where the warehouseman-bailee acts in the course of a business); and under the common law: *Cailiff v Danvers* (1792) Peake 155; *Chapman v GW Ry* (1880) 5 Q.B.D. 278; *Mitchell v Lancs & Yorks Ry* (1875) L.R. 10 Q.B. 256.
- 312 *British Road Services Ltd v Arthur V Crutchley & Co Ltd* [1968] 1 All E.R. 811, 820, 824 (the obligation was placed on the bailee on the basis of an implied term in the contract of bailment).
- 313 *Mackenzie v Cox* (1840) 9 C. & P. 632; *Reeve v Palmer* (1858) 5 C.B. N.S. 84; *Brooks Wharf Bull & Wharf Ltd v Goodman Bros* [1937] 1 K.B. 534. cf. see above, paras 35-032—35-050.
- 314 See above, para.35-054.

- 315 *Rosin and Turpentine Import Co v Jacobs* (1910) 15 Com. Cas. 111; *Gibaud v GE Ry* [1921] 2 K.B. 426; *Rutter v Palmer* [1922] 2 K.B. 87. See the approach to exemption clauses adopted by the House of Lords: see above, para.35-053; Vol.I, Ch.17, paras 17-024—17-027.
- 316 *Seton v Lafone* (1887) 19 Q.B.D. 68. cf. *Laurie & Morewood v Dudin & Sons* [1926] 1 K.B. 223. On attornment, see above, para.35-030.
- 317 *Smith v Cook* (1875) 1 Q.B.D. 79, 81; *Turner v Stallibrass* [1898] 1 Q.B. 56; *Coldman v Hill* [1919] 1 K.B. 443, 451. See also ss.12 and 13 of the Supply of Goods and Services Act 1982 (see above, paras 35-044—35-048) which cover cases where the bailee (supplier of services) acts in the course of a business and s.49(1) of the Consumer Rights Act 2015 which covers cases where the bailee is a trader contracting with a consumer. cf. *Sheehy v Faughan* [1991] 1 I.R. 425 (mare left at defendant's stud: onus of proof lay on defendant to show that her death was not due to his neglect).
- 318 *Coldman v Hill*, above.
- 319 *Smith v Cook*, above.
- 320 *Coldman v Hill*, above.
- 321 *Turner v Stallibrass*, above; cf. *Reid v Calderwood* (1911) 45 Ir.L.T. 139 (owner aware of dangerous state of the field).
- 322 *Halestrap v Gregory* [1895] 1 Q.B. 561.
- 323 *Jackson v Cummins* (1839) 5 M. & W. 342; *Re Southern Livestock Producers Ltd* [1964] 1 W.L.R. 24; *Bell and Bell v Clare* (1989) 23 F.C.R. 274; *Sheianov v Sarner International Ltd* [2020] EWHC 1214 (QB), [2020] 1 W.L.R. 3963 at [62]—[64]. See also *Ward v Fielden* [1985] C.L.Y. 2000 (racehorse trainer has no lien over horses being trained).
- 324 *Wallace v Woodgate* (1824) 1 Car. & P. 575.
- 325 *Searle v Laverick* (1874) L.R. 9 Q.B. 122 (a livery-stable keeper); see also above, paras 35-044—35-046. A livery-stable keeper has no lien on a horse for its keep: *Judson v Etheridge* (1833) 1 C. & M. 743; *Orchard v Rackstraw* (1850) 9 C.B. 698; *Re Southern Livestock Producers Ltd*, above. cf. *Bevan v Waters* (1828) 3 Car. & P. 520.
- 326 This paragraph was cited with approval and applied in *BG Transport Service Ltd v Marston Motor Co Ltd* [1970] 1 Lloyd's Rep. 371 (distinguishing *Sydney City Council v West* (1965) 114 C.L.R. 481). See Palmer at paras 5-001 et seq. The distinction between a bailment and a licence can, however, be a difficult one to draw on the facts of an individual case: see, for example, *The Rigoletto* [2000] 2 Lloyd's Rep. 532, 545—547 (but note the dissent of Chadwick LJ at 548) and *Odene v Hawarden Services Ltd* [2014] EWHC 1694 (QB), [2014] All E.R. (D) 214 (May).
- 327 *Ashby v Tolhurst* [1937] 2 K.B. 242. See also *Halbauer v Brighton Corp* [1954] 1 W.L.R. 1161. cf. *Shorters Parking Station Ltd v Johnson* [1963] N.Z.L.R. 135; *James Buchanan & Co Ltd v Hay's Transport Services Ltd* [1972] 2 Lloyd's Rep. 535, 542.
- 328 *Tinsley v Dudley* [1951] 2 K.B. 18.
- 329 But to the extent that the law might impose a duty to take reasonable care in respect of damage to the chattel left on the premises of the defendant, the provisions of s.2(2) of the Unfair Contract Terms Act 1977 might apply see Vol.I, para.17-085.
- 330 See above, paras 35-044—35-046.

- 331 Previously, the conditions published by the British Railways Board stated that, after the “termination of the transit”, the Board held goods carried by them as warehousemen, not as carriers, and the relevant conditions were those applicable to the former situation. The distinction between the beginning and the end of transit is discussed further below at para.[38-077](#).
- 332 Cl.26. See further below para.[38-076](#).
- 333 Cl.26.
- 334 Cl.42.1.
- 335 Cl.43.
- 336 Cl.44.
- 337 Cl.42.2. See further below para.[38-076](#).
- 338 Cl.42.3.
- 339 *Stallard v GWRy (1862) 2 B. & S. 419*.
- 340 e.g. *Harris v GWRy (1876) 1 Q.B.D. 515, 529–530*; *Pratt v SE Ry [1897] 1 Q.B. 718*. See above, para.[35-050](#), and Vol.I, Ch.17.
- 341 As to conditions in tickets being incorporated into the contract, see Vol.I, paras [15-008](#) et seq.
- 342 *Singer Manufacturing Co v LSW Ry [1894] 1 Q.B. 833* (this is an extension of the lien exercisable by a railway undertaking as a carrier).

## **(c) - Hire**

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**(c) - Hire**

### **Hire <sup>343</sup>**

- 35-064 In the bailment termed “hire” the bailee receives both possession of the chattel and the right to use it,<sup>344</sup> in return for remuneration to be paid to the bailor or other reward provided to the bailor.<sup>345</sup> The bailee is under an obligation to return the chattel to the owner (or his nominee) at the expiration of the fixed period of the hiring<sup>346</sup> and to pay the cost of returning it<sup>347</sup>; but in a hiring or lease of livestock, the progeny of the livestock born during the hiring belongs to the hirer (unless the contract provides to the contrary).<sup>348</sup> While the bailment continues to subsist, the bailee is entitled to possessory remedies, and can prevent anyone, including the owner,<sup>349</sup> from interfering with the chattel against his will.

### **Structure of this section**

- 35-065 This section will first examine the rules applicable to a hiring not falling within the definition of a “consumer hire agreement” regulated by the [Consumer Credit Act 1974](#),<sup>350</sup> and will then consider that Act.

### **Footnotes**

- 343 For an account of chattel-hiring, see the Crowther Report on Consumer Credit, Cmnd.4596 (1971), paras 2.4.56 et seq. The contract of hire-purchase is dealt with separately in Ch.41, below (many of the respective duties of the owner and hirer discussed in paras 41-315 et seq. apply to ordinary hire).
- 344 e.g. *Beecham Foods Ltd v North Supplies (Edmonton) Ltd [1959] 1 W.L.R. 643*. Where a contract of hiring is specifically enforceable, the hirer may have an equitable interest in the chattel: *Bristol Airport Plc v Powdrill [1990] Ch. 744, 759*.
- 345 *TRM Copy Centres (UK) Ltd v Lanwall Services Ltd [2009] UKHL 35, [2009] 1 W.L.R. 1375* at [11]. The “remuneration” can be paid either in cash or in kind. On the facts of the case it was held that no remuneration was paid by the party who received the photocopier so that the bailment was not by way of hire but was a gratuitous bailment. This was a case in which the provider of the photocopier paid the other party for the privilege of locating its photocopier in a place where it might generate income for both parties. If it did not generate any income, the recipient was not obliged to make any payment to the provider.
- 346 *Mills v Graham (1804) 1 Bos. & P.N.R. 140, 145; British Crane Hire Corp Ltd v Ipswich Plant Hire Ltd [1975] Q.B. 303, 311, 313*. (But the hirer might escape liability for failure to return the chattel if he can prove that the loss of the chattel was not due to his fault: *British Crane Hire Corp Ltd v Ipswich Plant Hire Ltd*, above, at 311–312, 313 (see below, para.35-079); or the terms of the hiring may oblige the bailee to deliver the chattel to a third person at the expiration of the period: see above, para.35-010.) cf. *Ballett v Mingay [1943] K.B. 281*. In the unlikely event of the bailor not accepting redelivery, the bailee may be able to sell the chattel under statutory powers: see below, paras 35-095—35-100.
- 347 *British Crane Hire Corp Ltd v Ipswich Plant Hire Ltd*, above, at 312.
- 348 *Tucker v Farm and General Investment Trust Ltd [1966] 2 Q.B. 421*.
- 349 *Lee v Atkinson & Brook (1609) Yel. 172; Turner v Hardcastle (1862) 11 C.B. N.S. 683*. See above, para.35-019.
- 350 See below, paras 35-085—35-090.

## **(i) - Hire (Unregulated by the Consumer Credit Act)**

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(c) - Hire

(i) - Hire (Unregulated by the Consumer Credit Act)

### **Terms implied into a contract of hire <sup>351</sup>**

- <sup>35-066</sup> The [Supply of Goods and Services Act 1982](#) has introduced <sup>352</sup> into contracts for the hire of goods a number of implied terms (broadly corresponding with those implied into contracts for the sale of goods). <sup>353</sup> The [Consumer Rights Act 2015](#) has similarly included in contracts for the hire of goods between a trader and a consumer a number of terms which also broadly correspond with those implied into contracts for the sale of goods. <sup>354</sup> Although most problems may be solved by reference to the terms implied by these Acts, <sup>355</sup> the common law rules should also be examined, because, in the case of contracts of hire which fall within the scope of the [Supply of Goods and Services Act 1982](#), the Act provides that it does not prejudice the operation of:

“... any rule of law whereby any condition or warranty (other than one relating to quality or fitness <sup>356</sup>) is to be implied in ... a contract for the hire of goods.”<sup>357</sup>

It would, nevertheless, be true to say that the common law rules are now considerably diminished in significance. The common law rules will therefore be set out briefly before turning to the terms implied by the [1982](#) and [2015 Acts](#).

### **Implied terms as to possession**

- <sup>35-067</sup>

At common law there was no authority which expressly recognised the existence of an obligation on the part of the bailor that he had the right to transfer possession of the goods by way of hire. But the common law did recognise the existence of a warranty that the bailee would enjoy uninterrupted use and enjoyment of the goods for the period of the hire.<sup>358</sup> These terms have now been considerably strengthened by the [Supply of Goods and Services Act 1982](#)<sup>359</sup> which provides that certain terms<sup>360</sup> are to be implied in “a contract for the hire of goods”<sup>361</sup> (which is not restricted to hiring in the course of a business by either party): “there is an implied condition on the part of the bailor that in the case of a bailment he has a right to transfer possession of the goods by way of hire for the period of the bailment”<sup>362</sup>; “there is also an implied warranty that the bailee will enjoy quiet possession of the goods for the period of the bailment except so far as the possession may be disturbed by the owner or other person entitled to the benefit of any charge or encumbrance disclosed or known to the bailee before the contract is made”.<sup>363</sup> Similar terms are to be treated as included in a contract of hire concluded between a trader and a consumer under the [Consumer Rights Act 2015](#).<sup>364</sup> Thus a term is to be included that at the beginning of the period of hire the trader has the right to transfer possession of the goods by way of hire for that period<sup>365</sup> and that the consumer will enjoy quiet possession of the goods except so far as it may be disturbed by the owner or other person entitled to the benefit of any charge or encumbrance disclosed or known to the consumer before entering into the contract.<sup>366</sup>

## Implied terms as to description and sample

- 35-068 The common law on hiring has little authority on correspondence with description or sample. But it is clear that the owner must supply a chattel which corresponds with the description of the chattel which, in the contract of hire, he undertook to supply.<sup>367</sup> The [Supply of Goods and Services Act 1982](#) also implies terms on hiring by description or by sample. Where, in a contract for the hire of goods (the definition is not restricted to hiring in the course of a business), the bailor bails or agrees to bail the goods by description,<sup>368</sup> there is an implied condition that the goods will correspond with the description<sup>369</sup>; where he bails or agrees to bail the goods by reference to a sample, “there is an implied condition—(a) that the bulk will correspond with the sample in quality; and (b) that the bailee will have a reasonable opportunity of comparing the bulk with the sample; and (c) that the goods will be free from any defect, making their quality unsatisfactory,<sup>370</sup> which would not be apparent on reasonable examination of the sample”.<sup>371</sup> Contracts of hire which fall within the scope of [Ch.2 of the Consumer Rights Act 2015](#) are also to be treated as including a term that the goods will match the description<sup>372</sup> and, in the case where the hire is by reference to a sample of goods, that the goods will match the sample except to the extent that any differences between the sample and the goods are brought to the consumer’s attention before the contract is made and that the goods will be free from any defects that makes their quality unsatisfactory and that would not be apparent on a reasonable examination of the sample.<sup>373</sup>

## Common law as to quality and fitness

35-069 The common law rules as to quality and fitness are not clearly formulated,<sup>374</sup> and they are now of very limited practical utility.<sup>375</sup> Subject to any express contractual provisions,<sup>376</sup> the normal rule is that the owner who lets out a chattel on hire must take reasonable care to see that it is in a reasonably fit condition for the purpose for which the bailee is to use it.<sup>377</sup> Thus, in an ordinary hiring contract, the owner impliedly assumes some contractual responsibility for the fitness of the chattel for the purpose for which the hirer requires it,<sup>378</sup> but the existence and extent of the obligation depends on the contractual intention of the parties,<sup>379</sup> which is to be ascertained from the provisions of the particular contract and the circumstances in which the contract was made.<sup>380</sup> The implied undertaking, however, is only to the effect that the chattel is as fit for the purpose as reasonable care and skill on the part of the owner can make it<sup>381</sup>; breach of the undertaking may lead to liability for consequential damage.<sup>382</sup> Although the undertaking implied at common law does not render the bailor liable where the immediate cause of the injury was a defect in the chattel not discoverable by reasonable care or skill,<sup>383</sup> the onus of proving such a defence is on the bailor.<sup>384</sup>

## Illustrations of the terms implied at common law

35-070 Where a motor car is let on hire, the owner (subject to the express terms of the contract) impliedly undertakes that it is “a functioning car which could be used on the roads”, “a viable motorcar”, “a roadworthy car”.<sup>385</sup> Such an implied undertaking depends on the existence of a bailment for hire; it has been held, for instance, that the relationship of bailment may arise between a company owning taxi-cabs and the drivers of the cabs where the company receives a proportion of the fares earned by the drivers.<sup>386</sup> Many older cases on the undertaking as to fitness implied at common law concerned the hire of horses and carriages: e.g. the owner was liable if the horse was vicious,<sup>387</sup> or if the horse was not fit for the particular purpose for which it was hired.<sup>388</sup> The undertaking as to fitness implied at common law may extend to cover an employee of the bailor whose services are hired, together with the vehicle, in order to drive it<sup>389</sup>; although the undertaking is limited to those acts of the employee which are within the scope of his employment, under the doctrine of vicarious liability in tort the scope of employment may be wide enough to cover even fraudulent acts of the employee.<sup>390</sup>

## Implied terms as to quality: the 1982 Act<sup>391</sup>

- 35-071 The Supply of Goods and Services Act 1982 also provides implied terms as to quality and fitness<sup>392</sup>: where under a contract for the hire of goods, “the bailor bails goods in the course of a business”,<sup>393</sup> there is an implied condition<sup>394</sup> that the goods supplied under the contract are of satisfactory quality”<sup>395</sup>; but there is no such condition “(a) as regards defects specifically drawn to the bailee’s attention before the contract is made; (b) if the bailee examines the goods before the contract is made, as regards defects which that examination ought to reveal; or (c) where the goods are bailed by reference to a sample, which would have been apparent on a reasonable examination of the sample”.<sup>396</sup>

## Implied term as to fitness: the 1982 Act

- 35-072 Finally, the Act implies a term about fitness for a particular purpose where “the bailor bails goods in the course of a business”.<sup>397</sup> Where “the bailee, expressly or by implication, makes known [to the bailor or to a credit-broker<sup>398</sup>] ... any particular purpose for which the goods are being bailed”<sup>399</sup> under a contract for hire, there is “an implied condition that the goods supplied under the contract are reasonably fit for that purpose, whether or not that is a purpose for which such goods are commonly supplied”.<sup>400</sup> But this provision “does not apply where the circumstances show that the bailee does not rely, or that it is unreasonable for him to rely, on the skill or judgment of the bailor or credit-broker”.<sup>401</sup>

## Durability

- 35-073 The express reference to durability<sup>402</sup> in the list of factors which can be taken into account when deciding whether or not goods are of satisfactory quality, resolves a point which had been of some doubt at common law, namely whether the implied terms continue to apply to the hired goods for a period after the bailor has transferred possession to the bailee.<sup>403</sup> In the case of many contracts of hire the obligation of the hirer is not a continuing one, in the sense that the obligation of the bailor is to supply and then to permit the bailee to retain possession until the hire terminates but, in other contexts, the court may infer from the terms of the contract between the parties that the obligation to supply goods of satisfactory quality may be held to be continuing one.<sup>404</sup>

## Implied terms as to quality and fitness: the 2015 Act

- 35-074 The [Consumer Rights Act 2015](#) provides that contracts for the hire of goods from a trader to a consumer are to be treated as including a term that the quality of goods is satisfactory.<sup>405</sup> Where, before the contract is made, the consumer, either expressly or by implication, makes known to the trader any particular purpose for which the consumer is contracting for the goods, the contract is also to be treated as including a term that the goods are reasonably fit for that purpose, whether or not that is a purpose for which goods of that kind are usually supplied.<sup>406</sup> However, the latter term is not to be treated as included in the contract if the circumstances show that the consumer did not rely or it was unreasonable for the consumer to rely on the skill or judgment of the trader or credit-broker.<sup>407</sup>

## Remedies: diminution of price and damages

- 35-075 If the owner supplies a defective chattel in breach of his warranty of fitness for purpose, the hirer can set up that breach in diminution or extinction of the rentals due under the contract. If the damages are assessed on the basis of hiring a similar item on similar terms they are likely to equal the claim for rentals.<sup>408</sup> In the case of a contract of hire which falls within the [Consumer Rights Act](#), the consumer is given a right to a price reduction in the circumstances prescribed in s.24 of the Act.<sup>409</sup>

## Remedies: termination

- 35-076 At common law the remedies for breach of an implied term turn on the nature of the term broken. Where the term broken is a condition, then the bailee is in principle entitled to terminate the contract of hire.<sup>410</sup> But where the term broken is a warranty, the bailee is not entitled to terminate the contract and is confined to a remedy in damages.<sup>411</sup> The [Supply of Goods and Services Act 1982](#) makes no general provision for the consequences of breach and so the entitlement of the bailee to terminate will turn on whether the term broken has been classified by the Act as a condition or a warranty. The Act does, however, contain one restriction on the right of the bailee to terminate. [Section 10A\(1\) of the Act](#) states that where the bailee would, apart from this subsection, have the right to treat the contract as repudiated by reason of a breach on the part of the bailor of a term implied by ss.8, 9, 10(2)(a) or 10(2)(b) of the Act and the breach is so slight that it would be unreasonable for him to do so the breach is not to be treated as a breach of a condition but may be treated as a breach of warranty. In other words, termination is not

an available remedy in these circumstances and the only remedy is damages. This provision has created an element of uncertainty in commercial transactions. It is for the bailor to show that the consequences of the breach are so slight that it would be unreasonable for the bailee to treat the contract as repudiated.<sup>412</sup> It is open to the parties to contract out of this provision, either actually or inferentially,<sup>413</sup> and thereby restore a greater element of certainty to their dealings. One restriction on the right to terminate which is not contained in the Act is that there is no provision which corresponds to s.11(4) of the Sale of Goods Act 1979 which states that where the buyer has accepted the goods the breach of a condition is generally only to be regarded as a breach of warranty. A court which wished to avoid the conclusion that the hirer had not lost his right to terminate where he continues to use the goods after becoming aware of the breach might find that he has lost his right to terminate as a result of his affirmation of the contract.<sup>414</sup>

## Remedies: the Consumer Rights Act

- 35-077 The remedies available to a consumer under the [Consumer Rights Act 2015](#)<sup>415</sup> where the trader has breached one of the terms treated as being included in a contract of hire concluded between a trader and consumer is more elaborate than that to be found at common law or in the [Supply of Goods and Services Act 1982](#). These include a short-term right to reject the goods,<sup>416</sup> a right of partial rejection,<sup>417</sup> a right to repair or replacement<sup>418</sup> and a right to a price reduction or final right to reject.<sup>419</sup>

## Exemption clauses<sup>420</sup>

- 35-078 At common law, the liability of the bailor for breach of the implied undertaking of fitness may be excluded by a special clause in the contract, provided the terms of the clause are made known to the hirer.<sup>421</sup> Subject to the provisions of the [Unfair Contract Terms Act 1977](#) the terms implied by the [1982 Act](#) may be negated or varied by express agreement, by the course of dealing between the parties or by usage.<sup>422</sup> But the ability of a bailor to exclude or restrict his liability for breach of obligations or duties arising from things done or to be done by him in the course of a business<sup>423</sup> is curtailed by the provisions of the [Unfair Contract Terms Act 1977](#).<sup>424</sup> In addition to the control imposed by s.2 of the [Act](#) (liability for death, personal injury or other loss or damage resulting from negligence)<sup>425</sup> and s.3 (exclusion or restriction of liability arising in contract where the person against whom the exemption clause is raised deals on the other's written standard terms of business),<sup>426</sup> s.7 applies specifically to contracts<sup>427</sup> of bailment ("where the possession ... of goods passes under ... a contract not governed by the law of sale of goods or hire-purchase ...")<sup>428</sup>

and to terms in such contracts “excluding or restricting liability”<sup>429</sup> for breach of obligation arising by implication of law from the nature of the contract.<sup>430</sup> **Section 7** thus applies to clauses which exclude or restrict a business liability under (inter alia) contracts of hire, or for work and labour. It does not specify the terms to be implied into the contract,<sup>431</sup> but it controls attempts to exclude or restrict liability arising under such terms. **Section 7(1A)**<sup>432</sup> provides:

“Liability in respect of the goods’ correspondence with description or sample, of their quality or fitness for any particular purpose, cannot be excluded or restricted by reference to such a term except in so far as the term satisfies the requirement of reasonableness.”

**Section 7(4)** further provides that:

“Liability in respect of—

- (a)the right to transfer ownership of the goods, or give possession; or
- (b)the assurance of quiet possession to a person taking goods in pursuance of the contract,

cannot<sup>433</sup> ... be excluded or restricted by reference to any such term except in so far as the term satisfies the requirement of reasonableness.”

As far as the **Consumer Rights Act 2015** is concerned, a term of a contract to hire goods from a trader to a consumer is not binding on the consumer to the extent that it would exclude or restrict the trader’s liability arising under **ss.9–16 of the Act**.<sup>434</sup> Apart from the **1977** and **2015 Acts**, the applicability of an exemption clause is a question of construction, depending on the intention of the parties<sup>435</sup>; it will require clear words for an exemption clause to be construed as wide enough to exempt the bailor from a fundamental breach of his undertaking.<sup>436</sup> The rules on incorporation<sup>437</sup> also apply. Thus the hirer will not be bound by an exemption clause printed on the back of a ticket which purports to be merely a receipt.<sup>438</sup>

## Obligations of the hirer

<sup>35-079</sup> The hirer is liable to pay the agreed hire,<sup>439</sup> to return the chattel at the expiration of the agreed period,<sup>440</sup> and to pay the cost of returning it.<sup>441</sup> The hirer may escape liability for failure to return the chattel if he can prove that the chattel was lost without the loss being due to his fault,<sup>442</sup> or that there was “good cause” for not returning it.<sup>443</sup> The hirer is bound to take reasonable care of the chattel hired, but he is not liable for damage to it if he can prove<sup>444</sup> that he or his employee (acting

in the course of his employment) were not negligent in causing the damage.<sup>445</sup> A special clause in the contract may vary the hirer's liability at common law, and such a clause may be interpreted in the light of the condition of the chattel at the commencement of the hiring.<sup>446</sup>

## Restrictions on use

- 35-080 The hirer may use the chattel only for the purpose for which it was let to him.<sup>447</sup> So, in early cases, if a horse was let for riding, the hirer was not permitted to use it for jumping<sup>448</sup>; if a horse was let for a particular journey, the hirer was not allowed to exceed that journey.<sup>449</sup> But the authority granted to the hirer to use the chattel will be construed as conferring on him implied authority to do in relation to the chattel anything reasonably incidental to its reasonable use, unless there is express provision to the contrary in the contract.<sup>450</sup> The hirer who uses a chattel for a purpose not contemplated by the contract of hiring will be liable both in contract and in tort for any loss caused by such use.<sup>451</sup>

## Relief against forfeiture

- 35-081 Where the contract provides for forfeiture of amounts paid, or for premature termination of the hiring, upon a breach by the hirer, the doctrine of relief against forfeiture may apply.<sup>452</sup>

## Repair and maintenance of the hired chattel

- 35-082 The terms of the contract may make the bailor liable for the repair of the chattel.<sup>453</sup> Apart from a special obligation undertaken in the contract, the hirer is not responsible for fair wear and tear,<sup>454</sup> nor is he under any obligation to do any repairs<sup>455</sup> except such as are naturally incidental to the due performance of his obligation to take reasonable care.<sup>456</sup> The hirer of a horse must provide it with suitable food, unless there is an agreement to the contrary.<sup>457</sup> Similarly, the hirer of a motorcar is obliged to pay for petrol and oil and other "running expenses". The mere fact of a bailment does not confer on the bailee any authority to deliver the chattel bailed to a third party for repair or otherwise so as to give that third party a lien for work done on the chattel: but where the circumstances show implied authority from the owner (e.g. where the bailee expressly agrees to keep the chattel in repair), a third party who repairs it at the request of the hirer may acquire, for the cost of the repairs, a lien effective against the owner as well as against the hirer.<sup>458</sup>

## Damages for wrongful detention by the hirer

- 35-083 Where the hirer wrongfully detains a chattel hired to him by the claimant, and the chattel is one which the claimant, as part of his business, hires out to users, the normal measure of damages is the full market rate of hire for the whole period of the detention if the hirer has made beneficial use of the chattel during that period.<sup>459</sup>

## Footnotes

- 351 Palmer at paras 21-016 et seq.; the Law Commission's report on Law of Contract: Report on Implied Terms in Contracts for the Supply of Goods, Law Com. No.95 (1979).
- 352 In addition to ss.13–15 of the Act, which apply if the hiring is also part of “a contract for the supply of services” (see above, paras 35-044—35-048).
- 353 See below, paras 46-074 et seq. The Act is noted by *Palmer* in (1983) 46 M.L.R. 619 and [1983] L.M.C.L.Q. 377; see also Woodroffe, Goods and Services—The New Law (1982), Ch.5.
- 354 A contract for the hire of goods is defined in s.6(1) of the Act as one under which the trader gives or agrees to give the consumer possession of the goods with the right to use them, subject to the terms of the contract, for a period determined in accordance with the contract. A hire-purchase agreement is not, for this purpose, a contract of hire. See below paras 40-491 et seq.
- 355 See below, paras 35-068, 35-071—35-072.
- 356 s.9(1) (see below, para.35-071).
- 357 s.11(3).
- 358 See, for example, *Lee v Atkinson & Brook* (1609) Yel. 172; *Turner v Hardcastle* (1862) 11 C.B. N.S. 683.
- 359 See below, para.35-071. cf. the terms implied into contracts for the sale of goods (see below, paras 46-074 et seq.) or for hire-purchase (see below, paras 41-386 et seq.).
- 360 Except by s.9(1), the Act does not prejudice other legislation or any rule of law about terms to be implied in a contract for the hire of goods: s.11(3).
- 361 Defined to mean “a contract under which one person bails or agrees to bail goods to another by way of hire” (whether or not services are also provided, and whatever is the nature of the consideration); but the definition excludes hire-purchase agreements, and contracts under which goods are to be bailed in exchange for trading stamps on their redemption: s.6. (For definitions, see s.18(1).) *Palmer* [1983] L.M.C.L.Q. 377 discusses various types of contract covered by the Act. In a conditional sale or under a *Romalpa* clause (see below, paras 46-173—46-188), the provisions of the 1982 Act could apply to the period of bailment (i.e. before the passing of property to the bailee).

- 362 And that “in the case of an agreement to bail he will have such a right at the time of the bailment”: s.7(1). cf. below, paras 46-075 et seq.
- 363 s.7(2). The right of the bailor to repossess the goods under an express or implied term of the contract is not affected: s.7(3) (but equitable relief against forfeiture (Vol.I, paras 29-259 et seq.) could prevent the bailor from repossessing). cf. below, paras 46-078 et seq.
- 364 s.17; see below, para.40-510.
- 365 s.17(1).
- 366 s.17(2)(c).
- 367 *Astley Industrial Trust Ltd v Grimley* [1963] 1 W.L.R. 584; *Charterhouse Credit Co Ltd v Tolly* [1963] 2 Q.B. 683 (overruled on another point: *Photo Production Ltd v Securicor Transport Ltd* [1980] A.C. 827). On the consequences of the breach of this undertaking, see below, paras 41-391—41-393.
- 368 The definition includes the situation where “being exposed for supply, the goods are selected by the bailee”: s.8(4).
- 369 s.8(1) and (2). See, by way of example, *Brewer v Mann* [2012] EWCA Civ 246, [2012] R.T.R. 28. If the reference is to a sample as well as a description it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description: s.8(3). cf. below, para.46-086 (sale of goods).
- 370 “Satisfactory quality” is to be construed in accordance with s.9(2A), and s.18(3).
- 371 s.10(2). cf. below, paras 46-095 et seq.
- 372 s.11(1).
- 373 s.13(2). Similar terms are to be treated as included in a contract to hire goods by reference to a model of the goods that is seen or examined by the consumer before entering into the contract: s.14(2).
- 374 See *Davies* (1964) 38 Aust.L.J. 277; *Turner* (1972) 46 Aust.L.J. 560, 619; *Palmer* (1975) 4 An.—Am.L.R. 207; and the Law Commission Report on Law of Contract: Report on Implied Terms in Contracts for the Supply of Goods, Law Com. No.95 (1979).
- 375 It can be argued that the common law rules still apply to contracts where the bailor is not acting in the course of a business. The basis for this argument is that s.11(3) states that nothing in the preceding provisions of the Act “prejudices” the operation of any rule of law whereby any condition (other than one relating to quality or fitness) is to be implied into such contracts. However, the words in brackets, taken together with the wording of s.9(1), suggest that there is no longer any room for the common law implied term. The better view would therefore appear to be that the common law rules are practically redundant: see Palmer at para.21-026.
- 376 *Astley Industrial Trust Ltd v Grimley* [1963] 1 W.L.R. 584; *Charterhouse Credit Co Ltd v Tolly*, above; *Doobay v Mohabeer* [1967] 2 A.C. 278; *Hadley v Droitwich Construction Co Ltd* [1968] 1 W.L.R. 37. See, however, the provisions of the Unfair Contract Terms Act 1977 (see above, para.35-054; see below, para.35-078).
- 377 *Yeoman Credit Ltd v Apps* [1962] 2 Q.B. 508; *Oliver v Saddler & Co* [1929] A.C. 584 (in this case there was no actual hiring, but since the transaction was for the mutual convenience of bailor and bailee, the House of Lords did not treat it as a gratuitous bailment, but as analogous to a hiring); *Mowbray v Merryweather* [1895] 2 Q.B. 640; cf. *MacCarthy v Young* (1861) 6 H.

- & N. 329 (gratuitous loan); *The Moorcock* (1889) 14 P.D. 64; *Farnworth Finance Facilities Ltd v Attryde* [1970] 1 W.L.R. 1053, 1056 (hire-purchase: see below, para.41-389).
- 378 *Fowler v Lock* (1872) L.R. 7 C.P. 272, 280, 282 (subsequent proceedings (1874) L.R. 10 C.P. 90). cf. *European and Australian Royal Mail Co Ltd v Royal Mail Steam Packet Co* (1861) 30 L.J. C.P. 247.
- 379 The circumstances must show that the hirer is not relying solely on his own judgment of the chattel: *Yeoman Credit Ltd v Apps* [1962] 2 Q.B. 508; but a cursory inspection by the hirer does not preclude his relying on the implied warranty: *Jones v Page* (1867) 15 L.T. 619. cf. *Robertson v Amazon Tug and Lighterage Co* (1881) 7 Q.B.D. 598; *GM Shepherd Ltd v North West Securities Ltd*, 1991 S.L.T. 499.
- 380 *Astley Industrial Trust Ltd v Grimley* [1963] 1 W.L.R. 584 (cf. below, para.41-389); *Charterhouse Credit Co Ltd v Tolly* [1963] 2 Q.B. 683. (This case also deals with the measure of damages when the implied undertaking as to fitness is broken: see below, para.41-393.)
- 381 *Mowbray v Merryweather* [1895] 2 Q.B. 640; *Reed v Dean* [1949] 1 K.B. 188; *Yeoman Credit Ltd v Apps*, above; *Astley Industrial Trust Ltd v Grimley*, above, at 598. See also *Vogan & Co v Oulton* (1899) 81 L.T. 435, and see below, para.41-389. cf. the analogous sale of goods cases (see below, paras 46-105—46-112).
- 382 *Mowbray v Merryweather*, see above.
- 383 *Readhead v Midland Ry* (1869) L.R. 4 Q.B. 379 (contract for carriage of passengers for reward: obligation of carrier in regard to the condition of the vehicle).
- 384 *Hyman v Nye* (1881) 6 Q.B.D. 685 (approved in *The West Cock* [1911] P. 208, 227, 231 (a contract for towage by a tug)).
- 385 *Yeoman Credit Ltd v Apps* [1962] 2 Q.B. 508, 520, 523, 525. See also *Mowbray v Merryweather* [1895] 2 Q.B. 640 and *Reed v Dean* [1949] 1 K.B. 188; cf. the similar obligation to deliver a “reasonably fit” car under a contract of sale: *Whincup* (1975) 38 M.L.R. 660.
- 386 *London General Cab Co Ltd v IRC* [1950] 2 All E.R. 566. See Paton at pp.287–289.
- 387 *Jones v Page* (1867) 15 L.T. 619; *Chew v Jones* (1847) 10 L.T.(O.S.) 231; *Windle v Jordan* (1883) 75 Maine 149; *Hyman v Nye*, above. As to liability to third parties, see *White v Steadman* [1913] 3 K.B. 340.
- 388 *Fowler v Lock* (1872) L.R. 7 C.P. 272 (subsequent proceedings (1874) L.R. 10 C.P. 90). cf. *Burnard v Haggis* (1863) 14 C.B. N.S. 45 (hirer expressly told horse not fit for jumping).
- 389 *Abraham v Bullock* (1902) 86 L.T. 796.
- 390 *Morris v CW Martin & Sons Ltd* [1966] 1 Q.B. 716 (see above, para.35-050) (approved by the House of Lords in *Photo Production Ltd v Securicor Transport Ltd* [1980] A.C. 827, 846, 852; and in *Lister v Hesley Hall Ltd* [2001] UKHL 22, [2002] 1 A.C. 215 at [19]–[20], [44]–[46], [55]–[60] and [71]–[76]). cf. *Sanderson v Collins* [1904] 1 K.B. 628; *Adams (Durham) Ltd and Day v Trust Houses Ltd* [1960] 1 Lloyd's Rep. 380; *Leesh River Tea Co Ltd v British India SN Co Ltd* [1967] 2 Q.B. 250.
- 391 Under s.46(1) of the Consumer Protection Act 1987, the bailor may commit an offence if he hires or offers to hire any consumer goods which fail to meet certain safety requirements; and by s.12, regulations may prohibit the hiring of specified goods.

- 392 By s.9(1), no term is to be implied about the quality or fitness for any particular purpose of the goods, except as provided by ss.9 and 10 of the Act or by any other enactment. However, s.9(7) recognises that such a term “may be annexed by usage to a contract for the hire of goods”. (The meaning of “quality” is extended by s.18(3).) cf. below, para.46-094.
- 393 s.9(8) extends this provision to a person “who in the course of a business is acting as agent for another”, except where the bailee knows (or ought to know) that the principal is not bailing in the course of a business. cf. below, paras 46-096, 46-097.
- 394 cf. also *Karsales (Harrow) Ltd v Wallis [1956] 1 W.L.R. 936, 940* (term implied that the goods should, at the time of delivery to the bailee, be in substantially the same condition as they were at the time the bailee had previously inspected them).
- 395 s.9(2). Goods are declared to be of satisfactory quality if they meet the standard that a reasonable person would regard as satisfactory, taking account of any description of the goods, the consideration for the bailment (if any) and all the other relevant circumstances (s.9(2A)). The definition of “quality” is expanded by s.18(3) so that, in appropriate cases, it encompasses (a) fitness for all the purposes for which goods of the kind in question are commonly supplied, (b) appearance and finish, (c) freedom from minor defects, (d) safety and (e) durability.
- 396 s.9(3). cf. see below, paras 46-101—46-102.
- 397 s.9(4).
- 398 Either “to the bailor in the course of negotiations conducted by him in relation to the making of the contract”, or to a credit-broker who sold the goods to the bailor before they were bailed: s.9(4). (For definitions, see s.18(1).)
- 399 s.9(4).
- 400 s.9(5). cf. below, paras 46-105 et seq.
- 401 s.9(6). cf. below, para.46-108. In the case of finance leasing, the bailee’s reliance may be on the supplier’s skill or judgment, rather than on that of the bailor who obtained the goods from the supplier.
- 402 s.18(3)(e).
- 403 There was some authority at common law for the proposition that there was a continuing element to the warranty of fitness for purpose: see *James Pty Ltd v Duncan [1970] V.R. 705, 717; Lambert v Lewis [1982] A.C. 225, 276* (see below, para.46-104).
- 404 See, for example, *Stoke-on-Trent College v Pelican Rouge Coffee Solutions Group Ltd [2017] EWHC 2829 (TCC)* at [131]–[133].
- 405 s.9(1). Goods are stated to be of satisfactory quality if they meet the standard that a reasonable person would consider satisfactory, taking account of any description of the goods, the price or other consideration for the goods (if any) and all the other relevant circumstances (s.9(2)). The definition of “quality” is expanded by s.9(3) so that, in appropriate cases, it encompasses (a) fitness for all the purposes for which goods of the kind in question are usually supplied, (b) appearance and finish, (c) freedom from minor defects, (d) safety and (e) durability. The relevant circumstances referred to in s.9(2) include any public statement about the specific characteristics of the goods made by the trader, the producer or any representative of the trader or the producer (s.9(5)–(7)).
- 406 s.10(1) and (3).

- 407 s.10(4).
- 408 *UCB Leasing Ltd v Holtom* [1987] R.T.R. 362, CA (the claim for damages related to the period when the hirer had not terminated the contract on account of the breach). See also *Charterhouse Credit Co Ltd v Tolly* [1963] 2 Q.B. 683; *Doobay v Mohabeer* [1967] 2 A.C. 278, 288–289. A deduction from the damages should be made for the value of any use which the hirer has made of the chattel.
- 409 On which see below, para.40-521.
- 410 See Vol.I, para.27-014.
- 411 See Vol.I, para.27-020.
- 412 s.10A(3).
- 413 s.10A(2).
- 414 See further on this point, Palmer (1983) 46 M.L.R. 619, 626–627.
- 415 See below, para.40-467.
- 416 ss.20 and 22, on which see further paras 40-515 and 40-518.
- 417 s.21, on which see further para.40-517.
- 418 s.23, on which see further para.40-520.
- 419 s.24, on which see further paras 40-521—40-522.
- 420 See Vol.I, Ch.17.
- 421 e.g. *Astley Industrial Trust Ltd v Grimley* [1963] 1 W.L.R. 584; *Handley v Marston* (1962) 106 S.J. 327. Where a clause sought to be incorporated into a contract is particularly onerous or unusual, it must be fairly and reasonably brought to the attention of the party affected by it: *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] Q.B. 433; *AEG (UK) Ltd v Logic Resource Ltd* [1996] C.L.C. 265; *Goodlife Foods Ltd v Hall Fire Protection Ltd* [2018] EWCA Civ 1371, [2018] B.L.R. 491, on which see Vol.I, para.15-012.
- 422 s.11(1). An express term does not negative one implied by the Act “unless inconsistent with it”: s.11(2).
- 423 s.1(3); and see Vol.I, para.17-083.
- 424 For a fuller treatment of the Act, see Vol.I, paras 17-075 et seq.
- 425 s.2.
- 426 See above, para.35-054; Vol.I, paras 17-090—17-091.
- 427 See above, para.35-054.
- 428 s.7(1).
- 429 On the extended meaning of this phrase, see s.13 (Vol.I, paras 17-079—17-081).
- 430 s.7(1). See also Vol.I, para.17-098.
- 431 s.7 applies to terms implied into the contract by law or from the nature of the contract: see above, paras 35-066 et seq.; see below, para.35-092.
- 432 Which replaces s.7(3).
- 433 The excluded words refer to subs.(3A) which does not apply to contracts of hire.
- 434 s.31, on which see further below, para.40-535. Note the extensions to the scope of s.31(1) to be found in s.31(2) and (3).

- 435 *Photo Production Ltd v Securicor Transport Ltd* [1980] A.C. 827 (explaining *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 A.C. 361 (Vol.I, paras 17-024 et seq.)).
- 436 The *Photo Production* case, see above. cf. the earlier cases: *Karsales (Harrow) Ltd v Wallis* [1956] 1 W.L.R. 936; *Yeoman Credit Ltd v Apps* [1962] 2 Q.B. 508 (see below, para.41-396). See also *White v John Warwick & Co Ltd* [1953] 1 W.L.R. 1285 (construction of clause).
- 437 See Vol.I, paras 15-005—15-021.
- 438 *Chapelton v Barry UDC* [1940] 1 K.B. 532. On “ticket cases” generally, see Vol.I, paras 15-005 et seq.
- 439 See above, para.35-048 (s.15 of the 1982 Act).
- 440 *British Crane Hire Corp Ltd v Ipswich Plant Hire Ltd* [1975] Q.B. 303, 311–312, 313. [1975] Q.B. 303 at 312.
- 441 [1975] Q.B. 303 at 311–312, 313.
- 442 [1975] Q.B. 303 at 311–312, 313 (“... if some great boulder descended on the vehicle and damaged it beyond repair, that might well be good cause for not returning it. As regards getting stuck in a snowdrift or a marsh, I would not think such a happening could normally constitute good cause”, per Sir Eric Sachs). See the doctrine of frustration: *Taylor v Caldwell* (1863) 3 B. & S. 826, 838–839; Vol.I, Ch.26.
- 443 On the onus of proof where the bailee has died, see *National Trust Co v Wong Aviation* [1969] 2 Lloyd's Rep. 340.
- 444 *Sanderson v Collins* [1904] 1 K.B. 628 (liability for employee); *British Crane Hire Corp Ltd v Ipswich Plant Hire Ltd*, above, at 311–312, 313. See also *Dean v Keate* (1811) 3 Camp. 4; *Coupé Co v Maddick* [1891] 2 Q.B. 413.
- 445 *Schroder v Ward* (1863) 13 C.B. N.S. 410; *Brice & Sons v Christiani & Nielsen* (1928) 44 T.L.R. 335. But see the statutory controls over exemption clauses: see above, paras 35-054, 35-078.
- 446 Palmer at paras 21-071—21-075; Story at para.413; Jones at pp.68, 69.
- 447 *Burnard v Haggis* (1863) 14 C.B. N.S. 45.
- 448 *Walley v Holt* (1876) 35 L.T. 631.
- 449 *Tappenden v Artus* [1964] 2 Q.B. 185 (see below, para.35-094). cf. *Morris v CW Martin & Sons Ltd* [1966] 1 Q.B. 716, 729–720 (decision approved in the House of Lords: see above, para.35-070).
- 450 *Burnard v Haggis*, above; *Walley v Holt*, above.
- 451 See Vol.I, paras 29-259 et seq.; see below, para.41-347.
- 452 Story at para.385. The assignee of the owner may, in some circumstances, discharge the latter’s liability to repair: *British Waggon Co v Lea & Co* (1880) 5 Q.B.D. 149. (On such vicarious performance, see Vol.I, paras 22-084 et seq.) See also *Brady v St Margaret's Trust Ltd* [1963] 2 Q.B. 494.
- 453 *Blakemore v Bristol and Exeter Ry* (1858) 8 El. & Bl. 1035 (a case of gratuitous loan, but the same principle would, it is submitted, apply to a hiring); *Coupé Co v Maddick* [1891] 2 Q.B. 413, 415.

- 455 cf. *Sutton v Temple* (1843) 12 M. & W. 52, 60; *Hopkins v GE Ry* (1895) 12 T.L.R. 25; also, see above, para.35-041. A bailee who executes repairs to the chattel without the owner's consent probably cannot recover the expense from the bailor. cf. also Story at para.392.
- 456 Story at para.393.
- 457 *Handford v Palmer* (1820) 2 Brod. & Bing. 359; Story at para.393 (citing American cases, French and Roman law to the same effect).
- 458 See the cases cited below, in the footnotes to para.35-094.
- 459 *Strand Electric and Engineering Co Ltd v Brisford Entertainments Ltd* [1952] 2 Q.B. 246; *Hillesden Securities Ltd v Ryjak Ltd* [1983] 1 W.L.R. 959. cf. Vol.I, para.32-162.

## (ii) - Equipment Leasing

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(ii) - Equipment Leasing

### Finance leasing

<sup>35-084</sup> In the light of various tax advantages,<sup>460</sup> a form of long-term financing has developed and is now well established, which is known as finance leasing. In a finance lease, the lessee selects the equipment to be supplied by a manufacturer or dealer, but the lessor (a finance company) provides the funds, acquires title to the equipment and allows the lessee to use it for all (or most) of its expected useful life. During the period of the lease the usual risks and rewards of ownership are substantially transferred to the lessee, who bears the risks of loss, destruction and depreciation of the leased equipment (fair wear and tear only excepted) and of its obsolescence or malfunctioning.<sup>461</sup> The lessee also bears the costs of maintenance, repairs and insurance. The regular rental payments during the primary period of the lease are calculated to enable the lessor to amortise its capital outlay and to make a profit from its finance charges.<sup>462</sup> At the end of the primary leasing period, there will frequently be a secondary leasing period during which the lessee may opt to continue the lease at a nominal rental, or the equipment may be sold and a proportion of the sale proceeds returned to the lessee as a rebate of rentals.<sup>463</sup> The lessee thus acquires any residual value in the equipment, after the lessor has recouped its investment and charges. If the lease is terminated prematurely, the lessor is entitled to recoup its capital investment (less the realisable value of the equipment at the time) and its expected finance charges (less an allowance to reflect the accelerated return of the capital). The bailment which underlies finance leasing is therefore only a device to provide the finance company with a security interest (its reversionary right)<sup>464</sup>; a finance lease is similar in function to outright purchase or hire purchase.<sup>465</sup> Details of finance leasing must be sought elsewhere.<sup>466</sup>

## Footnotes

- 460 In finance leasing, tax writing-down allowances are claimed by the lessor, and the rentals payable by the lessee are reduced accordingly; the rentals are usually an expense allowed against the lessee's liability to corporation tax.
- 461 Finance leases with non-consumers inevitably exclude the terms implied by the *Supply of Goods and Services Act 1982* (see above, paras 35-044 et seq.). It is believed that in the case of most such finance leases the reasonableness requirement in s.7(1A) of the *Unfair Contract Terms Act 1977* (see above, para.35-078) will be satisfied: see *R & B Customs Brokers Ltd v United Dominions Trust Ltd [1988] 1 W.L.R. 321, 331–332*.
- 462 A lease of equipment which does not have the characteristics set out in this paragraph is known as an “operating lease”; in such a lease the lessee has the use of the chattel for only a relatively short time and the equipment will have a substantial residual value at the end of the lease.
- 463 Unlike a hire-purchase transaction where, at the end of the hiring period, the hirer has the option of buying the chattel for a nominal sum (see below, para.41-310).
- 464 *GM Shepherd Ltd v North West Securities Ltd, 1991 S.L.T. 499, 511, 513–514*.
- 465 *On Demand Information Plc v Michael Gerson (Finance) Plc [1999] 1 All E.R. (Comm) 512, 515–516*, where reliance was placed by the court on this passage. See also *On Demand Information Plc v Michael Gerson (Finance) Plc [2001] 1 W.L.R. 155, 158, CA*. The point did not arise on the subsequent appeal to the House of Lords: *[2002] UKHL 13, [2003] 1 A.C. 551*.
- 466 Adams, Commercial Hiring and Leasing (1989); Sadler, Reisbach and Thomas, Equipment Leasing (1993, looseleaf); Davies, Equipment and Motor Vehicle Leasing and Hiring (1997).

## (iii) - Statutory Control of Hiring

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(iii) - Statutory Control of Hiring

## The Consumer Credit Act 1974

- 35-085 This Act imposes statutory controls, not only upon consumer credit agreements, but also on “consumer hire agreements”. A consumer hire agreement is defined<sup>467</sup> as an agreement made by a person with an individual<sup>468</sup> (the “hirer”) for the bailment<sup>469</sup> of goods to the hirer, being an agreement which: (a) is not a hire-purchase agreement<sup>470</sup>; and (b) is capable of subsisting for more than three months.<sup>471</sup> The use of the term “hire” has been held to imply that there is a payment or reward for the hire so that a gratuitous bailment does not fall within the scope of the definition.<sup>472</sup> A consumer hire agreement is a regulated agreement<sup>473</sup> for the purposes of the Act if it is a regulated consumer hire agreement for the purposes of Ch.14B of Pt 2 of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001.<sup>474</sup> The general provisions of the Act, together with the Regulations implementing the Consumer Credit Directive 2008, are examined below in Ch.41<sup>475</sup>: these include the power to make regulations about the information to be disclosed to a hirer before a regulated agreement is made<sup>476</sup>; controls over the form and content of agreements<sup>477</sup>; the duty to supply copies of agreements<sup>478</sup>; the right of the hirer to cancel certain agreements within a “cooling-off period”<sup>479</sup>; the duty of the owner to give notice before taking certain actions to enforce a term of the agreement<sup>480</sup>; restrictions on the rights of the owner following the death of the hirer<sup>481</sup>; the duty of the owner to serve a “default notice” on the hirer before enforcing certain rights following breach by the hirer,<sup>482</sup> or to give notice of termination of the agreement in non-default cases<sup>483</sup>; provisions regulating securities<sup>484</sup> and the taking of negotiable instruments<sup>485</sup>; and the powers of the court when enforcement of the

agreement is sought.<sup>486</sup> There are many Regulations made under the Act, details of which must be sought elsewhere.<sup>487</sup> In this section, only those provisions of the Act which are specifically applicable to hiring agreements will be examined.

## Duties on the parties to give information

- 35-086 The owner<sup>488</sup> under a regulated consumer hire agreement,<sup>489</sup> within 12 working days<sup>490</sup> after receiving a request in writing to that effect from the hirer and payment of a fee of £1,<sup>491</sup> must give<sup>492</sup> to the hirer a copy<sup>493</sup> of the executed agreement,<sup>494</sup> together with a statement signed by or on behalf of the owner showing, according to the information to which it is practicable for him to refer, the total sum which has become payable under the agreement by the hirer but remains unpaid and the various amounts comprised in that total sum, with the date when each became due.<sup>495</sup> (This provision does not apply to a non-commercial agreement.<sup>496</sup>) If the owner fails to comply with this provision he is not entitled, while the default continues, to enforce the agreement.<sup>497</sup> The statement when given by the owner is binding on him.<sup>498</sup> A surety under a regulated consumer hire agreement may similarly request copies of the agreement, documents and the security instrument, and a similar financial statement.<sup>499</sup>

## Whereabouts of goods

- 35-087 Where, under a regulated agreement, the hirer must keep the goods in his possession or control, he must, within seven working days after he has received a request in writing from the owner, tell him where the goods are.<sup>500</sup>

## Right to terminate hire agreement

- 35-088 Irrespective of the terms of the agreement, the Act gives the hirer under a regulated consumer hire agreement<sup>501</sup> the right to terminate the agreement by giving notice to any person entitled or authorised to receive the sums payable under the agreement.<sup>502</sup> Such notice must not expire earlier than 18 months after the making of the agreement<sup>503</sup>; otherwise, the minimum period of notice (unless the agreement provides for a shorter period) is as follows: (1) if the agreement provides for the making of payments by the hirer at equal intervals, the length of one interval or three months (whichever is less)<sup>504</sup>; (2) if the agreement provides for such payments at differing

intervals, the length of the shortest interval, or three months (whichever is less)<sup>505</sup>; (3) in any other case, three months' notice.<sup>506</sup> The right to terminate under this provision<sup>507</sup> does not apply to: (1) any agreement where the payments exceed in total £1,500 in any year<sup>508</sup>; or (2) where the goods are bailed to the hirer for the purposes of a business carried on by him<sup>509</sup> and the goods are selected by the hirer, and acquired by the owner for the purposes of the agreement at the request of the hirer from any person other than the owner's associate<sup>510</sup>; or (3) any agreement where the hirer requires<sup>511</sup> the goods for the purpose of bailing or hiring them to other persons in the course of a business carried on by him<sup>512</sup>; or (4) if the Financial Conduct Authority exempts a person from the provision.<sup>513</sup>

## Restrictions on the owner's rights

- 35-089 The owner is not entitled, without an order of the court, to enter any premises to take possession of goods subject (inter alia) to a regulated consumer hire agreement.<sup>514</sup> Special provision is made for the owner to prove that the hirer is in adverse possession of the goods.<sup>515</sup> When the court makes an order under a regulated agreement it has wide power<sup>516</sup> to impose conditions on the parties, or to suspend the operation of any term of the order; but it may not extend the period for which the hirer, under the terms of a consumer hire agreement, is entitled to possession of the goods.<sup>517</sup>

## Financial relief for the hirer

- 35-090 Where the owner under a regulated consumer hire agreement<sup>518</sup> recovers possession of the goods otherwise than by action, the Act entitles the hirer to apply to the court for an order that the whole or part of any sum paid by the hirer to the owner in respect of the goods shall be repaid, and that the obligation to pay the whole or part of any sum owed by the hirer to the owner shall cease.<sup>519</sup> The court is empowered to make such orders "if it appears to the court just to do so, having regard to the extent of the enjoyment of the goods by the hirer".<sup>520</sup> The terms of the enactment may be wide enough to cover payments under any heading of the agreement, e.g. for rental, for "depreciation", or as "liquidated damages".<sup>521</sup> If a court orders the hirer to deliver to the owner the goods covered by a regulated consumer hire agreement, an order may be made granting financial relief to the hirer in a similar way.<sup>522</sup>

## Footnotes

- 467 s.15(1); see also below, para.[41-036](#).
- 468 Defined in s.[189\(1\)](#); see below, para.[41-016](#).
- 469 See *Palmer and Yates [1979] C.L.J. 180*.
- 470 Defined in s.[189\(1\)](#); see below, para.[41-360](#).
- 471 There was at one time a further requirement, namely that the agreement did not require the hirer to make payments exceeding £25,000. The financial limit was removed by s.2 of the Consumer Credit Act 2006 in relation to non-business hire, which came into force on 6 April 2008 (see Consumer Credit Act 2006 (Commencement No.4 and Transitional Provisions) Order (SI 2008/831) Sch.2 para.1).
- 472 *TRM Copy Centres (UK) Ltd v Lanwell Services Ltd [2009] UKHL 35, [2009] 1 W.L.R. 1375* at [11].
- 473 Defined in s.[189\(1\)](#); see below, paras [41-037](#), [41-039](#).
- 474 SI 2001/544 art.60N (inserted by Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) (No.2) Order 2016 (SI 2016/392) Pt 2 art.2). An exempt agreement is a consumer credit hire agreement which is an exempt agreement under arts 60O–60Q of SI 2001/544.
- 475 See below, paras [41-002](#) et seq.
- 476 s.[55](#) (below, paras [41-078](#)—[41-079](#)).
- 477 ss.[60](#)–[61](#) (below, paras [41-082](#)—[41-083](#)); SI 1983/1553 (as amended) and, in the case of the Regulations implementing the Consumer Credit Directive 2008 (SI 2010/1014, as amended) (below, para.[41-084](#)).
- 478 ss.[62](#)–[64](#) (below, paras [41-090](#)—[41-091](#)); SI 1983/1557 (as amended) and s.[61A](#) (below, para.[41-093](#)).
- 479 ss.[64](#), [67](#)–[73](#) (below, paras [41-092](#), [41-103](#) et seq.).
- 480 s.[76](#) (below, paras [41-166](#) et seq.); SI 1983/1561 (as amended).
- 481 s.[86](#) (below, para.[41-177](#)).
- 482 ss.[87](#)–[89](#) (below, paras [41-168](#) et seq.); SI 1983/1561 (as amended).
- 483 s.[98](#) (below, para.[41-174](#)); SI 1983/1561 (as amended) and s.[98A](#) (below, para.[41-175](#)).
- 484 ss.[105](#)–[106](#), [110](#)–[113](#) (below, paras [41-182](#) et seq.); SI 1983/1556 (as amended).
- 485 ss.[123](#)–[125](#) (below, paras [41-197](#) et seq.). But see SI 1984/435.
- 486 ss.[127](#)–[132](#); [135](#)–[136](#). (Below, paras [41-201](#) et seq.).
- 487 Guest, Credit Law; Goode, Consumer Credit: Law and Practice; Bennion, Consumer Credit Control, Vol.2; F. Philpott, W. Hibbert, S. Neville, S. Popplewell, B. Say, P. Sayer and J. Smith, The Law of Consumer Credit and Hire (2009).
- 488 Defined in s.[189\(1\)](#) (together with a corresponding definition for “hirer”). See below, para.[41-038](#).

- 489 For the definition of this term (in s.15(2) of the Act) see below, paras 41-036, 41-037—41-044.
- 490 SI 1983/1569 reg.2.
- 491 SI 1998/997.
- 492 *Give* means deliver or send by appropriate method to: s.189(1), as amended by SI 2004/3236 art.2(9).
- 493 See s.180 and SI 1983/1557, as amended, made thereunder, for the form and content of copies.
- 494 Defined in s.189(1). A copy must also be given of any other document referred to in the agreement: s.79(1).
- 495 s.79(1). (The subsection does not apply to an agreement under which no sum is payable by the hirer, or to a request made less than one month after a previous request was complied with: s.79(2).)
- 496 s.79(4). (For the definition of “a non-commercial agreement”, see s.189(1) and see below, para.41-050).
- 497 s.79(3)(a). Originally, if the default continued for one month, an offence was committed (s.79(3)(b)) but this provision was repealed by the Consumer Protection from Unfair Trading Regulations 2008 (SI 2008/1277) reg.30(1) and Sch.2.
- 498 s.172(1). (But the court has a discretion to grant the owner relief if the statement is shown to be incorrect.)
- 499 s.109. (See below, para.41-137.)
- 500 s.80 (which is examined see below, para.41-140).
- 501 For the definition, see below, paras 41-036, 41-037—41-044.
- 502 s.101(1). (But termination under this subsection does not affect any liability under the agreement which has accrued before the termination: s.101(2).)
- 503 s.101(3). (In the case of a “modifying agreement” (see s.189(1)) this reads “after the making of the original agreement”: s.101(9).)
- 504 s.101(4).
- 505 s.101(5).
- 506 s.101(6). On the extent of the protection granted by s.101 see *Palmer and Yates [1979] C.L.J. 180, 195–199*.
- 507 s.101.
- 508 s.101(7)(a). (Payments under this subsection do not take account of breach of the agreement.) The monetary limit may be amended: s.181. See SI 1998/997.
- 509 “or the hirer holds himself out as requiring the goods for those purposes”: s.101(7)(b).
- 510 s.101(7)(b). This provision would cover many ordinary leasing agreements.
- 511 “or holds himself out as requiring”: s.101(7)(c).
- 512 s.101(7)(c).
- 513 s.101(8). The exemption may be granted if “it appears … to be in the interests of hirers to do so”, and may be made subject to conditions. In addition, the FCA may, subject to conditions, grant an exemption of a more general nature to a consumer hire agreement which falls within a specified description: s.101(8A).

- 514 s.92(1). (An entry in contravention of s.92(1) is actionable as a breach of statutory duty: s.92(3).)
- 515 s.134 (the same provision applies to other types of regulated agreements: see below, para.41-383).
- 516 s.135(1) (see below, para.41-209).
- 517 s.135(3).
- 518 For the definition, see below, paras 41-036, 41-037—41-044.
- 519 s.132(1).
- 520 s.132(1). For an illustration, see *Automotive Financial Services Ltd v Henderson, 1992 S.L.T. (Sh. Ct.) 63*.
- 521 See Vol.I, paras 29-203 et seq.
- 522 s.132(2).

## (d) - Work and Labour

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(d) - Work and Labour

### Bailment for hire of work and labour

- 35-091 Where a chattel is bailed to the bailee in order that he may perform work upon it for reward,<sup>523</sup> it is a bailment for hire of work and labour.<sup>524</sup> The duty of the bailor to pay the agreed price, or a reasonable remuneration upon a quantum meruit,<sup>525</sup> depends upon general principles of the law of contract,<sup>526</sup> or (where applicable) on s.15 of the Supply of Goods and Services Act 1982 or s.51 of the Consumer Rights Act 2015 (discussed above<sup>527</sup>); this type of contract is discussed here only insofar as it involves a bailment.

### Duties and liabilities of the worker

- 35-092 Wherever the worker is acting in the course of a business, the standard of workmanship and of care of the chattel which he must achieve is laid down in the term implied by s.13 of the Supply of Goods and Services Act 1982<sup>528</sup> and where a trader is supplying a service to a consumer it is to be found in s.49(1) of the Consumer Rights Act 2015.<sup>529</sup> These standards merely codify the common law rules<sup>530</sup> (which still apply to any such bailment not covered by the Acts): the reported cases will therefore still be relevant. Since the worker is to be remunerated, the common law required him to perform the work in an efficient manner,<sup>531</sup> showing reasonable competence in any art or craft which he publicly professes<sup>532</sup>; it also required him to take reasonable care of the chattel bailed to him<sup>533</sup> and to return it to the bailor at the expiration of the agreed<sup>534</sup> period.<sup>535</sup> This duty of care may require the bailee to take precautionary measures once the chattel is found to be in

unexpected danger.<sup>536</sup> If the chattel is lost or injured during the bailment, the onus is on the bailee to show that the loss or injury was due to inevitable accident, inherent vice in the chattel, or some other cause not involving any failure on the part of himself or his employees<sup>537</sup> to take reasonable care.<sup>538</sup> Even after the work is completed, the liability of the bailee for negligence continues until the relationship of bailment terminates.<sup>539</sup> Subject to the provisions of the **Unfair Contract Terms Act 1977** and the **Consumer Rights Act 2015**,<sup>540</sup> the bailee may exclude his liability by a special clause in the contract.<sup>541</sup> The scope of such an exemption clause is a question of construction, depending on the intention of the parties.<sup>542</sup> Normally, the worker may not delegate his task to another, but the nature of the work to be done may indicate the bailor's implied permission that the worker may delegate.<sup>543</sup> If the worker deals with the chattel in a way not contemplated by the contract, he acts at his peril.<sup>544</sup>

## Lien of the worker

- 35-093 Where a worker is to be paid<sup>545</sup> for work done on a chattel bailed to him<sup>546</sup> he has at common law, after completion of the work,<sup>547</sup> a lien<sup>548</sup> on the chattel for the remuneration due to him<sup>549</sup>; hence he may refuse to return the chattel until he is paid.<sup>550</sup> An express or implied term of the contract, especially one relating to credit, may, however, exclude such a lien.<sup>551</sup> The lien covers the sum due for materials supplied and work performed on the chattel,<sup>552</sup> but not charges for warehousing or storage, even during the period of the lien.<sup>553</sup> There is no lien at common law for the maintenance of the chattel in its original condition without improvement.<sup>554</sup> The lien is lost by waiver<sup>555</sup> or by the worker relinquishing possession of the chattel,<sup>556</sup> but the mere taking of security for the debt does not discharge the lien, unless it is inconsistent with the existence of the lien.<sup>557</sup>

## Lien in favour of third person

- 35-094 Where the circumstances show that a bailee has actual or ostensible authority from the bailor to deliver the chattel to a third person for work to be performed upon it (e.g. when the bailee expressly undertakes to keep it in repair), the third party will obtain a lien which may be effective against the bailor as well as against the bailee.<sup>558</sup> Thus the hirer of a motor-vehicle will normally have implied authority to permit a garage to obtain a lien over it for repairs which it has carried out.<sup>559</sup>

## Uncollected goods: statutory power of sale <sup>560</sup>

- 35-095 In the absence of agreement, the right of lien does not, at common law, confer on the bailee the right to sell the chattel.<sup>561</sup> However, subject to the terms of the bailment,<sup>562</sup> the *Torts (Interference with Goods) Act 1977* confers a power of sale on a bailee in possession of uncollected goods.<sup>563</sup> The Act does not define bailment<sup>564</sup> and therefore all types of bailment appear to be included.<sup>565</sup> The Act provides for two separate powers of sale, one with,<sup>566</sup> and one without the authority of the court. The non-judicial power of sale arises in any one of the following situations<sup>567</sup>: (a) where the bailor is in breach of an obligation to take delivery of the goods (or, if the terms of the bailment so provide, to give directions as to their delivery); (b) where the bailee could impose such an obligation by giving notice to the bailor, but is unable to trace or communicate with the bailor; or (c) where the bailee can reasonably expect to be relieved of any duty to safeguard the goods by giving notice to the bailor, but is unable to trace or communicate with the bailor.

## Power to impose an obligation to take delivery

- 35-096 Because many bailments do not impose a definite obligation on the bailor to collect the goods before a fixed time, the *1977 Act* entitles<sup>568</sup> the bailee, by a notice in writing given to the bailor, to impose on him an obligation to take delivery of the goods (or, where relevant, to give directions as to their delivery).<sup>569</sup> This power is without prejudice to the provisions of the contract<sup>570</sup> and is not confined to commercial bailments where the bailee is in business, so that gratuitous bailments (e.g. between friends) are included.<sup>571</sup> The notice must be in writing,<sup>572</sup> and must comply with the requirements of Sch.1 Pt I, which, in summary, are: the notice must specify the bailee's name and address; must give sufficient particulars of the goods and their location; must state that the goods are ready for delivery, or (where combined with a notice terminating the contract of bailment) will be ready for delivery when the contract is terminated; and must specify any amount payable to the bailee which became due before the notice.<sup>573</sup> There are further provisions<sup>574</sup> about *when* the notice must be given in various circumstances, according to the purpose of the bailment in question, e.g. at any time after "the repair or other treatment [of the goods] has been carried out"; or "after the bailee has carried out the valuation or appraisal"; or (in cases of storage or warehousing by a bailee who is not a mercantile agent)<sup>575</sup> after the bailee's "obligation as custodian has come to an end".

## Notice of intention to sell <sup>576</sup>

- 35-097 Once the power of sale arises under the above provisions, the bailee is entitled <sup>577</sup> to sell the goods, if he is reasonably satisfied that the bailor owns the goods and either (a) he has given notice to the bailor of his intention to sell the goods; or (b) he has failed to trace or communicate with the bailor with a view to giving him such a notice, after having taken reasonable steps for the purpose. <sup>578</sup> The notice of intention to sell must be in writing and be sent by registered letter or by the recorded delivery service, <sup>579</sup> and must specify the following information <sup>580</sup>: the bailee's name and address; particulars of the goods and of their location; the date on or after which their sale is proposed; and the amount, if any, payable by the bailor to the bailee in respect of the goods, and which became due before the giving of the notice. <sup>581</sup> The period between the notice and the proposed date of sale must afford the bailor "a reasonable opportunity of taking delivery of the goods", and, when any payment is due, must be not less than three months. <sup>582</sup>

## Disputes

- 35-098 The non-judicial procedure before sale cannot be used if there is a dispute between the bailor and the bailee. It is laid down that the notice of intention to sell may not be given, nor may the goods be sold pursuant to such a notice, at a time when the bailee "has notice that, because of a dispute concerning the goods, the bailor is questioning or refusing to pay all or any part of what the bailee claims to be due to him in respect of the goods". <sup>583</sup> In these circumstances, the goods may be sold only if the court authorises the sale. <sup>584</sup>

## Effect of the sale

- 35-099 A sale duly made under the provisions of the [1977 Act](#) gives a good title to the purchaser as against the bailor, but not as against the true owner. <sup>585</sup> After the sale, the bailee must account to the bailor for the proceeds of sale, less any costs of sale; the account is to be taken on the footing that the bailee should have adopted the best method of sale reasonably available in the circumstances and any sum due to the bailee in respect of the goods before he gave notice of intention to sell may be deducted. <sup>586</sup> The bailor's rights against the goods are therefore divested, and replaced by a right to claim from the bailee the balance of the proceeds of sale.

## Sale authorised by the court

- 35-100 There are some circumstances in which it would not be prudent for the bailee to sell under the non-judicial power given by s.12 discussed in the preceding paragraphs, e.g. where the goods are of high value, or where the bailee is unable to notify the bailor, and considers that he might be at risk in selling on the basis that he had taken “reasonable steps” to trace him.<sup>587</sup> Section 13 therefore permits a sale with the authority of the court, which will preclude the bailor from later challenging the bailee’s actions. In one situation, however, the bailee is expressly prevented from using the non-judicial power and can therefore sell only with the authority of the court, viz he cannot sell under s.12 if there is a dispute between him and the bailor over any payment claimed by the bailee.<sup>588</sup> Section 13 of the 1977 Act enables the bailee to sell under the authority of the court, and thereby to gain the protection of a decision which, subject to any right of appeal, is “conclusive, as against the bailor, of the bailee’s entitlement to sell the goods”.<sup>589</sup> The bailee must satisfy the court<sup>590</sup> that he is entitled (or would be entitled if he had given the required<sup>591</sup> notice) to sell under s.12.<sup>592</sup> The court may impose terms, may fix deductions from the proceeds of sale, and may direct that the net proceeds of sale be paid into court to be held to the bailor’s credit.<sup>593</sup>

## Footnotes

- 523 On voluntary service performed without request, see *Taylor v Laird* (1856) 25 L.J. Ex. 329, 332; also Vol.I, paras 6-029, 6-033, 32-077—32-079.
- 524 Palmer at Ch.15; Paton at pp.331 et seq.
- 525 e.g. payment for “extras”: see *Wilmot v Smith* (1828) 3 C. & P. 453; Vol.I, paras 32-076—32-079 and 32-084.
- 526 On substantial performance of an entire contract, see Vol.I, para.24-031; on waiver, see Vol.I, para.25-042; on frustration, see Vol.I, Ch.26.
- 527 See above, para.35-048.
- 528 See above, para.35-046.
- 529 See below, para.40-575.
- 530 For a statement, see *Smith v Eric S Bush* [1990] 1 A.C. 831, 843.
- 531 *Kimber v William Willett Ltd* [1947] K.B. 570.
- 532 *Lamphier v Phipos* (1838) 8 Car. & P. 475, 479. See also *Duncan v Blundell* (1820) 3 Stark. 6; *Harmer v Cornelius* (1858) 5 C.B. N.S. 236, 246; Jones at p.99.
- 533 *Morris v CW Martin & Sons Ltd* [1966] 1 Q.B. 716. See also *Leck v Maestaer* (1807) 1 Camp. 138; *Clark v Earnshaw* (1818) Gow. 30. cf. *Wilson v Powis* (1826) 3 Bing. 633; *Becker v Lavender Ltd* (1946) 62 T.L.R. 504 (misdelivery by bailee’s negligence); *Houghland v RR*

- Low (Luxury Coaches) Ltd [1962] 1 Q.B. 694, 698* (see above, para.35-008). On special clauses limiting liability, see above, para.35-053, and Vol.I, Ch.17.
- 534 On the time when performance is due, see s.14 of the Supply of Goods and Services Act 1982 (see above, para.35-047) which applies wherever the bailee is supplying services in the course of a business and s.52 of the Consumer Rights Act 2015 where a trader is supplying a service to a consumer.
- 535 Or when demanded: wrongful detention beyond this period makes the worker liable in damages for the amount which a profit-earning chattel would have earned for the owner (*Re Trent and Humber Co (1868) L.R. 4 Ch. App. 112, 117*) and also liable as an insurer if the chattel is lost or destroyed (*Shaw & Co v Symmons Sons [1917] 1 K.B. 799; Mitchell v Ealing London BC [1979] Q.B. 1*).
- 536 *Leck v Maestaer*, above.
- 537 *Aitchison v Page Motors Ltd (1935) 154 L.T. 128*. cf. *Jobson v Palmer [1893] 1 Ch. 71*. See also above, text at para.35-070.
- 538 Story at para.437; *Leck v Maestaer*, above; *Clarke v Earnshaw*, above. cf. *Joseph Travers & Sons Ltd v Cooper [1915] 1 K.B. 73; Mayne v Silvermere Cleaners Ltd [1939] 1 All E.R. 693; Levison v Patent Steam Carpet Cleaning Co Ltd [1978] Q.B. 69, 82, 83, 85; Sheehy v Faughan [1991] 1 I.R. 425* (mare left at defendant's stud). cf. above, paras 35-010, 35-032, 35-049, 35-064, 35-079.
- 539 *Mitchell v Davis (1920) 37 T.L.R. 68*. On the power of the bailee to terminate the bailment and to sell the chattel, see below, paras 35-095 et seq.
- 540 See above, paras 35-054, 35-078.
- 541 Exclusion is also permitted under Pt II of the 1982 Act (see above, para.35-044) but the ability to exclude liability under the Consumer Rights Act 2015 is more limited (see s.57, on which see further para.40-590).
- 542 *Photo Production Ltd v Securicor Transport Ltd [1980] A.C. 827*. On exemption clauses generally, see Vol.I, Ch.17; see above, paras 35-053, 35-078.
- 543 cf. *Davies v Collins [1945] 1 All E.R. 247; Martin v N Negin Ltd (1945) 172 L.T. 275; Morris v CW Martin & Sons Ltd [1966] 1 Q.B. 716* (see above, para.35-092) (approved by the House of Lords in *Photo Production Ltd v Securicor Transport Ltd [1980] A.C. 827, 846, 852*). See further, on vicarious performance, Vol.I, paras 22-084—22-087.
- 544 *Doucette v Proud [1940] 4 D.L.R. 111* (sed quaere whether the bailor had waived the breach in this case); cf. above, paras 35-042, 35-052.
- 545 The statements of the rule assume that the lien arises although a precise price may not have been fixed beforehand: e.g. *Scarfe v Morgan (1838) 4 M. & W. 270, 283*.
- 546 The worker must have possession of the chattel: *Forth v Simpson (1849) 13 Q.B. 680; James Bibby Ltd v Woods and Howard [1949] 2 K.B. 449, 453*. Further, his work must be “on” the chattel and not simply “with” the chattel: *Sheianov v Sarner International Ltd [2020] EWHC 1214 (QB), [2020] 1 W.L.R. 3963* at [54]—[80].
- 547 If the bailor countermands his order for the work before it is completed, the worker has a lien for the work actually done: *Lilley v Barnsley (1844) 1 C. & K. 344, 346*.
- 548 A lien does not entitle the worker to exercise any remedy of self-help, e.g. by removing engine parts so as to disable a ship from moving: *The “Gregos” [1985] 2 Lloyd’s Rep. 347*,

- 361–362.* (The worker is simply entitled to retain the chattel in his possession.) A lien cannot be exercised if the worker fails to give the bailor proper details of the work done: *Thaper v Singh [1987] F.L.R. 369* (accountant).
- 549 Where the remuneration has not been agreed, but the worker claims an unreasonably high amount, the bailor who pays under protest may have a claim in restitution to recover the excess over a reasonable charge: see above, para.35-048; Vol.I, paras 32-108—32-113.
- 550 Story at para.440; *Franklin v Hosier (1821) 4 B. & Ald. 341*; *Scarf v Morgan (1838) 4 M. & W. 270* (lien on mare for services of stallion); *Steadman v Hockley (1846) 15 M. & W. 553, 556–557*. cf. *R. v Wade (1869) 11 Cox C.C. 549*; *Woodworth v Conroy [1976] 1 Q.B. 884* (accountants have a lien over the books of account, files and papers delivered to them in the course of their professional work); and the lien of an agent, see Vol.I, para.21-180.
- 551 *Raitt v Mitchell (1815) 4 Camp. 146* (custom excluding lien); *Chase v Westmore (1816) 5 M. & S. 180, 186*; *Scarf v Morgan*, above, at 283; *Forth v Simpson (1849) 13 Q.B. 680*. See also *Keene v Thomas [1905] 1 K.B. 136*; *Green v All Motors Ltd [1917] 1 K.B. 625*; *Albemarle Supply Co Ltd v Hind & Co*, above; *Tappenden v Artus [1964] 2 Q.B. 185*. *Jarl Tra Ab v Convoys Ltd [2003] EWHC 1488 (Comm)*, [2003] 2 Lloyd's Rep. 459.
- 552 On a general lien, see Paton at pp.345–347.
- 553 *Somes v British Empire Shipping Co Ltd (1860) 8 H.L. Cas. 338* (distinguished by the House of Lords in *China Pacific SA v Food Corp of India [1982] A.C. 939, 962–963* (owner benefited from the expenditure, which was made before he demanded redelivery of the goods: gratuitous bailment following salvage)). The principle laid down in *Somes* has since been restrictively interpreted (see *Metall Market OOO v Vitorio Shipping Co Ltd (The "Lehmann Timber") [2013] EWCA Civ 650, [2014] Q.B. 760* at [70]) and it would now appear to stand for the proposition that the common law remedy of an artificer's lien does not attach to it, or contain within it, a right of claim to the expenses of enforcing it or exercising it and that there is no lien for such expenses unless the contract provides for one (at [90]). In any event, the principle in *Somes* is unlikely to apply outside the context of an artificer's lien, given that it has been stated to be of “doubtful status outside that context” (at [122]). See also *Hartley v Hitchcock (1816) 1 Stark. 408*.
- 554 *Jackson v Cummins (1839) 5 M. & W. 342* (mere agistment of an animal: see above, para.35-059; cf. charges for training an animal: *Bevan v Waters (1828) Mood. & M. 235*; *Forth v Simpson (1849) 13 Q.B. 680*); *Hatton v Car Maintenance Co Ltd [1915] 1 Ch. 621*; *Sheianov v Sarner International Ltd [2020] EWHC 1214 (QB)*, [2020] 1 W.L.R. 3963 at [54]–[80]. cf. *Steadman v Hockley (1846) 15 M. & W. 553, 556*.
- 555 *White v Gainer (1824) 2 Bing. 23*.
- 556 *Hartley v Hitchcock (1816) 1 Stark. 408*; *Jacobs v Latour (1828) 5 Bing. 130*; *Legg v Evans (1840) 6 M. & W. 36, 42*; *Pennington v Reliance Motor Works Ltd [1923] 1 K.B. 127*; *Hatton v Car Maintenance Co Ltd*, above. cf. *Albemarle Supply Co Ltd v Hind & Co [1928] 1 K.B. 307* (lien continued despite temporary loss of possession); *Caldwell v Sumpters [1972] Ch. 478* (solicitor's lien over documents not lost when they were sent to the client's present solicitors with the request to hold them to the order of the sender).
- 557 *Angus v McLachlan (1883) 23 Ch. D. 330*. cf. *Ex p. Willoughby (1881) 16 Ch. D. 604*.

- 558 *Keene v Thomas* [1905] 1 K.B. 136; *Green v All Motors Ltd* [1917] 1 K.B. 625; *Albemarle Supply Co Ltd v Hind & Co*, above; *Jarl Tra Ab v Convoys Ltd* [2003] EWHC 1488 (Comm), [2003] 2 Lloyd's Rep. 459. cf. *Cassils & Co and Sassoon & Co v Holden Wood Bleaching Co Ltd* (1914) 84 L.J. K.B. 834; *K Chellaram & Sons (London) Ltd v Butlers Warehousing and Distribution Ltd* [1977] 2 Lloyd's Rep. 192; *Pennington v Reliance Motor Works Ltd*, above; *Bowmaker Ltd v Wycombe Motors Ltd* [1946] K.B. 505 (no lien arose after owners had validly terminated a hire-purchase agreement). See below, para.41-427. See also *Peden* (1969) 18 I.C.L.Q. 129.
- 559 *Tappenden v Artus* [1964] 2 Q.B. 185.
- 560 On the right of innkeepers to sell, see below, para.35-118.
- 561 *Thames Iron Works Co v Patent Derrick Co* (1860) 1 J. & H. 93. Perishable goods, however, may be sold by order of the court.
- 562 s.12(8). See also Sch.1 Pt I para.1(6). Section 12 therefore cannot be read as a provision which excludes previously existing common law rules regarding contracts of bailment: *JJD SA v Avon Tyres Ltd*, *The Times*, 25 January 1999.
- 563 ss.12 and 13.
- 564 The words “bailor” and “bailee” in ss.12 and 13 include successors in title: s.12(7)(a).
- 565 Sed quaere, in the case of involuntary bailment, sub-bailment, or bailment without the owner’s consent. On the possible application of the sections to pledge, see below, para.35-132, to an innkeeper, see below, para.35-118.
- 566 See below, para.35-100.
- 567 s.12(1).
- 568 For the purposes of s.12(1), see above: s.12(2) and Sch.1 Pt I.
- 569 Sch.1 Pt I paras 1(1) and (6).
- 570 Sch.1 Pt I para.1(6). The power also arises whether or not the bailor has paid any amount due to the bailee in respect of the goods: Sch.1 Pt I para.5. The importance of the fact that s.12 does not remove the common law rules or prevent the implication of terms into the contract of bailment was demonstrated in *JJD SA v Avon Tyres Ltd*, *The Times*, 25 January 1999.
- 571 Sch.1 Pt I para.5.
- 572 Sch.1 Pt I para.1(2).
- 573 Sch.1 Pt I para.1(3).
- 574 Sch.1 Pt I paras 2-4.
- 575 Sch.1 Pt I para.4(2).
- 576 The notice required under Sch.1 Pt I (above, para.35-096), may be combined with this notice: Sch.1 Pt I para.1(4).
- 577 As against the bailor: see below, para.35-099.
- 578 s.12(3). If the bailee is in doubt whether the steps he has taken would be considered reasonable, it would be prudent to apply for the authority of the court: see below, para.35-100.
- 579 Sch.1 Pt II para.6(4).
- 580 Sch.1 Pt II para.6.
- 581 Sch.1 Pt II para.6(1).
- 582 Sch.1 Pt II para.6(2) and (3).

- 583 Sch.1 Pt II para.7(1).
- 584 Under s.13 (below, para.35-100).
- 585 s.12(4) and (6). A sale under the Act does not give a good title as against the true owner, nor against anyone claiming under the true owner: s.12(4).
- 586 s.12(5).
- 587 See s.12(3)(b) (see above, para.35-097).
- 588 Sch.1 Pt II para.7 (see above, para.35-098).
- 589 s.13(2). A sale under the authority of the court “gives a good title to the purchaser as against the bailor”.
- 590 The *court* includes the county court: s.13(3).
- 591 See Sch.1 Pt II (above, para.35-097).
- 592 For the requirements of selling under this section, see above, paras 35-095—35-099. The option given to the bailee to satisfy the court that they would have been entitled to sell (had they given the required notice to sell) has been held to indicate that a court can make an order for sale, regardless of whether a s.12 notice has been served, and if it has been served, whether the requirements of Sch.1 have been complied with, so long as the bailee would have been entitled to serve such a notice: *Walton Family Estates Ltd v GJD Services Ltd [2021] EWHC 88 (Comm)* at [65]. There is nothing in the Act or in the Civil Procedure Rules to set out the procedure to be adopted when making an application under s.13 and it is therefore for the court to evolve the most suitable procedure to deal with such an application. It has been held that a court does have power to make an order under s.13 on an application to which no defendant has been joined in the case where no bailor could at the time be identified by the bailee. In such a case a court may grant an order which permits the bailee to inspect the goods and, in the event that the inspection reveals the identity of any of the bailors, the bailee may be required to join the identified bailors to the proceedings should the bailee subsequently wish to exercise its power of sale: *Crédit Agricole Corporate and Investment Bank v Persons Having Interest in Goods Held by the Claimant [2021] EWHC 1679 (Ch), [2021] 1 W.L.R. 3834.*
- 593 s.13(1).

## (e) - Innkeepers

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Volume II - Specific Contracts

Chapter 35 - Bailment

Section 4. - Bailments for Valuable Consideration

(e) - Innkeepers<sup>594</sup>

### Definition of an inn

- 35-101 By the Hotel Proprietors Act 1956,<sup>595</sup> only a hotel within the definition contained in the Act is an inn. By the Act<sup>596</sup> an “‘hotel’ means an establishment held out<sup>597</sup> by the proprietor as offering food, drink and, if so required, sleeping accommodation, without special contract, to any traveller presenting himself who appears able and willing to pay a reasonable sum for the services and facilities provided and who is in a fit state to be received”.<sup>598</sup> This definition excludes establishments which had at common law been held not to be inns, e.g. lodging houses,<sup>599</sup> boarding houses,<sup>600</sup> private residential hotels,<sup>601</sup> alehouses (i.e. “public houses” where there is no obligation to receive and entertain guests),<sup>602</sup> houses of public entertainment,<sup>603</sup> or restaurants.<sup>604</sup> A “tavern” and a “coffee-house” may, however, fall within the statutory definition of an hotel,<sup>605</sup> and so may a temperance hotel.<sup>606</sup> The name by which premises are designated is not conclusive: the important matter is the use to which they are applied.<sup>607</sup> By s.1(1) of the Act, the duties, liabilities and rights which immediately before the commencement of the Act (viz 1 January 1957) by law attached to an innkeeper as such attach, subject to the provisions of the Act, to the proprietor of an hotel within the statutory definition and do not attach to any other person. If a limited company is the proprietor of an hotel, the company is the innkeeper, even though a manager conducts the affairs of the hotel and holds the licence for the sale of intoxicating liquors in the hotel.<sup>608</sup>

## Duty to receive guests

- 35-102 At common law an innkeeper is obliged to receive and lodge in his inn all travellers who come to him, and to entertain them at reasonable prices, unless he has a reasonable ground for refusal.<sup>609</sup>

## Liability for goods of guests

- 35-103 Subject to certain exceptions and limitations,<sup>610</sup> the proprietor of an hotel in his capacity as an innkeeper<sup>611</sup> is strictly liable to his guests for the loss of<sup>612</sup> or damage to<sup>613</sup> the property of the guest within the hospitium of the inn. The liability of the innkeeper is strict in that he is liable even in the absence of proof of negligence on his part or on the part of his employees<sup>614</sup>; nor does the fact that he was sick or insane at the time of the loss or damage exclude his liability.<sup>615</sup> The liability is only strict, however, and not absolute, since there are certain defences available to the innkeeper<sup>616</sup> and he may, subject to certain conditions, limit the amount of his liability.<sup>617</sup> This strict liability of the innkeeper depends on common law and the custom of the realm<sup>618</sup> as modified by statute; it does not necessarily depend upon contract, bailment or pledge.<sup>619</sup> The innkeeper is almost an insurer of the goods of his guest<sup>620</sup> in that, apart from the specified defences, he is liable even for unexplained loss of or damage to the goods.<sup>621</sup> An innkeeper cannot contract out of his strict liability by special agreement,<sup>622</sup> nor can he escape liability by informing the guest that he will not be responsible for goods not placed under lock and key,<sup>623</sup> or that there are persons in the inn whose character he does not know so that the guest should lock his goods in his room.<sup>624</sup>

## Extension of liability to cover damage to the goods

- 35-104 The Hotel Proprietors Act 1956 extended the common law liability of the innkeeper for loss of his guests' goods by providing<sup>625</sup> that he is under the same liability to make good to any guest of any damage to property brought to the hotel as he would be under to make good the loss of any such property. Before the Act, there was some doubt whether the innkeeper was liable for damage to goods as distinct from loss of the goods.<sup>626</sup>

## Conditions necessary for strict liability

35-105 For the innkeeper to come under strict liability for loss of or damage to his guests' property, six conditions must be satisfied:

- (1) it must be an "inn" within the statutory definition <sup>627</sup>;
- (2) the guest must be a traveller who has been received at the inn <sup>628</sup>;
- (3) the guest must have engaged sleeping accommodation at the inn <sup>629</sup>;
- (4) the loss or damage must occur within a specified period of time <sup>630</sup>;
- (5) the property of the guest which is lost or damaged must fall within the category to which strict liability relates <sup>631</sup>;
- (6) the property must, at the time of the loss or damage, be within the hospitium of the inn. <sup>632</sup>

The first of these conditions has already been discussed <sup>633</sup>; the others will be discussed in the succeeding paragraphs.

## Who is a guest?

35-106 A traveller becomes a guest only when the innkeeper accepts him as such <sup>634</sup>; even if the traveller is wrongfully refused accommodation <sup>635</sup> he is still not a guest. For strict liability to arise, the traveller must engage sleeping accommodation, <sup>636</sup> but the term *traveller* or *guest* does not include everyone who sleeps at the inn, since it excludes the innkeeper's family, his employees, his private guests and his lodgers. <sup>637</sup> If a person is refused accommodation, and then, without the permission of the innkeeper, another guest permits him to share a bedroom, he is not a guest. <sup>638</sup> A guest continues to be a guest even if he remains at the hotel for some considerable time, <sup>639</sup> even for months, <sup>640</sup> provided nothing occurs to alter his status as a guest. <sup>641</sup> The mere length of his stay is only one of the circumstances to be taken into consideration when deciding whether he is still a guest. <sup>642</sup> If the guest makes an agreement for board at the inn for a considerable period, such as three months, he will probably be held to be a boarder, and not a guest. <sup>643</sup> It is a question of fact when a person ceases to be a guest <sup>644</sup>; once a person ceases to be a guest he may be given reasonable notice to leave the inn. <sup>645</sup> The guest need not be physically within the inn at the time when his goods are lost or damaged, <sup>646</sup> but if he is away for several days, he will not be a guest during that period, even though his goods remain at the inn. <sup>647</sup> A person may be a guest although

a third person is to pay the innkeeper<sup>648</sup>; thus, in some cases the innkeeper's liability does not depend on the existence of a contractual relationship with the guest.

## Statutory conditions for strict liability

- 35-107 The [Hotel Proprietors Act 1956](#) alters the strict liability of the innkeeper at common law by excluding his liability towards a traveller who seeks only temporary refreshment and not sleeping accommodation<sup>649</sup> and by limiting his liability to loss or damage occurring during a specified period. It is provided by the Act<sup>650</sup> that without prejudice to any other liability<sup>651</sup> incurred by him with respect to any property brought to the hotel, the proprietor of an hotel shall not be liable as an innkeeper to make good to any traveller any loss of or damage to such property except where: (a) at the time of the loss or damage sleeping accommodation at the hotel had been engaged for the traveller<sup>652</sup>; and (b) the loss or damage occurred during the period commencing with the midnight immediately preceding, and ending with the midnight immediately following a period for which the traveller was a guest at the hotel and entitled to use the accommodation so engaged.

## Property to which strict liability relates

- 35-108 The [Hotel Proprietors Act 1956](#)<sup>653</sup> provides that without prejudice to any other liability<sup>654</sup> or right of his with respect thereto, the proprietor of an hotel is not as an innkeeper liable to make good to any guest<sup>655</sup> of his any loss of or damage to any vehicle or any property left therein, or any horse or other live animal or its harness or other equipment. Subject to this exception, the innkeeper is strictly liable for the safety of all movables and moneys<sup>656</sup> brought by the guest into the inn; the category includes charters, or evidences concerning freeholds and inheritances, or obligations or other deeds or specialties, being things in action.<sup>657</sup> Where, however, goods are deposited in an inn for the purpose of being forwarded by a carrier, the innkeeper is not strictly liable.<sup>658</sup>

## Hospitium of the inn

- 35-109 The innkeeper is strictly liable only where the goods of the guest are within the hospitium of the inn.<sup>659</sup> The hospitium of the inn consists in the buildings of the inn and the precincts so intimately related to those buildings as to be treated as forming part of them.<sup>660</sup> If the innkeeper invites his guests, whether expressly or by implication, to place any of his goods outside the inn, he is treating that place as within the hospitium and so will be liable if the goods are lost or damaged there.<sup>661</sup>

But mere permission, not amounting to an invitation, given by an innkeeper to leave a chattel in such a place will not extend the hospitium of the inn to it.<sup>662</sup> Stable buildings and garages attached to the inn, car parks, inner courts enclosed by the walls of the inn<sup>663</sup> and a yard alongside the inn,<sup>664</sup> have been treated as within the hospitium of the inn. But a place which is not obviously attached to the inn premises, e.g. a petrol station runway, is not within the hospitium.<sup>665</sup> The test is whether the place is intended and suitable for use in connection with the innkeeper's business.<sup>666</sup> The **Hotel Proprietors Act 1956**<sup>667</sup> excludes strict liability for the kind of property most likely to be left outside the inn (e.g. vehicles or any property left therein), but it may still be necessary to determine the extent of the hospitium in the case of other chattels.<sup>668</sup>

## Limitation of liability by means of a notice

35-110 Provided he displays a statutory notice,<sup>669</sup> the proprietor of an hotel, in his capacity as innkeeper,<sup>670</sup> may limit his liability to make good the loss of or damage to property brought to the hotel,<sup>671</sup> so that his liability to any one guest will not exceed £50 in respect of any one article, nor £100 in the aggregate, except where: (a) the property was stolen, lost or damaged through the default, neglect or wilful<sup>672</sup> act of the proprietor or some servant of his<sup>673</sup>; or (b) the property was deposited by or on behalf of the guest expressly for safe custody with the proprietor or some servant of his authorised, or appearing to be authorised, for the purpose<sup>674</sup> and, if so required by the proprietor or that servant, in a container fastened or sealed by the depositor; or (c) at a time after the guest had arrived at the hotel, the property in question was offered for deposit as aforesaid and the proprietor or his servant refused to receive it, or the guest or some other guest acting on his behalf wished so to offer the property in question but, through the default of the proprietor or a servant of his, was unable to do so.<sup>675</sup> The onus of proving the default, neglect or wilful act of the proprietor or his servant within exception (a) above, rests upon the guest.<sup>676</sup> For there to be an express deposit under exception (b) above, it must be shown that something was said or done to inform the innkeeper in a reasonable and intelligible manner that it was a deposit for safe custody<sup>677</sup>; it is insufficient merely to place a bag in the office without saying a word.<sup>678</sup>

## Statutory notice

35-111 The limitation of liability under the statute does not apply to the proprietor of an hotel unless, at the time when the property in question was brought to the hotel, a copy of the notice set out in the Schedule to the Act printed in plain type was conspicuously displayed in a place where it could conveniently be read by his guests at or near the reception office or desk or, where there is no reception office or desk, at or near the main entrance to the hotel.<sup>679</sup> The innkeeper cannot rely on

the statutory limitation of his liability unless the notice is properly exhibited<sup>680</sup>; an unintentional misprint, even the omission of one word, may exclude the limitation.<sup>681</sup>

## Defences: negligence of the guest

- 35-112 The innkeeper is not liable for loss or damage to his guests' property if he can show that the loss or damage was due to the negligence or misconduct<sup>682</sup> of the guest or his employee.<sup>683</sup> Gross negligence need not be proved,<sup>684</sup> but the onus of proving negligence is upon the innkeeper.<sup>685</sup> Negligence in a guest has been defined for this purpose as the absence of "the ordinary care that a prudent man may be reasonably expected to take under the circumstances"<sup>686</sup>; the negligence must be such as to render likely the loss of the property.<sup>687</sup> The decisions seem to show that the mere fact of a guest omitting to lock the door of the bedroom or other apartment which he occupies at an inn or hotel is not necessarily enough, of itself, to raise a presumption of negligence sufficient to avoid the liability of the innkeeper,<sup>688</sup> even though there may have been a notice in the room requiring the occupant to lock the door.<sup>689</sup> But leaving open a window communicating with a balcony which gave access to several rooms, when coupled with a failure to lock the door and a prior display in a public room of a bag containing money, has been held sufficient to absolve an innkeeper from responsibility.<sup>690</sup> And it is carelessness conducing to the loss if a guest, after ostentatiously rolling up notes and letting people see him put them away in an ill-secured box, leaves the box in a public room.<sup>691</sup> In one case, even failure to act upon a notice in the room to the effect that "the proprietor will be happy to take charge of any valuables", was held to avoid the innkeeper's liability for loss.<sup>692</sup> A guest is not negligent in failing to discover whether a watch is kept to prevent strangers gaining access to bedrooms; he is entitled to assume that the innkeeper will take reasonable precautions in this regard.<sup>693</sup>

## Contributory negligence

- 35-113 It is an undecided point whether the negligence of the guest should be treated, in proper cases, as contributory negligence under the [Law Reform \(Contributory Negligence\) Act 1945](#). Under the Act, "Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person"<sup>694</sup> the damages recoverable may be reduced to such an extent as the court thinks just and equitable. It has been argued that the Act should apply to cases of strict liability upon the defendant, including innkeepers' liability.<sup>695</sup>

## Other defences

- 35-114 The innkeeper is not strictly liable when the guest chooses to make himself exclusively responsible for the safety of his goods<sup>696</sup>; the guest must show an intention to relieve the innkeeper of all liability.<sup>697</sup> It depends on the facts whether the conduct of the guest indicates his assumption of entire responsibility for his own goods; thus the fact that a guest does not deposit an article at the office of the hotel, in accordance with a notice in his bedroom, does not amount to an exemption of the innkeeper's liability.<sup>698</sup> The common law also exempts the innkeeper from liability when the loss arises from an act of God or of alien enemies.<sup>699</sup> It has also been held that the **Fires Prevention (Metropolis) Act 1774**<sup>700</sup> limits the strict liability of an innkeeper, so that he is not liable for loss or damage caused to his guest's goods by an accidental fire, i.e. a fire which occurred without negligence on the part of the innkeeper or his employees.<sup>701</sup>

## Lien of the innkeeper

- 35-115 An innkeeper<sup>702</sup> has at common law a general lien, for the unpaid amount of his bill, on all the chattels which the guest takes, in his capacity as guest,<sup>703</sup> into the hospitium of the inn.<sup>704</sup> The lien exists to cover the price of the guest's personal food and lodging while he is a guest<sup>705</sup>; it does not cover money lent to the guest by the innkeeper<sup>706</sup> nor money disbursed by the innkeeper on behalf of a guest.<sup>707</sup> The exercise of the lien is not limited to articles which the innkeeper receives in the inn as luggage,<sup>708</sup> but the lien has been held not to attach where the goods were merely sent to the guest for some particular purpose, as where a manufacturer sent in a piano to a professional pianist for him to play on during his stay.<sup>709</sup> The **Hotel Proprietors Act 1956**<sup>710</sup> provides that the proprietor of an hotel<sup>711</sup> has, as an innkeeper, no lien on any vehicle or any property left therein or any horse or other live animal or its harness or other equipment. This provision reverses, on their facts, many common law cases,<sup>712</sup> though they will remain authoritative on the general principles of an innkeeper's lien. As a result of this enactment, the lien now applies only to the property of the guest in respect of which the innkeeper is strictly liable for loss or damage.<sup>713</sup> Even at common law, however, the innkeeper had no right to detain the person of his guest, or to strip off his clothes, to secure payment.<sup>714</sup> While the goods are detained under the lien, they are in the possession of the innkeeper as bailee, and he is no longer subject to the strict liability of an innkeeper<sup>715</sup>; according to the modern formulation of the bailee's liability, he will be required to take reasonable care of them.<sup>716</sup> In a nineteenth-century case,<sup>717</sup> where the innkeeper locked up the guest's clothes in a cupboard where his own goods of a similar character were kept, and the guest's clothes were

damaged by moths and rats, the innkeeper was held to be not liable. The cost of storing the goods during the lien cannot be claimed by the innkeeper, since the detention is for his benefit.<sup>718</sup>

## Goods not owned by the guest

- 35-116 The lien covers all the chattels brought in by the guest, provided the innkeeper accepts them as part of the guest's luggage, even though the chattels do not belong to the guest,<sup>719</sup> or the owner has not consented to their being taken into the inn.<sup>720</sup> The fact that the innkeeper knows that a third person owns the chattels does not prevent the lien, so long as the innkeeper accepted them as part of the chattels accompanying the guest.<sup>721</sup> The lien of the innkeeper prevails over the rights of the true owner in these circumstances, even if the goods were hired<sup>722</sup>; if the innkeeper did not know of the facts, the lien even covers goods which had been stolen or wrongfully obtained.<sup>723</sup> Where a husband and wife are guests, the lien for the food and lodging of both extends to the chattels of both which are brought into the inn, even though credit may be given solely to the husband, and the wife's luggage is her property.<sup>724</sup>

## Loss of lien

- 35-117 The lien exists so long as the innkeeper retains possession of the goods.<sup>725</sup> If he allows the goods to be taken away before the guest pays his bill, and the guest returns on a subsequent occasion, the innkeeper cannot claim a lien in regard to the former bill.<sup>726</sup> The relationship of innkeeper and guest has, however, been held to continue in some circumstances despite occasional absences of the guest,<sup>727</sup> so that the innkeeper's lien continues to apply in regard to the bill covering the whole period.<sup>728</sup> The innkeeper's lien is not necessarily waived by his taking security for the guest's bill, unless the taking of the security in the circumstances is inconsistent with the lien and destructive of it.<sup>729</sup>

## Innkeeper's right of sale

- 35-118 At common law an innkeeper has no right to sell the property of a guest,<sup>730</sup> and this is so even where he is put to expense and inconvenience by keeping it,<sup>731</sup> but the *Innkeepers Act 1878*<sup>732</sup> allows the innkeeper<sup>733</sup> to sell by public auction any goods or chattels left or deposited with him by a guest indebted to him for board, lodging or keep of horses or other animals.<sup>734</sup> There is no

power to sell until the goods have been left with him<sup>735</sup> for six weeks without the debt having been paid, nor until at least one month's notice of the intended sale has been given, in one London and one local newspaper, by an advertisement containing a description of the goods and the name of the owner if it is known.<sup>736</sup> Any surplus upon the sale, after payment of the debt, costs and expenses, must be paid to the guest upon demand.

## Statutory powers of sale

- 35-119 It is not clear how far the powers of sale in ss.12 and 13 of the Torts (Interference with Goods) Act 1977<sup>737</sup> would apply to an innkeeper. To the extent that he is holding the goods of his guest for safe-keeping, he would probably be a “bailee” within the terms of:

“... goods in the possession or under the control of a bailee where—(a) the bailor is in breach of an obligation to take delivery of the goods”<sup>738</sup>;

but if the innkeeper holds the goods under his lien,<sup>739</sup> it is very doubtful whether these words would apply to the situation.<sup>740</sup>

## Liability of boarding-house keepers<sup>741</sup>

- 35-120 Though strict liability for the safety of a guest's property is imposed only in the case of an innkeeper who keeps an “inn” within the statutory definition,<sup>742</sup> a lodging-house or boarding-house keeper owes the lower duty of reasonable care<sup>743</sup>: he must take reasonable care of the property which his guests bring into his house.<sup>744</sup> In *Scarborough v Cosgrove*<sup>745</sup> a husband and wife took a room in the defendant's boarding-house. They told the defendant that they had property which they wished to keep under lock and key and asked for a second key to their room. This request was refused, and they were told that the key must be left in the door, to enable the defendant's employees to clean the room. They also asked for a key to the chest of drawers, but no key was given to them. Some of the plaintiff's jewellery was stolen by a fellow guest, and the Court of Appeal held that the defendant was liable since he had failed in his duty to take reasonable care. Romer LJ said that the goods left in the room were not bailed to the defendant, but “seeing that the landlord carries on his business of a boarding-house keeper for reward, I think he is bound to carry on that business with reasonable care, having regard to the nature and normal conduct of the business as known to the guest or as represented to the guest by him”.<sup>746</sup> Similarly, in *Olley v Marlborough Court Ltd*<sup>747</sup> the proprietors of a “residential” hotel were liable for their negligence in permitting the theft of articles from a guest's room. The custom was for residents to deposit the keys of their rooms on a

keyboard when they went out. A stranger entered the hotel during the plaintiff's absence, took the key and stole the articles. It was held that the proprietors were negligent in permitting the keyboard to be unguarded.<sup>748</sup>

## Footnotes

- 594 See Palmer at Ch.27. The Member States of the Council of Europe have agreed certain minimum rules relevant to the liability of hotel-keepers: see the convention on the liability of hotel-keepers concerning the property of their guests (17 December 1962) ratified by the United Kingdom on 12 July 1963. The convention entered into force on 15 February 1967 (Cmnd.3205: Treaty Series No.9, 1967) but although its provisions bind the United Kingdom, they are not part of English municipal law.
- 595 s.1(1). The Act implemented the Law Reform Committee's Second Report (on Innkeepers' Liability), Cmnd.9161 (1954). The statutory definition supersedes many judicial statements attempting to define an inn.
- 596 s.1(3).
- 597 A sign is not essential for an inn: *R. v Collins* (1623) *Palm.* 373; *Parker v Flint* (1703) 12 *Mod.* 254.
- 598 At common law the innkeeper was also bound to receive all travellers, and was not permitted to discriminate between them: *Browne v Brandt* [1902] 1 *K.B.* 696, 698. cf. *Lamond v Richard* [1897] 1 *Q.B.* 541, 545.
- 599 *Parker v Flint*, above; *Thompson v Lacy* (1820) 3 *B. & Ald.* 283, 287.
- 600 *Dansey v Richardson* (1854) 3 *El. & Bl.* 144. cf. *Holder v Soulby* (1860) 8 *C.B. N.S.* 254, 266; *Scarborough v Cosgrove* [1905] 2 *K.B.* 805. cf. also *R. v Jones* [1898] 1 *Q.B.* 119, 159.
- 601 *Duke of Devonshire v Simmons* (1894) 11 *T.L.R.* 52, 53. cf. *Olley v Marlborough Court Ltd* [1949] 1 *K.B.* 532.
- 602 *Pidgeon v Legge* (1857) 21 *J.P.* 743; *Sealey v Tandy* [1902] 1 *K.B.* 296, 299. A bar or shop for the sale of spirits is not an inn even where it is under the same roof as an inn, if it is separate from the inn and has a separate entrance: *R. v Rymer* (1877) 2 *Q.B.D.* 136.
- 603 cf. *Webb v Fagotti Brothers* (1898) 79 *L.T.* 683, 684.
- 604 cf. *Ultzen v Nicols* [1894] 1 *Q.B.* 92; *Orchard v Bush & Co* [1898] 2 *Q.B.* 284.
- 605 *Thompson v Lacy* (1820) 3 *B. & Ald.* 283. cf. *Doe D Pitt v Laming* (1814) 4 *Camp.* 73, 77; *Fitz v Iles* [1893] 1 *Ch.* 77.
- 606 *Cunningham v Philp* (1896) 12 *T.L.R.* 352.
- 607 *Thompson v Lacy*, above, at 286.
- 608 *Dixon v Birch* (1873) *L.R.* 8 *Ex.* 135.
- 609 *Constantine v Imperial Hotels Ltd* [1944] *K.B.* 693. See also *Browne v Brandt* [1902] 1 *K.B.* 696; *Thompson v McKenzie* [1908] 1 *K.B.* 905; *R. v Higgins* [1948] 1 *K.B.* 165. For full details of the innkeeper's liability to receive guests, see Halsbury's Laws of England, 5th edn, Vol.68, paras 650–677. For more general duties applicable see s.29 of the Equality Act

- 2010 and Pt II of the Supply of Goods and Services Act 1982 (above, paras 35-044—35-048) will also apply.
- 610 See below, paras 35-110—35-114.
- 611 See above, para.35-101.
- 612 Resolution of Judges (1624) Hut. 99; *Squire v Wheeler* (1867) 16 L.T. 93. Loss includes theft of the goods: *Reniger v Fogossa* (1552) Plowd. 1, 9; *Robins & Co v Gray* [1895] 2 Q.B. 501, 504. Loss does not include loss by accidental fire: *Williams v Owen* [1955] 1 W.L.R. 1293, 1297–1298 (applying the Fires Prevention (Metropolis) Act 1774 s.86, to limit the liability of an innkeeper).
- 613 Hotel Proprietors Act 1956 s.1(2). See below, para.35-104.
- 614 *Shacklock v Ethorpe Ltd* [1939] 3 All E.R. 372, HL. See also *Morgan v Ravey* (1861) 6 H. & N. 265; *Squire v Wheeler* (1867) 16 L.T. 93; *Cunningham v Philp* (1896) 12 T.L.R. 352; *Butler & Co Ltd v Quilter* (1900) 17 T.L.R. 159.
- 615 *Cross v Andrews* (1597) Cro. Eliz. 622.
- 616 See below, paras 35-109—35-114.
- 617 See below, paras 35-110—35-111.
- 618 *Calye's case* (1583) 8 Co. Rep. 32a; *Kent v Shuckard* (1831) 2 B. & Ad. 803, 804; *Robins & Co v Gray*, above, at 503–505; *Shacklock v Ethorpe Ltd*, above, at 373; 1 Smith's L.C., 13th edn, 120. See also Winfield, Province of the Law of Tort, pp.57, 59–62.
- 619 See the cases cited in the previous footnote.
- 620 *Bather v Day* (1863) 32 L.J. Ex. 171, 173; *Squire v Wheeler*, above.
- 621 *Morgan v Ravey*, above; *Winkworth v Raven* [1931] 1 K.B. 652, 657–659.
- 622 *Williams v Linnitt* [1951] 1 K.B. 565, 584–585; *Burns v Royal Hotel (St Andrews) Ltd*, 1957 S.L.T. 53, 56.
- 623 *Harland's Case* (1641) Clay. 97.
- 624 Anon. (1566) Moore K.B. 78.
- 625 s.1(2).
- 626 *Winkworth v Raven*, above, at 657 (followed in *Williams v Owen* [1955] 1 W.L.R. 1293, 1297).
- 627 See above, para.35-101.
- 628 See below, para.35-106.
- 629 See below, para.35-107.
- 630 See below, para.35-107.
- 631 See below, para.35-108.
- 632 See below, para.35-109.
- 633 See above, para.35-101.
- 634 *White's case* (1557) 2 Dyer 158b. cf. *Grant v Cardiff Hotels Co Ltd* (1921) 37 T.L.R. 775 (some retrospective operation given to the acceptance of a guest: see the Hotel Proprietors Act 1956 s.2(1)(b)).
- 635 See above, para.35-102.
- 636 See below, para.35-107.
- 637 *Williams v Linnitt* [1951] 1 K.B. 565, 579. See also *Calye's case* (1583) 8 Co. Rep. 32a.

- 638 *White's case*, above.
- 639 In old law, a traveller ceased to be a guest if he stayed more than three days: *Calye's case*, above (overruled on this point in *Harland's case* (1641) *Clay.* 97 (14 days)). See now *Thompson v Lacy* (1820) 3 *B. & Ald.* 283 (83 days); *Chesham Automobile Supply Co Ltd v Beresford Hotel (Birchington) Ltd* (1913) 29 *T.L.R.* 584.
- 640 *Allen v Smith* (1862) 12 *C.B. N.S.* 638 (seven months); *Hanley v Bethell Hotels Ltd* (1917) 52 *I.L.T.* 10.
- 641 (1917) 52 *I.L.T.* 10.
- 642 *Lamond v Richard* [1897] 1 *Q.B.* 541, 546.
- 643 *Drope v Thaire* (1626) *Lat.* 126.
- 644 *Portmand v Griffin* (1913) 29 *T.L.R.* 225 (payment of bill terminated the relationship). See the *Hotel Proprietors Act 1956 s.2(1)* (below, para.35-107).
- 645 *Lamond v Richard*, above.
- 646 See the notes to *White's case* (1557) 2 *Dyer* 158b (goods stolen while guest away for the day).
- 647 See the *Hotel Proprietors Act 1956 s.2(1)* (see below, para.35-107); *Gelley v Clerk* (1606) *Cro. Jac.* 188. cf. *Allen v Smith* (1862) 12 *C.B. N.S.* 638.
- 648 *Wright v Anderton* [1909] 1 *K.B.* 209. cf. *Cryan v Hotel Rembrandt Ltd* (1925) 133 *L.T.* 395.
- 649 For the position at common law, see *Calye's case* (1583) 8 *Co. Rep.* 32a; *Bennett v Mellor* (1793) 5 *Term Rep.* 273; *Orchard v Bush* [1898] 2 *Q.B.* 284; *Williams v Linnitt* [1951] 1 *K.B.* 565.
- 650 s.2(1).
- 651 e.g. for negligence, or as a bailee. (See on the latter, *Williams v Gesse* (1837) 3 *Bing.N.C.* 849; *Adams (Durham) Ltd and Day v Trust Houses Ltd* [1960] 1 *Lloyd's Rep.* 380.)
- 652 cf. *Strauss v County Hotel and Wine Co* (1883) 12 *Q.B.D.* 27 (plaintiff intended to sleep at an inn, but after receiving a telegram waiting for him at the inn decided not to stay; he left his baggage with the porter, and went to the refreshment room which was under the same management as the inn: held, he was not a guest at the inn).
- 653 s.2(2). The innkeeper has no lien in regard to the property mentioned in this subsection: s.2(2). On his lien, see below, paras 35-115—35-118.
- 654 e.g. for negligence, or as a bailee. (See above, para.35-107.) See also Pt II of the *Supply of Goods and Services Act 1982* (see above, paras 35-044—35-048).
- 655 On the term “guest”, see above, para.35-106.
- 656 *Kent v Shuckard* (1831) 2 *B. & Ad.* 803; *Doorman v Jenkins* (1834) 2 *A. & E.* 256.
- 657 *Calye's case* (1583) 8 *Co. Rep.* 32a; *Kent v Shuckard*, above, at 804, 805.
- 658 *Williams v Gesse* (1837) 3 *Bing.N.C.* 849.
- 659 *Williams v Linnitt* [1951] 1 *K.B.* 565, 580.
- 660 [1951] 1 *K.B.* 565, 580.
- 661 [1951] 1 *K.B.* 565 at 581. See also *Jones v Tyler* (1834) 1 *A. & E.* 522; *Aria v Bridge House Hotel (Staines) Ltd* (1927) 137 *L.T.* 299 (but see above, para.35-108 on vehicles); *Watson v People's Refreshment House Association Ltd* [1952] 1 *K.B.* 318, 322.
- 662 *Watson v People's Refreshment House Association Ltd*, above, at 322. cf. *Gresham v Lyon* [1954] 1 *W.L.R.* 1100, 1104.

- 663 *Williams v Linnitt*, above; *Gee, Walker and Slater Ltd v Friary Hotel (Derby) Ltd (1949) 66 T.L.R. (Pt 1) 59.*
- 664 *Davies v Clarke (1953) 103 L.J. 141.*
- 665 *Watson v People's Refreshment House Association Ltd*, above.
- 666 *Williams v Linnitt*, above, at 580, 581; *Watson v People's Refreshment House Association Ltd*, above, at 323, 324.
- 667 s.2(2). See above, para.35-108.
- 668 If goods are lost or damaged outside the hospitium of the inn, the innkeeper may still be liable in negligence or under s.13 of the Supply of Goods and Services Act 1982 (see above, para.35-046) or possibly under s.49(1) of the Consumer Rights Act 2015.
- 669 See below, para.35-111.
- 670 See above, para.35-101.
- 671 **Hotel Proprietors Act 1956 s.2(3).** The financial limits of £50 and £100 set in this subsection have *not* been increased in line with inflation.
- 672 The word “wilful” does not qualify “default or neglect”: *Behrens v Grenville Hotel (Bude) Ltd (1925) 69 S.J. 346; Belleville v Palatine Hotel and Buildings Co Ltd (1944) 171 L.T. 363.*
- 673 See *Medawar v Grand Hotel Co [1891] 2 Q.B. 11; Belleville v Palatine Hotel and Buildings Co Ltd*, above; *Bonham-Carter v Hyde Park Hotel Ltd (1948) 64 T.L.R. 177; Olley v Marlborough Court Ltd [1949] 1 K.B. 532*. The reference to “servant” does not incorporate the common law doctrine of vicarious liability: *Kott v Gordon Hotels Ltd [1968] 2 Lloyd's Rep. 228.*
- 674 *Behrens v Grenville Hotel (Bude) Ltd*, above. cf. *Moss v Russell (1884) 1 T.L.R. 13* (“boots” of hotel has no implied authority to receive goods for safe deposit).
- 675 Hotel Proprietors Act 1956 s.2(3).
- 676 *Whitehouse v Pickett [1908] A.C. 357.*
- 677 [1908] A.C. 357 at 361. See also *Moss v Russell*, above; *O'Connor v Grand International Hotel Co [1898] 2 Ir.R. 92.* cf. *Cryan v Hotel Rembrandt Ltd (1925) 133 L.T. 395.*
- 678 *Whitehouse v Pickett*, above.
- 679 Hotel Proprietors Act 1956 s.2(3) proviso. On the sufficiency of notices under previous legislation (which was not identical with this proviso) see *Shacklock v Ethorpe Ltd [1937] 4 All E.R. 672* (affirmed on another ground: [1939] 3 All E.R. 372); *Carey v Long's Hotel Co Ltd (1891) 7 T.L.R. 213; affirming 6 T.L.R. 415.*
- 680 *Hodgson v Ford & Sons (1892) 8 T.L.R. 722.*
- 681 *Spice v Bacon (1877) 2 Ex. D. 463* (decided under the Innkeepers' Liability Act 1863 ss.1, 3 (now repealed); the notice to be exhibited under the 1956 Act is not identical with that which was required by the 1863 Act).
- 682 e.g. theft by servant of the guest: *Calye's case (1583) 8 Co. Rep. 32a; Burgess v Clements (1815) 4 M. & S. 306.*
- 683 *Calye's case*, above; *Cashill v Wright (1856) 6 E. & B. 891; Robins & Co v Gray [1895] 2 Q.B. 501, 504.* See also, in addition to the cases cited in the remainder of this paragraph, below, *Butler & Co v Quilter (1900) 17 T.L.R. 159; Hansen v Killick [1925] Ir.R. 70.*
- 684 *Cashill v Wright*, above.

- 685 *Cashill v Wright*, above; *Gee, Walker & Slater Ltd v Friary Hotel (Derby) Ltd (1949) 66 T.L.R. (Pt 1) 59*. cf. R. Munday, Cross and Tapper on Evidence, 13th edn (2018), p.130, n.56 (discussing *Medawar v Grand Hotel Co [1891] 2 Q.B. 11*).
- 686 *Cashill v Wright*, above, at 900.
- 687 *Armistead v Wilde (1851) 17 Q.B. 261*.
- 688 *Filipowski v Merryweather (1860) 2 F. & F. 285*; *Shacklock v Ethorpe Ltd [1939] 3 All E.R. 372*; *Brewster v Drennan [1945] 2 All E.R. 705*. See also *Herbert v Markwell (1881) 45 L.T. 649*.
- 689 *Morgan v Ravey (1860) 2 F. & F. 283*; *Carpenter v Haymarket Hotel Ltd [1931] 1 K.B. 364*.
- 690 *Oppenheim v White Lion Hotel Co Ltd (1871) L.R. 6 C.P. 515*.
- 691 *Armistead v Wilde*, above.
- 692 *Jones v Jackson (1873) 29 L.T. 399*; but see *Huntly v Bedford Hotel Co (1892) 56 J.P. 53*; *Wright v Embassy Hotel (1934) 39 S.J. 12*.
- 693 *Olley v Marlborough Court Ltd [1949] 1 K.B. 532, 542, 548*.
- 694 s.1(1).
- 695 Williams, Joint Torts and Contributory Negligence (1951), pp.207–209, 326, 327. Contributory negligence is available as a defence to a claim based on [s.2\(1\) of the Misrepresentation Act 1967](#): *Gran Gelato v Richcliff (Group) Ltd [1992] Ch. 560*; but not to a claim in deceit: *Standard Chartered Bank v Pakistan National Shipping Corp (Nos 2 and 4) [2002] UKHL 43, [2003] 1 A.C. 959*.
- 696 *Farnworth v Packwood (1816) 1 Stark. 249*; *Richmond v Smith (1828) 8 B. & C. 9*.
- 697 *Farnworth v Packwood (1816) 1 Stark. 249*; *Richmond v Smith (1828) 8 B. & C. 9*.
- 698 *Carpenter v Haymarket Hotel Ltd [1931] 1 K.B. 364*. cf. *Morgan v Ravey (1860) 2 F. & F. 283*; *Carpenter v Haymarket Hotel Ltd [1931] 1 K.B. 364*.
- 699 *Morgan v Ravey (1861) 6 H. & N. 265*.
- 700 s.86.
- 701 *Williams v Owen [1955] 1 W.L.R. 1293, 1297–1298*.
- 702 See above, para.35-101. The keeper of a lodging-house has no lien: *Alldis v Huxley (1891) 12 S.R.(N.S.W.) 158*; nor, in the absence of a special agreement, has the keeper of a livery-stable: *Wallace v Woodgate (1824) Ry. & M. 193*; or the trainer of a racehorse: *Ward v Fielden [1985] C.L.Y. 2000*.
- 703 cf. *Binns v Pigot (1840) 9 Car. & P. 208* (goods deposited at the inn by a person who was not a guest).
- 704 See above, para.35-109.
- 705 *Mulliner v Florence (1878) 3 Q.B.D. 484*. cf. *Smith v Dearlove (1848) 6 C.B. 132*.
- 706 *Matsuda v Waldorf Hotel Co Ltd (1911) 27 T.L.R. 153* (stolen railway tickets deposited as a security for money advanced by the innkeeper); *Chesham Automobile Supply Co Ltd v Beresford Hotel (Birchington) Ltd (1913) 29 T.L.R. 584*.
- 707 *Chesham Automobile Supply Co Ltd v Beresford Hotel (Birchington) Ltd*, see above; cf. *Ferguson v Peterkin, 1953 S.L.T. (Sh. Ct.) 91* (no lien for damage caused by the guest).
- 708 *Marsh v Police Commissioner [1945] K.B. 43*.
- 709 *Broadwood v Granara (1854) 10 Ex. 417*.

- 710 s.2(2).
- 711 See above, para.35-101.
- 712 e.g. *Scarfe v Morgan* (1838) 4 M. & W. 270; *Chase v Westmore* (1816) 5 M. & S. 180; *Mulliner v Florence*, above, at 493; *Chesham Automobile Supply Co Ltd v Beresford Hotel (Birchington) Ltd*, above.
- 713 See above, para.35-108.
- 714 *Sunbolf v Alford* (1838) 3 M. & W. 248. See also *R. v Stewart* (1895) 59 J.P. 650.
- 715 *Angus v McLachlan* (1883) 23 Ch. D. 330.
- 716 *Houghland v RR Low (Luxury Coaches) Ltd* [1962] 1 Q.B. 694, 698 (see above, para.35-008); see also s.13 of the Supply of Goods and Services Act 1982 and s.49(1) of the Consumer Rights Act 2015 (see above, paras 35-044—35-046).
- 717 See *Angus v McLachlan* (1883) 23 Ch. D. 330.
- 718 *British Empire Shipping Co v Somes* (1858) E.B. & E. 353, 367; affirmed (1860) 8 H.L. Cas. 338. However it has since been held that the principle established in *Somes* is a “narrow one” which is of “doubtful status” outside of the context of artificer’s liens and so on this basis it may not apply to an innkeeper, in which case an innkeeper may be entitled to recover the cost of storing the goods during the detention (*Metall Market OOO v Vitorio Shipping Co Ltd (The “Lehmann Timber”)* [2013] EWCA Civ 650, [2014] Q.B. 760 at [122]). Where the innkeeper is held to be acting for his own benefit, then it is unlikely that the innkeeper will be entitled to make the charge, but the position may be otherwise where the guest has failed in breach of contract to remove his or her possessions from the inn.
- 719 *Robinson v Walter* (1617) 3 Bulst. 269; *Turrill v Crawley* (1849) 13 Q.B. 197; *Snead v Watkins* (1856) 26 L.J. C.P. 57. See also *Johnson v Hill* (1822) 3 Stark. 172; *Threfall v Borwick* (1875) L.R. 10 Q.B. 210; *Robins & Co v Gray* [1895] 2 Q.B. 501; *Chesham Automobile Supply Co Ltd v Beresford Hotel (Birchington) Ltd* (1913) 29 T.L.R. 584.
- 720 *Johnson v Hill* (1822) 3 Stark. 172.
- 721 *Robins & Co v Gray* [1895] 2 Q.B. 501 (sewing machines sent by employers to a commercial traveller for sale).
- 722 *Threfall v Borwick* (1875) L.R. 10 Q.B. 210; *Chesham Automobile Supply Co Ltd v Beresford Hotel (Birchington) Ltd* (1913) 29 T.L.R. 584.
- 723 *Mulliner v Florence* (1878) 3 Q.B.D. 484; *Gordon v Silber* (1890) 25 Q.B.D. 491; *Marsh v Police Commissioner* [1945] K.B. 43.
- 724 *Gordon v Silber*, above. cf. *Mulliner v Florence*, above, at 488.
- 725 *Jones v Thurloe* (1723) 8 Mod. 172; *Jacobs v Latour* (1828) 5 Bing. 130 (innkeeper allowed sheriff to seize the goods, and did not assert his lien); *Legg v Evans* (1840) 6 M. & W. 36; *Orchard v Rackstraw* (1850) 9 C.B. 698. cf. *Wallace v Woodgate* (1824) 1 Car. & P. 575 (goods fraudulently taken from innkeeper’s custody, in order to destroy lien).
- 726 *Jones v Thurloe*, above.
- 727 See above, para.35-106.
- 728 *Allen v Smith* (1862) 12 C.B. N.S. 638; affirmed (1863) 9 Jur.(N.S.) 1284.
- 729 *Angus v McLachlan* (1883) 23 Ch. D. 330; *Matsuda v Waldorf Hotel Co Ltd* (1911) 27 T.L.R. 153.

730 *Mulliner v Florence*, above, at 489.

731 *Jones v Thurloe*, above.

732 s.1.

733 The Act refers to the landlord, proprietor, keeper or manager of any hotel, inn or licensed public-house, and so has a wider application than the “hotel proprietor” referred to in the *Hotel Proprietors Act 1956* (above, para.35-101).

734 The right of sale under this Act is unaffected by the statutory abolition of the innkeeper’s lien in respect of certain property: see above, para.35-115.

735 cf. *Chesham Automobile Supply Co Ltd v Beresford Hotel (Birchington) Ltd* (1913) 29 T.L.R. 584.

736 s.1.

737 Examined above, paras 35-095—35-100.

738 s.12(1)(a). Sch.1 Pt I para.4(1) explicitly includes “possession of goods which he has held as custodian”.

739 See above, paras 35-115—35-117.

740 ss.12 and 13 were particularly designed for goods not collected by their owners after repairs, valuations or appraisals, as well as custody, e.g. s.12(5)(b) entitles the bailee to deduct from the proceeds of sale “any sum payable *in respect of the goods*” (italics supplied), which is not relevant to the innkeeper’s lien.

741 See Palmer at Ch.28.

742 See above, para.35-101.

743 At common law (see the following note) and under the term implied (in a contract to supply services in the course of a business) by s.13 of the *Supply of Goods and Services Act 1982* and included in a contract between a trader and a consumer under s.49(1) of the *Consumer Rights Act 2015* (see above, paras 35-044—35-046).

744 *Scarborough v Cosgrove* [1905] 2 K.B. 805; *Paterson v Norris* (1914) 30 T.L.R. 393; *Caldecutt v Piesse* (1932) 49 T.L.R. 26; *Olley v Marlborough Court Ltd* [1949] 1 K.B. 532. A similar duty to take reasonable care lies upon the proprietors of a residential club: *Williams v Curzon Syndicate Ltd* (1919) 35 T.L.R. 475. On the distinction between a lodger and a tenant (to whom no such duty of care is owed) see *Appah v Parncliffe Investments Ltd* [1964] 1 W.L.R. 1064.

745 [1905] 2 K.B. 805.

746 [1905] 2 K.B. 805, 815.

747 See above.

748 This case also concerned a notice purporting to exempt the proprietors from liability: see above, para.35-110.

## **(i) - Pledge at Common Law**

**Chitty on Contracts 34th Ed.**

**Consolidated Mainwork Incorporating First Supplement**

**Volume II - Specific Contracts**

**Chapter 35 - Bailment**

**Section 4. - Bailments for Valuable Consideration**

**(f) - Pledge<sup>749</sup>**

**(i) - Pledge at Common Law**

### **Definition of pledge**

35-121 Although the **Consumer Credit Act 1974** regulates many categories of pledge<sup>750</sup> the common law on pledges must first be examined, since it defines the concept of pledge or pawn used in the Act<sup>751</sup> and still applies to all pledges falling outside the Act. A pledge or pawn is “a bailment of goods<sup>752</sup> by a debtor to his creditor to be kept by him till the debt be discharged”<sup>753</sup>; the bailment is intended to be a security for some debt or engagement.<sup>754</sup> The general property in the goods pledged remains in the pledgor, but a special property in them passes to the pledgee in order that he may be able to sell the goods if his right to sell arises.<sup>755</sup> This “special property” is strictly only a right to possession of the goods<sup>756</sup> together with a power of sale upon default.<sup>757</sup> The special property is such that if a bailee accepts an object of value as security for a debt, the dishonest retaking of the object by the bailor is theft.<sup>758</sup>

### **Characteristics of pledge**

35-122 Sale upon default in payment of the debt is an incident of pledge, whereas a lien gives merely a right to detain the goods until the debt is paid<sup>759</sup>; again, a pledge, unlike a lien,<sup>760</sup> is assignable, and may be taken in execution against the pledgee.<sup>761</sup> A mortgage of chattels or bill of sale differs from

a pledge in that on a mortgage the property passes by assignment, subject to a right of redemption, while possession need not pass to the mortgagee.<sup>762</sup>

## Delivery essential for pledge

- 35-123 Delivery, either actual or constructive, of the articles pledged in consideration of the debt or advance is essential for pledge.<sup>763</sup> Constructive delivery is sufficient where it is practically impossible to give physical possession (as in the case of bulky goods) or where the pledge remains in the possession of the pledgor for a special purpose<sup>764</sup>; the pledge may be legally delivered though it does not actually pass from the hands of the pledgor to those of the pledgee.<sup>765</sup> Delivery of a key of a warehouse in which goods are stored,<sup>766</sup> or the handing over of a delivery order directing a warehouseman to deliver goods to the pledgee (followed by the warehouseman's acknowledgment of the delivery order)<sup>767</sup> may be sufficient in law to form constructive delivery. But where the goods are in the possession of a third person, such as a warehouseman, the latter must attorn to the pledgee in order for possession to pass to the pledgee.<sup>768</sup>

## Advance and delivery need not be contemporaneous

- 35-124 In pledge, it is not essential that the advance and the delivery should be contemporaneous. It is sufficient if possession is delivered within a reasonable time of the advance, in pursuance of the contract to pledge.<sup>769</sup> Redelivery of the goods to the pledgor for a limited purpose and on the understanding that the pledge is to continue, does not destroy the pledge.<sup>770</sup>

## Bills of Sale Acts

- 35-125 If a document is signed which gives the terms of the pledge, this is not a bill of sale under the **Bills of Sale Acts 1878** and **1882**, since the document is not a transfer of title nor a licence to take possession of goods; it is the delivery of possession which distinguishes the pledge from a mortgage or bill of sale.<sup>771</sup> Where, however, the document is essential to the proof of the creditor's right to possession of the goods, because there has been no delivery to complete a pledge, it is a bill of sale within the Acts, and requires registration.<sup>772</sup> In deciding whether a transaction is one to which the Acts apply the court should look not merely at the documents but at the real nature of the transaction.<sup>773</sup> A delivery order, addressed to a warehouseman who holds the goods, is not a bill of sale, since it is merely a step in the transfer of possession to the pledgee.<sup>774</sup>

## Pledge of negotiable instrument

- 35-126 Where a pledgor pledges a negotiable instrument<sup>775</sup> to which he has no title or in which he has only a limited interest, but the pledgee receives it for value and in good faith, the pledgee becomes an innocent holder for value; the pledgee's right to the negotiable instrument will then prevail against the true owner despite the pledgor's lack of title.<sup>776</sup> Thus in *London Joint Stock Bank v Simmons*,<sup>777</sup> a broker in fraud of the owner pledged negotiable instruments, together with other instruments belonging to other persons, with a bank as a security en bloc for an advance. The bank did not know whether the instruments belonged to the broker or other persons, or whether the broker had any authority to deal with them, and made no inquiries. The broker having absconded, the bank realised the securities. It was held by the House of Lords that there being as a matter of fact no circumstances to create suspicion, the bank was entitled to retain and realise the securities, having taken negotiable instruments for value and in good faith. The mere fact that a broker brings a block of securities and pledges them with a banker against his general account and allows them to remain as security for a considerable time, is not sufficient to put the banker on inquiry.<sup>778</sup> If, however, the pledgee has suspicions and the means of knowledge, and wilfully shuts his eyes, he does not act in good faith.<sup>779</sup> It would appear that where the pledgee makes an advance upon securities, knowing that the pledgor has only a limited authority to deal with them, he must return the securities to the true owner on repayment of the advance made to the pledgor.<sup>780</sup>

## Pledges by mercantile agents or factors

- 35-127 There is special statutory provision for the implied authority of a mercantile agent to pledge goods in his possession<sup>781</sup> and of a seller or buyer of goods in possession of them after the sale or agreement to sell.<sup>782</sup> In the case of a factor or mercantile agent, it is expressly provided by the *Factors Act 1889*<sup>783</sup> that "A pledge of the documents of title to goods shall be deemed to be a pledge of the goods".

## Pledge of bills of lading<sup>784</sup>

- 35-128 When goods are under the operation of a bill of lading, delivery for the purpose of pledging the goods may be effected by indorsement or transfer of the bill of lading.<sup>785</sup> It is a question of fact whether a particular transaction was intended to pass the title in the goods, or only to create a

pledge.<sup>786</sup> A bill of lading is still in operation when the goods are landed at a sufferance-wharf with a stop for freight; a transfer of the bill of lading while the goods are there creates an effective pledge.<sup>787</sup>

## Liabilities of the pledgee

- 35-129 The pledgee, since he has possession of the thing pledged, is liable for failure to take reasonable care of it<sup>788</sup>; if it is stolen from him he will be discharged from liability if he can show that he took ordinary care of it.<sup>789</sup> Similarly he is excused where the thing was perishable, and did in fact perish.<sup>790</sup> If several things are pledged for the same debt, and one of them is lost without default in the pledgee, the residue is liable to be retained for the whole debt.<sup>791</sup>

## Pledgor's title

- 35-130 By the pledge, the pledgor impliedly warrants that he has a title to the thing pledged,<sup>792</sup> and that it may safely be returned to him<sup>793</sup>; he is liable in damages to the pledgee for any breach of such a warranty.<sup>794</sup> If the pledgor has no authority to make the pledge, the pledgee cannot hold the thing pledged as against the true owner,<sup>795</sup> since, apart from the *Factors Act 1889*,<sup>796</sup> the possession which the pledgor transferred to the pledgee is no defence to the latter when he is sued by the true owner.<sup>797</sup> The pledgee will prevail, however, if the true owner has allowed the pledgor to hold himself out as the owner in such a way as to induce the pledgee innocently to enter into the contract of pledge.<sup>798</sup> But an authority to sell does not impliedly include an authority to the agent to pledge.<sup>799</sup>

## Power of sale at common law

- 35-131 If the pledgor makes default in payment at the stipulated time, the pledgee has the power at common law to sell the pledge, even although there is no express agreement to that effect<sup>800</sup>; or he may sue the pledgor for his debt, retaining the pledge as a security.<sup>801</sup> But if a time for payment has not been agreed upon, or if the time agreed upon has been extended indefinitely, the pledgee cannot sell the pledge until after demand for payment and notice of his intention to sell.<sup>802</sup> The pledgee must take care that it is a provident sale.<sup>803</sup> At common law, he sells by virtue of an implied authority from the pledgor and for the benefit of both parties; hence he must, after deducting his debt, account to

the pledgor for any surplus of the proceeds of the sale.<sup>804</sup> If, however, the proceeds of the sale do not satisfy the debt, the pledgor is still personally liable for the deficit.<sup>805</sup>

## Statutory powers of sale

- 35-132 The wide powers of sale conferred on bailees by ss.12 and 13 of the Torts (Interference with Goods) Act 1977 were not designed with pledges in mind,<sup>806</sup> but they could be construed as wide enough to include pledges.<sup>807</sup> The statutory powers were examined earlier in this chapter<sup>808</sup>; the procedure under s.13, which empowers a bailee to apply to the court to authorise a sale, may be especially useful to a pledgee.<sup>809</sup> There is a special statutory procedure for the sale of a pawn.<sup>810</sup>

## Other powers of the pledgee

- 35-133 Until repayment, the pledgee is, by virtue of his possession and his immediate right to possession of the thing pledged, the only person who may sue a stranger for trespass or conversion<sup>811</sup>; where the pledgee is deprived of possession by the tortious act of a stranger, the measure of damages recoverable by the pledgee is the full market value of the thing at the time when and the place where he should have obtained possession.<sup>812</sup> (The tortfeasor cannot take advantage of the pledgee's liability, upon his receiving that value, to account to the pledgor (or another) for any amount exceeding the pledgee's interest.<sup>813</sup>) The pledgee may assign or sub-pledge to a third person his special property or interest in the thing pledged<sup>814</sup>; such a transfer is lawful only if it purports to transfer no more than the pledgee's interest in the thing, and the pledgee continues to be liable for reasonable care being taken for its safe custody.<sup>815</sup>

## The rights of the pledgee and the terms of the pledge

- 35-134 The right of the pledgee to use the thing pledged will depend upon the agreed terms of the pledge; in the absence of any express or implied term, there is old authority to the effect that the pledgee may not use it if it is something which will be the worse for such use, such as clothes,<sup>816</sup> but that he may, at his own risk, use a thing which will not be the worse for use.<sup>817</sup> If the keeping of the thing is an expense to the pledgee, such as a cow or horse, he may milk the cow or ride the horse in recompense for the keeping.<sup>818</sup> If during the pledge there is any increase in the value of the thing pledged, the pledgee is entitled to the increase as part of his security.<sup>819</sup>

## Unlawful dealing by the pledgee

- 35-135 If the pledgee deals with the thing pledged in an unlawful manner, such as by sale before the time fixed for repayment of the debt,<sup>820</sup> or by wrongfully claiming to be absolute owner of the thing,<sup>821</sup> the contract of pledge is not determined<sup>822</sup> and the pledgor cannot, without payment or tender of the debt, sue the pledgee for conversion.<sup>823</sup> But if the pledgee “deals with it in a manner other than is allowed by law for the payment of his debt, then, in so far as by disposing of the reversionary interest of the pledgor he causes to the pledgor any difficulty in obtaining possession of the pledge on payment of the sum due, and thereby does him any real damage, he commits a legal wrong against the pledgor”.<sup>824</sup>

## Termination of pledge

- 35-136 By a bailment in pledge the pledgee impliedly undertakes to return the chattel to the pledgor upon payment of the debt.<sup>825</sup> Upon repayment, the contract of pledge is extinguished, and the pledgee is divested of his special property in the chattel.<sup>826</sup> The pledgor (or his personal representative)<sup>827</sup> may, by virtue of his general property in the thing pledged, and upon tender of the debt,<sup>828</sup> redeem it at any time<sup>829</sup> until the pledge is lawfully sold by the pledgee. If the debtor tenders the debt to the pledgee, but the pledgee refuses to deliver up the pledge, the pledgee's special property therein is determined, and the pledgor becomes entitled to the immediate possession of the thing pledged; the pledgee thereupon becomes liable for conversion<sup>830</sup> at the suit of the pledgor, or his assignee.<sup>831</sup> But apparently, even in such a case, the pledgee is entitled to deduct from the damages he must pay the amount of the debt.<sup>832</sup> If, after tender of the debt, the pledgee retains the thing pledged, he is strictly liable for its safety.<sup>833</sup>

## Footnotes

- 749 See generally Palmer and Hudson, “Pledge” in Palmer and McKendrick (eds), *Interests in Goods*, 2nd edn (1998), pp.621 et seq.
- 750 See below, paras 35-137—35-144.
- 751 See below, para.35-137.
- 752 A pledge can be created only in respect of a chattel capable of delivery; thus there can be no pledge of a chose in action as such: *Harrold v Plenty [1901] 2 Ch. 314, 316*.

- 753 Jones at p.118. See also *Coggs v Bernard* (1703) 2 *Ld. Raym.* 909, 913; *Donald v Suckling* (1866) *L.R.* 1 *Q.B.* 585, 594. The debt creates a personal liability to pay, irrespective of the pledge: *South Sea Co v Duncomb* (1731) 2 *Str.* 919; *Jones v Marshall* (1889) 24 *Q.B.D.* 269, 271.
- 754 There must have been an intention to pledge the goods: *Marcq v Christie, Manson & Woods Ltd* [2003] *EWCA Civ* 731, [2004] *Q.B.* 286 at [41].
- 755 *Ex p. Hubbard* (1886) 17 *Q.B.D.* 690, 698.
- 756 Which entitles the pledgee to sue strangers who tortiously interfere with the goods: see below, para.35-133.
- 757 *The Odessa* [1916] 1 *A.C.* 145, 158–159. See also *Halliday v Holgate* (1868) *L.R.* 3 *Ex.* 299, 302; *Attenborough & Son v Solomon* [1913] *A.C.* 76, 84. The pledgee may be under some fiduciary obligations towards the pledgor: see *Mathew v TM Sutton Ltd* [1994] 1 *W.L.R.* 1455 (see below, para.35-144; commented on by *Palmer and Merkin* [1994] *All E.R. Annual Review* 26–28).
- 758 *Rose v Matt* [1951] 1 *K.B.* 810 (larceny under the law before the Theft Act 1968: see now ss.1 and 5(1) of that Act).
- 759 *Yungman v Briesemann* (1892) 67 *L.T.* 642. cf. above, paras 35-093, 35-115.
- 760 *Donald v Suckling*, above, at 612.
- 761 *Re Rollason* (1887) 34 *Ch. D.* 495. cf. *Insolvency Act 1986* s.311(5).
- 762 *Re Morritt* (1886) 18 *Q.B.D.* 222, 232, 234–235. A pledge is also distinguishable from an equitable mortgage (e.g. a pledgee has no right of foreclosure, since he has only a special property in the chattel): *Carter v Wake* (1877) 4 *Ch. D.* 605; *Re Richardson* (1885) 30 *Ch. D.* 396, 403.
- 763 *Dublin City Distillery Ltd v Doherty* [1914] *A.C.* 823, 843; *Kum v Wah Tat Bank Ltd* [1971] 1 *Lloyd's Rep.* 439, *PC*. Thus there may be a pledge of bearer bonds (*Carter v Wake*, above), but not a chose in action such as shares (*Harrold v Plenty* [1901] 2 *Ch.* 314, 316). Apart from the *Factors Act 1889* s.3, and the exceptional case of bills of lading (below, para.35-128) the delivery of a document of title to goods is insufficient for a pledge at common law, although a lien (without a power of sale) may arise.
- 764 *Reeves v Capper* (1838) 5 *Bing. N.C.* 136; *Martin v Reid* (1862) 11 *C.B. N.S.* 730.
- 765 *Barber v Meyerstein* (1866) *L.R.* 2 *C.P.* 38; (1870) *L.R.* 4 *H.L.* 317. On constructive delivery, see *Stoljar* (1958) 21 *M.L.R.* 27, 31 et seq.
- 766 *Young v Lambert* (1870) *L.R.* 3 *P.C.* 142; *Hilton v Tucker* (1888) 39 *Ch. D.* 669. See also *Ward v Turner* (1752) 2 *Ves. Sen.* 431, 443. However, the delivery of a pin code may not suffice to constitute delivery: *MSC Mediterranean Shipping Co SA v Glencore International AG* [2017] *EWCA Civ* 365, [2017] 2 *Lloyd's Rep.* 186 at [25]–[42].
- 767 *Grigg v National Guardian Assurance Co* [1891] 3 *Ch.* 206. But the goods must be ascertained: *Re London Wine Co (Shippers)* *Ltd* [1986] *P.C.C.* 121.
- 768 *Madras Official Assignee v Mercantile Bank of India Ltd* [1935] *A.C.* 53, 58–59; *Impala Warehousing and Logistics (Shanghai) Co Ltd v Wanxiang Resources (Singapore) Pte Ltd* [2015] *EWHC* 811 (*Comm*), [2015] 2 *All E.R. (Comm)* 234 at [54]–[59]. But the Privy Council has held that delivery under a contract of pledge to a bank is completed when the

- goods are shipped under a mate's receipt naming the bank as consignee: *Kum v Wah Tat Bank Ltd* [1971] 1 *Lloyd's Rep.* 439. cf. above, para.35-030, see below, para.46-254.
- 769 *Hilton v Tucker*, above; *Reeves v Capper*, above.
- 770 *North Western Bank Ltd v John Poynter, Son & Macdonalds* [1895] A.C. 56; *Re David Allester Ltd* [1922] 2 Ch. 211; *Lloyds Bank Ltd v Bank of America National Trust and Savings Association* [1938] 2 K.B. 147 (see below, para.36-556). On "trust receipts", see below and Benjamin's Sale of Goods, 11th edn (2021), paras 7-033, 18-504—18-509.
- 771 *Ex p. Hubbard* (1886) 17 Q.B.D. 690; *Charlesworth v Mills* [1892] A.C. 231. See also *Re David Allester Ltd*, above.
- 772 *Dublin City Distillery Ltd v Doherty* [1914] A.C. 823; *Re David Allester Ltd*, above; *Madras Official Assignee v Mercantile Bank of India Ltd*, above. See also below, para.36-555; and *Diamond* (1960) 23 M.L.R. 399.
- 773 *Dublin City Distillery Ltd v Doherty*, above, at 848; *Madras Official Assignee v Mercantile Bank of India Ltd*, above, at 58. See also below, paras 41-523—41-532.
- 774 *Grigg v National Guardian Assurance Co* [1891] 3 Ch. 206. cf. s.29(4) of the Sale of Goods Act 1979 (below, para.46-254).
- 775 See below, paras 36-001 et seq.
- 776 *London Joint Stock Bank v Simmons* [1892] A.C. 201; followed in *Fuller v Glyn, Mills, Currie & Co* [1914] 2 K.B. 168.
- 777 See above. See also s.27(3) of the Bills of Exchange Act 1882.
- 778 *Fuller v Glyn, Mills, Currie & Co*, above. See also *Crerar v Bank of Scotland*, 1921 S.C. 736, 1922 S.C. 137; *Colonial Bank v Cady & Williams* (1890) 15 App. Cas. 267; *Lloyds Bank Ltd v Swiss Bankverein* (1913) 108 L.T. 143.
- 779 cf. the statutory provision on pawning in s.117(2) of the Consumer Credit Act 1974 (below, para.35-140).
- 780 *Sheffield v London Joint Stock Bank Ltd* (1888) 13 App. Cas. 333. See also *Jameson v Union Bank of Scotland* (1914) 109 L.T. 850.
- 781 *Factors Act 1889* s.2(1) (discussed in Vol.I, para.21-089 and below, paras 46-204—46-205). See Benjamin's Sale of Goods, 11th edn (2021), paras 7-034—7-054. See *London Jewellers Ltd v Attenborough* [1934] 2 K.B. 206. cf. *Buller & Co Ltd v Brooks Ltd* (1930) 142 L.T. 576.
- 782 Sale of Goods Act 1979 ss.24, 25(1) and (2); *Factors Act 1889* ss.8, 9 (discussed below, paras 46-214—46-231). See Benjamin at paras 7-055 et seq., 7-069 et seq.
- 783 s.3. See Benjamin at paras 7-049—7-052.
- 784 See Benjamin at paras 5-142, 18-262, 18-622—18-624.
- 785 *Burdick v Sewell* (1883) 10 Q.B.D. 363; affirmed sub nom. *Sewell v Burdick* (1884) 10 App. Cas. 74; *Lloyds Bank v Bank of America National Trust and Savings Association* [1938] 2 K.B. 147.
- 786 *Burdick v Sewell*, above, at 369—377. (For an illustration, see *Chabra Corp Pte Ltd v Jag Shakti (Owners)* [1986] A.C. 337). cf. *Glyn, Mills, Currie & Co v East and West India Dock Co* (1880) 6 Q.B.D. 475, 481.
- 787 *Meyerstein v Barber* (1866) L.R. 2 C.P. 38; *Barber v Meyerstein* (1870) L.R. 4 H.L. 317.
- 788 *Coggs v Bernard* (1703) 2 Ld. Raym. 909, 917; *Syred v Carruthers* (1858) El. Bl. & El. 469; Jones at pp.75, 76. cf. *Foley v O'Hara* (1920) 54 Ir.L.T. 167; and *Houghland v RR Low*

(*Luxury Coaches*) Ltd [1962] 1 Q.B. 694, 698 (see above, para.35-008). The pledgee might also be liable under s.13 of the Supply of Goods and Services Act 1982 or s.49(1) of the Consumer Rights Act 2015 (see above, para.35-044). On the matter of exemption clauses, see above, paras 35-053, 35-054. cf. below, paras 35-137 et seq. (statutory controls over pawning).

789 See the cases cited in the previous footnote.

790 *Ratcliff v Davis* (1610) Yel. 178.

791 (1610) Yel. 178; Bac.Abr. Bailment (B).

792 But receipt of goods by way of pledge is conversion, if the delivery of goods is conversion: s.11(2) of the Torts (Interference with Goods) Act 1977; reversing, on this point, *Spackman v Foster* (1883) 11 Q.B.D. 99.

793 *Cheesman v Exall* (1851) 6 Exch. 341; *Singer Manufacturing Co v Clark* (1879) 5 Ex. D. 37, 42. cf. s.12 of the Sale of Goods Act 1979; also see above, paras 35-067 et seq.

794 *Singer Manufacturing Co v Clark*, above.

795 *Williams v Barton* (1825) 3 Bing. 139. See also *Hoare v Parker* (1788) 2 Term Rep. 376; *Kingsford v Merry* (1856) 1 Hurl. & N. 503, 516.

796 See above, para.35-127.

797 *Williams v Barton* (1825) 3 Bing. 139. The pledgee is liable in conversion to the true owner before he refuses to deliver the chattel to him. On the position of the parties to the pledge when a third party claims an interest in the chattel which is pledged, see ss.7 and 8 of the Torts (Interference with Goods) Act 1977 (see above, paras 35-015—35-017).

798 *Henderson & Co v Williams* [1895] 1 Q.B. 521. See also *Cole v North Western Bank* (1875) L.R. 10 C.P. 354, 363; *Fry and Mason v Smellie and Taylor* (1912) 106 L.T. 404; *Fuller v Glyn, Mills, Currie & Co* [1914] 2 K.B. 168; *Blundell-Leigh v Attenborough* [1921] 3 K.B. 235.

799 *City Bank v Barrow* (1880) 5 App. Cas. 664, 669, 670.

800 *Pigot v Cubley* (1864) 15 C.B. N.S. 701, 710; *Re Morritt* (1886) 18 Q.B.D. 222, 235; see also *The Ningchow* [1916] P. 221.

801 *South Sea Co v Duncomb* (1731) 2 Str. 919; *Lawton v Newland* (1817) 2 Stark. 72.

802 *Pigot v Cubley*, above; *France v Clark* (1883) 22 Ch. D. 830; 26 Ch. D. 257; *Burdick v Sewell* (1883) 10 Q.B.D. 363, 367; (1884) 10 App. Cas. 74; see *Re Morritt*, above; and *The Ningchow*, above. The pledgor may redeem at any time up to the actual sale: *Re Morritt*, above, at 232; *France v Clark*, above.

803 cf. s.121(6) and (7) of the Consumer Credit Act 1974 (below, para.35-144).

804 *The Odessa* [1916] 1 A.C. 145, 159. cf. s.121(3) of the Consumer Credit Act 1974 (below, para.35-144).

805 *Jones v Marshall* (1889) 24 Q.B.D. 269 (extending this principle to the former “special contract” of pawn). cf. now s.121(4) of the Consumer Credit Act 1974 (below, para.35-144).

806 e.g. the categories in Sch.1 Pt I paras 2–4, do not include pledges.

807 cf. the submission made above, para.35-119, in the case of the innkeeper’s lien.

808 See above, paras 35-095—35-100.

809 See above, para.35-100.

- 810 See below, para.35-144.
- 811 *Martin v Reid* (1862) 11 C.B. N.S. 730; *Broadbent v Varley* (1862) 12 C.B. N.S. 214. Under the common law, the pledgor need not be joined as claimant: *Saville v Tankred* (1748) 1 Ves. Sen. 101; and the measure of damages is the full value of the thing: *Swire v Leach* (1865) 18 C.B. N.S. 479. But for the statutory rules, see above, paras 35-010—35-022.
- 812 *Chabba Corp Pte Ltd v Jag Shakti (Owners)* [1986] A.C. 337 (following *Swire v Leach* (1865) 18 C.B. N.S. 479; and *The Winkfield* [1902] P. 42); *Scipion Active Trading Fund v Vallis Group Ltd* [2020] EWHC 1451 (Comm) at [74]–[79]. See above, para.35-024.
- 813 *The Jag Shakti*, above cf. see below, para.35-144 (note).
- 814 *Donald v Suckling* (1866) L.R. 1 Q.B. 585, 614; *Halliday v Holgate* (1868) L.R. 3 Ex. 299.
- 815 *Donald v Suckling*, above, at 615, 616. cf. *Nicholson v Hooper* (1838) 4 My. & Cr. 179. On the pledgee's liability if the thing is damaged in the hands of the third person, or if the pledgor is prejudiced by delay in redelivery of the thing after tender of the debt, see *Donald v Suckling*, above, at 618.
- 816 *Mores v Conham* (1609) Owen 123.
- 817 *Anon.* (1693) 2 Salk. 522.
- 818 *Coggs v Bernard* (1703) 2 Ld. Raym. 909, 916, 917; Story at paras 329–331; Jones at p.81, n.38; Paton at pp.369, 370. cf. *Cooke v Haddon* (1862) 3 F. & F. 229.
- 819 Story at para.292.
- 820 Or a sub-pledge for a sum greater than that owed by the pledgor: *Donald v Suckling* (1866) L.R. 1 Q.B. 585. On an alleged custom for moneylenders to repledge, see *Sheffield v London Joint Stock Bank* (1888) 13 App. Cas. 333 (see also above, para.35-133).
- 821 *Yungmann v Briesemann* (1892) 67 L.T. 642. But note that “Denial of title is not of itself conversion”: s.11(3) of the Torts (Interference with Goods) Act 1977. (There must in addition be some dealing with the thing pledged.)
- 822 Unless some special personal confidence is reposed in the pledgee: *Donald v Suckling*, above, at 615.
- 823 *Donald v Suckling*, above, at 610, 616, 618; *Halliday v Holgate* (1868) L.R. 3 Ex. 299. cf. *Pigot v Cubley* (1864) 15 C.B. N.S. 701. (The pledgor's claim for specific recovery must follow the rules in s.3 of the Torts (Interference with Goods) Act 1977: see above, para.35-013).
- 824 *Halliday v Holgate*, above, at 302. See also *Donald v Suckling*, above, at 611, 612, 618.
- 825 *Singer Manufacturing Co v Clark* (1879) 5 Ex. D. 37.
- 826 *Babcock v Lawson* (1880) 5 Q.B.D. 284.
- 827 Under the Law Reform (Miscellaneous Provisions) Act 1934 s.1. In view of this Act, it is submitted that the decision in *Ratcliff v Davis* (1610) Yel. 178 is no longer good law on this point.
- 828 *Coggs v Bernard* (1703) 2 Ld. Raym. 909, 917.
- 829 After the pledgee's death, his personal representative is liable to return the pledge upon redemption: *Ratcliff v Davis*, above.
- 830 *Coggs v Bernard*, above, at 917; *Donald v Suckling* (1866) L.R. 1 Q.B. 585, 610; *Yungmann v Briesemann* (1892) 67 L.T. 642. In a claim for conversion, the pledgor may seek an order for specific delivery of the chattel: see above, para.35-013. If ownership of the thing pledged

is in dispute, a temporary refusal to return it, pending investigation, is justified: *Vaughan v Watt (1840) 6 M. & W. 492*. cf. *Clayton v Le Roy [1911] 2 K.B. 1031, 1051*. On the statutory rules applicable where third parties claim an interest in the chattel, see above, paras 35-015—35-016.

- 831 *Franklin v Neate (1844) 13 M. & W. 481*.
- 832 *Johnson v Stear (1863) 15 C.B. N.S. 330*; see also *Halliday v Holgate (1868) L.R. 3 Ex. 299; Yungmann v Briesemann*, above. cf. above, para.35-017.
- 833 *Anon. (1693) 2 Salk. 522* (goods stolen). cf. his liability during the period he is lawfully in possession: see above, para.35-129.

## (ii) - Statutory Control of Pledges

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 35 - Bailment

Section 4. - Bailments for Valuable Consideration

(f) - Pledge<sup>749</sup>

(ii) - Statutory Control of Pledges

### The Consumer Credit Act 1974

35-137 This Act replaced previous legislation on pawnbrokers by ss.114–122, under the heading of “Pledges”.<sup>834</sup> The general provisions of the Act are discussed below in Ch.41<sup>835</sup>; if a pledge of goods is given as security for a regulated consumer credit agreement or a regulated consumer hire agreement,<sup>836</sup> the agreement and the security are governed by these general provisions, in addition to the sections dealing specifically with pledges. It should be noted that the sections on pledges cover a wider range of transactions than are associated with the popular concept of “pawnbroking”. Under the Act,<sup>837</sup> a person who takes any article in pawn<sup>838</sup> under “a regulated agreement”,<sup>839</sup> must give to the person from whom he receives it a “pawn-receipt” in the prescribed form.<sup>840</sup> However, the obligation to give a pawn-receipt<sup>841</sup> and the other provisions of the Act on pledges (ss.114–122) do not apply to two categories<sup>842</sup>: (a) a pledge of documents of title or of bearer bonds<sup>843</sup>; or (b) a non-commercial agreement.<sup>844</sup> It is submitted in Ch.41<sup>845</sup> that these sections do not apply to choses in action nor to deeds or certificates of title to land deposited with a creditor as security.

### Prohibited transactions

35-138 It is an offence for a person to take any article in pawn from an individual whom he knows to be, or who appears to be and is, a minor.<sup>846</sup> There are still various statutory prohibitions against

pledges of particular items, e.g. naval, military and air force equipment, arms and stores,<sup>847</sup> and other special articles.<sup>848</sup>

## Redemption period

- 35-139 The Act lays down several tests for the period within which the debtor may redeem the pawn. First (and irrespective of the terms of the agreement between the parties)<sup>849</sup> the Act provides that a pawn is redeemable at any time within six months after it was taken.<sup>850</sup> Subject to this provision, a pawn is redeemable (secondly) within the period fixed by the parties for the duration of the credit secured by the pledge, or (thirdly) within such longer period as they may agree.<sup>851</sup> The longest of these three periods is “the redemption period”, but if the pawn has not been redeemed by the end of the redemption period, it nevertheless (subject to one exception) remains redeemable until it is realised by the pawnee under the statutory procedure set out below<sup>852</sup>; the exception is where the property in the pawn passes to the pawnee in accordance with the provision dealing with a pawn securing a credit not exceeding £75.<sup>853</sup>

## Redemption procedure

- 35-140 On surrender of the pawn receipt, and payment of the amount owing, at any time when the pawn is redeemable, the pawnee must deliver the pawn to the bearer of the pawn-receipt<sup>854</sup> (except in the special situation discussed below).<sup>855</sup> If the pawnee delivers the pawn to the bearer of the pawn-receipt in accordance with this provision, he is not liable to any person in tort<sup>856</sup>; nor is the pawnee liable to any person in tort if he refuses to deliver it where the person demanding delivery does not surrender the pawn-receipt<sup>857</sup> or pay the amount owing, or in the special situation where “the pawnee knows or has reasonable cause to suspect that the bearer of the pawn-receipt is neither the owner of the pawn nor authorised by the owner to redeem it”.<sup>858</sup> The pawnee is granted immunity only “in tort” in this special situation, which means that he could still be liable in contract.

## Charges and other matters

- 35-141 It is provided<sup>859</sup> that no special charge may be made for redemption of a pawn after the end of the redemption period,<sup>860</sup> and that charges in respect of the safe keeping of the pawn shall not be at a higher rate after the end of the redemption period than before. It is a criminal offence if a person

who has taken a pawn under a regulated agreement<sup>861</sup> refuses without reasonable cause<sup>862</sup> to allow the pawn to be redeemed<sup>863</sup>; although the debtor is entitled to a contractual remedy against the pawnee in these circumstances, the criminal remedy may be more efficient since the court, upon conviction of the pawnee, may make an order for restitution to the debtor.<sup>864</sup>

## Loss of pawn-receipt

- 35-142 The Act prescribes<sup>865</sup> the procedure to be adopted by a person who is not in possession of the pawn-receipt but claims to be the owner of the pawn or to be otherwise entitled or authorised to redeem it. Such a claimant may redeem the pawn (at any time when it is redeemable) by tendering in place of the pawn-receipt, either (a) a statutory declaration made by the claimant in the prescribed form<sup>866</sup>; or (b) (when the pawn is security for a credit not exceeding £75,<sup>867</sup> and the pawnee agrees) a statement in writing in the prescribed form<sup>868</sup> signed by the claimant.<sup>869</sup> Such a declaration or statement is to be treated for the purpose of the redemption procedure<sup>870</sup> as if it were the pawn-receipt, and the pawn-receipt itself then becomes inoperative for that purpose.<sup>871</sup>

## Consequence of failure to redeem

- 35-143 If at the end of the redemption period<sup>872</sup> (or in some cases<sup>873</sup> after the expiry of five days following the end of the redemption period), the pawn has not been redeemed, it becomes (with one exception) realisable by the pawnee.<sup>874</sup> The exceptional case is where the redemption period is six months, the pawn is security for fixed-sum credit<sup>875</sup> not exceeding £75 or running-account credit<sup>876</sup> on which the credit limit<sup>877</sup> does not exceed £75, and the pawn was not immediately before the making of the regulated consumer credit agreement a pawn under another regulated consumer credit agreement in respect of which the debtor has discharged his indebtedness in part<sup>878</sup>: at the end of the redemption period, the property in such a pawn passes to the pawnee.<sup>879</sup> The redemption period is extended for these purposes where the debtor is entitled to apply to the court for a time order<sup>880</sup>: if he is so entitled, the pawn becomes realisable (or the property is automatically vested in the pawnee, as the case may be) if after the expiry of five days following the end of the redemption period the pawn has not been redeemed.<sup>881</sup>

## Realisation of pawn

- 35-144

When the pawn has become realisable by him,<sup>882</sup> the pawnee may sell it, after giving to the pawnor<sup>883</sup> not less than the prescribed<sup>884</sup> period (14 days) of notice<sup>885</sup> of intention to sell, indicating in the notice the asking price and such other particulars as may be prescribed.<sup>886</sup> Within the prescribed period (20 working days)<sup>887</sup> after the sale takes place, the pawnee must give the pawnor the prescribed information in writing as to the sale, its proceeds and expenses.<sup>888</sup> Where the net proceeds of sale<sup>889</sup> are not less than the sum which would have been payable for its redemption,<sup>890</sup> the debt secured by the pawn is discharged and any surplus must be paid by the pawnee to the pawnor.<sup>891</sup> If the net proceeds are less than the sum payable for redemption,<sup>892</sup> the debt shall be treated as from the date of sale as equal to the amount by which the net proceeds of sale fall short of the sum which would have been payable for the redemption of the pawn on that date.<sup>893</sup> If the pawnor alleges that the gross amount realised on the sale of the pawn is less than the true market value of the pawn on the date of sale, it is for the pawnee to prove that he and any agents employed by him in the sale used reasonable care to ensure that the true market value was obtained<sup>894</sup>; if the pawnee fails to prove this, the references above to “the net proceeds of sale”<sup>895</sup> shall have effect as if “the true market value” were substituted for the gross amount realised on the sale.<sup>896</sup> If the pawnor alleges that the expenses of the sale were unreasonably high, it is for the pawnee to prove that they were reasonable, and if he fails to do so, the calculation of “the net proceeds of sale”<sup>897</sup> in the provisions above<sup>898</sup> shall have effect as if “reasonable expenses” were substituted for “expenses”.<sup>899</sup> (Unlike the former law, the 1974 Act does not require the sale of the pawn to take place by auction.)

## Footnotes

- 749 See generally Palmer and Hudson, “Pledge” in Palmer and McKendrick (eds), Interests in Goods, 2nd edn (1998), pp.621 et seq.
- 834 On these sections generally, see Guest and Lloyd, Encyclopedia of Consumer Credit Law (looseleaf), paras 2-115 et seq. For the application of the Regulations implementing the Consumer Credit Directive 2008 to pledges, see below, para.41-196.
- 835 See below, paras 41-002 et seq.
- 836 For definitions of these terms, see below, paras 41-017, 41-018, 41-036, 41-037.
- 837 s.114(1).
- 838 “Pawn” is defined by s.189(1) as “any article subject to a pledge”; “pledge” is defined as “the pawnee’s rights over an article taken in pawn”. These definitions appear to leave the meaning of “pledge” and “pawn” to be elucidated by the common law on the subject. (The extended meaning of pledge in s.1(5) of the Factors Act 1889 would not apply.)
- 839 The definition of “a regulated agreement” is found in s.189(1) which in turn refers to s.15(2) and which is examined below paras 41-017, 41-037.
- 840 *Prescribed* means prescribed by Regulations to be made by the Secretary of State: s.189(1). See the Consumer Credit (Pawn-Receipts) Regulations 1983 (SI 1983/1566), as amended by

SI 2004/3236. If the pawn-receipt is not separate from the document embodying the regulated agreement, reg.4 of the Consumer Credit (Agreements) Regulations 1983 (SI 1983/1553, as amended, especially by SI 2004/1482) applies.

841 s.114(1).

842 s.114(3) (as amended by the Banking Act 1979 s.38(2)).

843 Documents of title are not defined in the Act. The common law definition is examined in Benjamin's Sale of Goods, 11th edn (2021), paras 18-024—18-028.

844 A “non-commercial agreement” is defined by s.189(1) as a consumer credit agreement or a consumer hire agreement not made by the creditor or owner in the course of a business carried on by him: a *business* includes a profession or trade. See below, para.41-050.

845 See below, para.41-195.

846 s.114(2).

847 The specific prohibitions have now been repealed but actions of this kind may now be caught by s.24 of the Armed Forces Act 2006.

848 e.g. Firearms Act 1968 s.3(6).

849 It is not possible to contract out of the provisions of s.116: see s.173. See *Wilson v Robertson (London) Ltd [2005] EWHC 1425 (Ch), [2005] C.C.L.R. 6.*

850 s.116(1).

851 s.116(2).

852 s.121 (below, para.35-144).

853 s.120(1)(a) (set out below, para.35-143).

854 s.117(1).

855 s.117(2), see below.

856 s.117(3). (cf. the previous law: *Singer Manufacturing Co v Clark (1879) 5 Ex. D. 37.*)

857 See below, para.35-142, for the procedure to be adopted where a pawn-receipt has been lost or destroyed.

858 s.117(2).

859 s.116(4).

860 For the definition of “the redemption period”, see above, para.35-139.

861 For the definition of this term, see below, paras 41-017, 41-037.

862 By s.171(6) the burden is on the pawnee to prove that he had reasonable cause to refuse to allow the pawn to be redeemed.

863 s.119(1).

864 By s.119(2), the court may, upon the conviction of a pawnee under subs.(1), make an order for restitution under s.148 of the Powers of Criminal Courts (Sentencing) Act 2000, as if he had been convicted of theft. Under s.148, the court may order restitution of the goods themselves, or of other goods which directly or indirectly represent them, or may order payment of the value of the goods. (s.122 of the Consumer Credit Act 1974 provides for a court order in Scotland for delivery up of the pawn following a relevant conviction.)

865 s.118.

866 Consumer Credit (Loss of Pawn-Receipt) Regulations 1983 (SI 1983/1567) (made under s.189(1) of the 1974 Act).

- 867 “Where the pawn is security for fixed-sum credit not exceeding £75 or running-account credit on which the credit limit does not exceed £75”. (For definitions of the terms used in this provision, see below, para.35-143). By s.181(1), the monetary limits in this provision may be amended by statutory instrument: the figure of £75 was fixed by the [Consumer Credit \(Further Increase of Monetary Amounts\) Order 1998 \(SI 1998/997\)](#).
- 868 To be prescribed by Regulations: s.189(1).
- 869 s.118(1).
- 870 s.117 (see above, para.35-140). (But s.117(2) still applies.)
- 871 s.118(2). cf. *Burslem v Attenborough (1873) L.R. 8 C.P. 122* (decided on ss.15 and 16 of the Pawnbrokers Act 1800 (now repealed)).
- 872 For the definition of this period, see ss.116, 189(1) (examined above, para.35-139).
- 873 See below (s.120(2)).
- 874 s.120(1). The procedure for realisation of the pawn is laid down by s.121 (see below, para.35-144). The question whether a default notice under s.87 must be served on the debtor (in addition to a notice of intention to sell under s.121(1) (see below, para.35-144)) is discussed in Guest and Lloyd, Encyclopedia of Consumer Credit Law, para.2-122.
- 875 Defined by ss.10(1)(b), 189(1); see below, para.41-026.
- 876 Defined by ss.10(1)(a), 189(1); see below, para.41-024.
- 877 Defined by ss.10(2), 189(1); see below, para.41-025.
- 878 Under s.94(3).
- 879 s.120(1)(a). (By s.181(1) these monetary limits may be amended by statutory instrument): the figure of £75 was fixed by the [Consumer Credit \(Further Increase of Monetary Amounts\) Order 1998 \(SI 1998/997\)](#).
- 880 s.129 (discussed below, paras 41-203—41-206).
- 881 s.120(2).
- 882 By virtue of the provisions of s.120 (see above, para.35-143).
- 883 Except in such cases as may be prescribed: s.121(1). Agreements where the credit or credit limit is not more than £100 are exempted by the [Consumer Credit \(Realisation of Pawn\) Regulations 1983 \(SI 1983/1568\)](#), as amended by SI 2004/3236: these Regulations also fix the periods stated in the text, and prescribe the information to be given in the notices. The figure of £100 was fixed by the [Consumer Credit \(Realisation of Pawn\) \(Amendment\) Regulations 1998 \(SI 1998/998\)](#).
- 884 viz “prescribed by regulations made by the Secretary of State”: s.189(1). See SI 1983/1568, as amended by SI 2004/3236.
- 885 A “notice” is defined by s.189(1) as “notice in writing”.
- 886 s.121(1).
- 887 To be prescribed by Regulations: s.189(1). See SI 1983/1568, as amended by SI 2004/3236.
- 888 s.121(2).
- 889 Defined as “the amount realised (the ‘gross amount’) less the expenses (if any) of the sale”: s.121(5).
- 890 Calculated as “if the pawn had been redeemed on the date of the sale”: s.121(3).

- 891 s.121(3). The relationship between the parties being fiduciary in nature, the pawnbroker holds the surplus upon trust for the pawnor: the pawnor may therefore claim an award of interest in equity: *Mathew v TM Sutton Ltd [1994] 1 W.L.R. 1455*. The limitation period for a claim by the pawnor to the surplus will be six years from the sale: see Vol.I, para.31-002.
- 892 viz “Where subs.(3) does not apply”: s.121(4).
- 893 s.121(4). (See the decision of *Jones v Marshall (1889) 24 Q.B.D. 269* (on the former law: the Pawnbrokers Act 1872 did not affect the right of the pawnbroker at common law to recover the deficit if the sale of the article pawned realised less than the amount advanced on it).)
- 894 s.121(6).
- 895 Defined in s.121(5).
- 896 s.121(6).
- 897 Defined in s.121(5).
- 898 s.121(3) and (4), see above.
- 899 s.121(7).

## **(a) - The Nature of Negotiable Instruments**

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 36 - Bills of Exchange and Banking

Section 1. - Negotiable Instruments

### **(a) - The Nature of Negotiable Instruments**

*R.J.A. Hooley*

#### **The meaning of negotiability**

36-001 The essential feature of negotiable instruments (which include bills of exchange, cheques and promissory notes) is that they can be transferred from person to person. The principles governing negotiable instruments differ from some of the fundamental principles of the law of contract. First, in a simple contract, the persons entitled to enforce it are either parties to the contract when it is made or, in certain cases, assignees.<sup>1</sup> In the case of a negotiable instrument, any “holder” (i.e. the payee or indorsee who is in possession of it or the bearer) can bring an action to enforce it.<sup>2</sup> There is, thus, a fundamental difference in the concept of privity. In a simple contract a privy or party is either a person who enters into the contract when it is made or an assignee. In the case of negotiable instruments any holder becomes a party. Secondly, although most contracts may be assigned, an assignee cannot sue without joining the assignor as a party unless certain requirements of form are satisfied and, in particular, notice must be given to the debtor.<sup>3</sup> A negotiable instrument, on the other hand, may be transferred by the payee or by any subsequent holder to a third party either—insofar as the instrument is payable to order—by indorsement (i.e. the holder’s signature on the back of the instrument) and delivery, or—insofar as the instrument is payable to bearer—by mere delivery of the instrument to the third party.<sup>4</sup> No notice of the transfer need be given. Thirdly, when a contract is assigned, the assignee’s rights are usually subject to the equities between the debtor and the assignor.<sup>5</sup> In the case of negotiable instruments, a transferee obtains a right to enforce payment of the instrument, despite any defects in the title of or equities available to the transferor, provided the transferee is a “holder in due course”. A holder in due course is a person who takes a negotiable instrument which is:

- (a) complete and regular on its face;

(b)for value (i.e. consideration); and

(c)in good faith, i.e. without notice of any defect in the title of the transferor.<sup>6</sup>

Thus, the rule nemo dat quod non habet applies to negotiable instruments subject to considerable modifications.

## Negotiable instruments as choses in action and in possession

36-002 There is a further fundamental distinction between simple contracts and negotiable instruments. The formation of a contract confers upon the parties thereto certain rights. These rights are not dependent upon the physical possession of the instrument in which the terms of the contract are recorded. They arise from the creation of the contract itself and are enforceable by action. Negotiable instruments, likewise, confer certain rights on the payee and the transferees, i.e. the procedural right to sue on the instrument and, in certain cases, the right to enforce payment. To this extent negotiable instruments resemble contracts.<sup>7</sup> However, in the case of negotiable instruments possession of the instrument itself is of importance. Usually a person who obtains the possession of a negotiable instrument becomes a “holder” and has a right to sue on it. Moreover, a person can have a title to a negotiable instrument and the concept of ownership, thus, applies.<sup>8</sup> Negotiable instruments may, therefore, be regarded as a special type of personal property. They differ from most types of chattel in that their possession confers certain contractual rights on the holder. But they differ from contracts by reason of the existence of proprietary elements.<sup>9</sup>

## Practical use of negotiable instruments

36-003 The widespread use of electronic payment systems has reduced the significance of negotiable instruments in modern commercial practice.<sup>10</sup> Nevertheless, negotiable instruments are still used in international sales as well as in domestic trade. Foremost in international transactions is the bill of exchange, which is primarily used to facilitate the payment of the price of goods. The practice is for the seller to draw a bill of exchange on the buyer, to attach it to the documents relating to the shipment of the goods and to arrange through banking channels for the presentation of this “documentary bill” for payment and for acceptance. Of particular advantage to the seller is that in many cases the bank, or other financial institution engaged by him, may agree to discount the documentary bill or to make an advance against it. In modern times this advantage has led to a noticeable increase in the volume of “commercial bills” drawn under “acceptance credits”, which are facilities used by banks to assist their customers in obtaining finance from third parties. To this end the issuing bank undertakes in the acceptance credit to accept and to pay at maturity bills of exchange drawn on it by the customer at a usance which is usually of 90 or 180 days’ sight. The customer acquires the funds needed by discounting these bills, which attain their currency mainly

on the basis of the bank's signature. The customer promises to furnish the amounts of the bills to the bank before their maturity. If he requires further credit to do so, he is asked to draw a fresh set of bills which are, again, accepted by the bank and discounted on the bills market. This procedure is known as a "roll over" of bills. The amount of the new bills usually reflects the finance charges involved in the roll-over exercise.<sup>11</sup>

## Promissory notes

36-004 Promissory notes are used in international trade to a limited extent, their main function being to serve as security for instalments due under transactions involving medium or long-term credit.<sup>12</sup> The popularity of promissory notes is greater in domestic trade, where, basically, they serve two functions. In the first place, promissory notes made by the debtor (or by the "hirer" of a lease or of a hire-purchase agreement) constitute a useful security. The dates of payment of the notes are usually made to coincide with the dates of the instalments provided for by the main contract. If the debtor or hirer falls in arrears, the creditor is able to bring an action to enforce the corresponding promissory note or notes. The advantage of such an action over an action based on the main contract is that, even if an action on a note is maintained by the original creditor or lessor, the debtor cannot plead certain defences concerned with the main contract.<sup>13</sup> For this reason, the taking of promissory notes has been precluded in respect of regulated consumer credit and consumer hire agreements by the [Consumer Credit Act 1974](#).<sup>14</sup> In the second place, promissory notes executed by the debtor facilitate the refinancing of the transaction: the creditor can discount the promissory notes with a financial institution and, in this way, obtain credit against them well before the date of maturity. From the discounter's point of view, the transfer to him of promissory notes is more attractive than a mere assignment of the main contract. While a simple contract is assigned subject to the equities available to the debtor against the assignor, a transferee of a negotiable instrument, who attains the status of a holder in due course, is entitled to enforce the instrument despite defects in the title of previous parties. Subject to the limitations imposed by the [Consumer Credit Act 1974](#),<sup>15</sup> promissory notes are the main negotiable instruments used as security for inland transactions.<sup>16</sup> Bills of exchange (other than cheques) are not common in domestic trade. Cheques, of course, are used to effect payment.

## The sources of the law of negotiable instruments

36-005 When a person wants to create a negotiable instrument, he must choose one of the forms recognised by law. Persons cannot, at will, create novel types of negotiable instruments. The negotiability of an instrument may be established either by statute<sup>17</sup> or by mercantile usage.<sup>18</sup> Such a usage must be notorious,<sup>19</sup> certain<sup>20</sup> and reasonable<sup>21</sup> and must further be a general usage, i.e. one

recognised and adopted by the commercial world in general.<sup>22</sup> The usage need not be of long standing, but it must have prevailed for a sufficiently long period in order to achieve certainty and notoriety. Thus, the courts may give effect to mercantile usages which establish the validity of new kinds of negotiable instruments.

## The Bills of Exchange Act 1882

- 36-006 The most important source of the law of negotiable instruments is the [Bills of Exchange Act 1882](#). The Act is not, however, exhaustive and, by [s.97\(2\)](#), the rules of the common law, including the law merchant, continue to apply to bills of exchange, cheques and promissory notes, save insofar as these rules are inconsistent with the Act. Cases decided before the Act are, thus, not without importance. However, in *Bank of England v Vagliano Bros*<sup>23</sup> the House of Lords indicated that such decisions should be used as a source of construction only when the sections of the Act are ambiguous or their language technical. When the language of the Act is clear, there is, indeed, no need to refer to decisions predating it. Apart from cases of ambiguities in the Act, such decisions are also of importance as regards problems on which the Act is silent.

## Effect of Consumer Credit Act 1974

- 36-007 The use of negotiable instruments in inland transactions involving individuals (including unincorporated traders) has been affected by the coming into force of specific provisions of the [Consumer Credit Act 1974](#).<sup>24</sup> Section 123 restricts the use of negotiable instruments<sup>25</sup> in “regulated” consumer credit agreements and consumer hire agreements, other than in the case of non-commercial agreements, i.e. those not concluded in the course of a business carried on by the creditor or the lessor (“owner”).<sup>26</sup> Subsection (1) prohibits the taking of a negotiable instrument other than a cheque in discharge of amounts payable by the debtor or hirer, or by a surety.<sup>27</sup> Subsection (3) prohibits the taking of any negotiable instrument (including a cheque) as security for an amount payable under such an agreement.<sup>28</sup> A person who takes an instrument in contravention of these provisions is not entitled to enforce it.<sup>29</sup> While the owner or creditor may take a cheque in payment of an amount due to him under a regulated agreement, he is not allowed to negotiate it except to a banker.<sup>30</sup> The object of this last provision is to preclude the negotiation of a cheque to an assignee of a regulated agreement, or to a stranger to the transaction, who may seek to enforce the cheque notwithstanding disputes relating to the regulated agreement. Negotiation to a banker is permitted so as to provide for the clearing of the cheque.<sup>31</sup>

## Footnotes

- 1 See Vol.I, paras 22-001 et seq.
- 2 See below, paras 36-092 et seq.
- 3 See Vol.I, paras 22-017 et seq.
- 4 See below, paras 36-085 et seq.
- 5 See Vol.I, para.22-072.
- 6 See below, paras 36-075 et seq.
- 7 cf. *R. v Duru* [1974] 1 W.L.R. 2, 8 (overruled in relation to s.15(1) of the Theft Act 1968 by *R. v Preddy* [1996] A.C. 815, 836–837). For an analysis of the contractual rights conferred by a negotiable instrument, see *Pollway Ltd v Abdullah* [1974] 1 W.L.R. 493, 496.
- 8 See, e.g. s.80 of the Bills of Exchange Act 1882, which refers to the “true owner” of a cheque. See *Citibank NA v Brown, Shipley & Co* [1991] 1 Lloyd’s Rep. 576 (Waller J); *Dextra Bank and Trust Co Ltd v Bank of Jamaica* [2002] 1 All E.R. (Comm) 193, PC (indicating a bailee can confer title on the “true owner”).
- 9 e.g. it is possible to bring an action for conversion of a cheque and, by a “legal fiction”, damages are based on the face value of the cheque rather than the value of the cheque as paper; on the other hand, the House of Lords has held (by a majority) that the tort of conversion does not cover the appropriation of choses in action: see *OBG Ltd v Allan* [2007] UKHL 21, [2008] 1 A.C. 1.
- 10 See below, paras 36-388 et seq.
- 11 See generally *Robertson* (1976) 3 Auckland L. Rev. 1; *Ellinger* (1978) 20 Malaya L. Rev. 84; E.P. Ellinger, E. Lomnicka and C.V.M. Hare, *Ellinger’s Modern Banking Law*, 5th edn (2011), Ch.10, s.10.
- 12 See, e.g. *Banque Cantonale de Genève v Sanomi* [2016] EWHC 3353 (Comm). Promissory notes are used in some transactions covered by export credit guarantees; see Benjamin’s Sale of Goods, 11th edn (2021), Ch.25.
- 13 See below, paras 36-094 et seq.
- 14 ss.123, 124; see below, paras 36-007, 36-081 and 41-197.
- 15 s.123(3), (4); below, paras 36-007, 36-081 and 41-197.
- 16 See below, paras 36-192 et seq. discussing also NIFs.
- 17 e.g. promissory notes, the validity of which was for the first time established in 1704 in 3 & 4 Anne, c.8.
- 18 *Goodwin v Robarts* (1875) L.R. 10 Ex. 337; *London Joint Stock Bank v Simmons* [1892] A.C. 201; *Venables v Baring Bros* [1892] 3 Ch. 527; *Bechuanaland Exploration Co v London Trading Bank* [1898] 2 Q.B. 658; *Edelstein v Schuler & Co* [1902] 2 K.B. 144.
- 19 *Tucker v Linger* (1883) 8 App. Cas. 508.
- 20 *Sewell v Corp* (1824) 1 C. & P. 392, 393; *Devonald v Rosser & Sons* [1906] 2 K.B. 728, 743.

- 21 *Paxton v Courtnay* (1860) 2 F & F 131; *Tucker v Linger*, above; *Gibbon v Pease* [1905] 1 K.B. 810.
- 22 *Easton v London Joint Stock Bank* (1886) 34 Ch. D. 95, 113; reversed on a different point sub nom. *Sheffield v London Joint Stock Bank* (1888) 13 App. Cas. 333.
- 23 [1891] A.C. 107, 120, 127, 144–145.
- 24 See below, paras 36-081, 41-197 and see E.P. Ellinger, E. Lomnicka and C.V.M. Hare, Ellinger's Modern Banking Law, 5th edn (2011), Ch.10, s.11.
- 25 The term “negotiable instrument” is not defined in the Act. It is therefore questionable whether a bill of exchange, a cheque, or a promissory note, the negotiability of which has been restricted in the manner prescribed by s.8 of the Bills of Exchange Act 1882 (discussed below, paras 36-026, 36-164) falls within the scope of ss.123–125 of the Consumer Credit Act 1974. See also below, paras 36-081 et seq.; for an exemption by order under s.123(6) respecting certain hire agreements which have a connection with a country outside the UK, see the Consumer Credit (Negotiable Instruments) (Exemption) Order 1984 (SI 1984/435).
- 26 “Consumer credit agreement” is defined in s.8 of the 1974 Act and in art.60B(3) of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (SI 2001/544) (“RAO”) (below, para.41-016); “consumer hire agreement” in s.15 of the 1974 Act and in art.60N(3) of the RAO (below, para.41-036); as regards “regulated” agreements, see ss.8(3) and 15(2) of the 1974 Act, and arts 60B and 60N of the RAO. “Non-commercial” agreement is defined in s.189(1).
- 27 Defined in s.189(1); below, para.41-185.
- 28 As to when a negotiable instrument is considered to have been taken by way of security, see s.123(4). But note exemption where a transaction involves the extension of credit respecting the supply of goods or services outside the UK: the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (SI 2001/544) art.60C(8).
- 29 s.125(1) (see below, para.36-082). The bill may nevertheless be enforced by a transferee (see below, para.36-082); but the creditor or owner has to indemnify the hirer, debtor or surety in respect of this liability: s.125(3).
- 30 s.123(2). The use of the word “negotiation” is puzzling. Negotiation involves the transfer of the instrument and of the right to enforce it (below, para.36-085) and is not required where a cheque is remitted by the payee to a banker for collection purposes (below, para.36-371). It would have been more consistent with the policy of the Act to prohibit negotiation altogether and, to avoid doubt, to permit transfer to a bank for collection.
- 31 The position of a holder of an instrument, made or negotiated in contravention of s.123, is discussed in the part of the chapter concerning the holder’s rights; below, para.36-092.

## **(i) - Definitions and Requirements**

Chitty on Contracts 34th Ed.

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Volume II - Specific Contracts

Chapter 36 - Bills of Exchange and Banking

Section 1. - Negotiable Instruments

(b) - Bills of Exchange<sup>32</sup>

(i) - Definitions and Requirements

**Important definitions: “bill of exchange”**

- 36-008 According to s.3(1) of the Act, a bill of exchange is an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to, or to the order of, a specified person or to bearer.<sup>33</sup> According to s.3(2) an instrument which does not comply with these conditions, or which requires an additional act to be done,<sup>34</sup> is not a bill of exchange. However, s.3(4) provides that a bill is not invalid if it is not dated,<sup>35</sup> or fails to specify the value given for it or the place at which it has been drawn or is to be payable.

**“Drawer”, “drawee”, “acceptor”, “payee”, “indorsor” and “holder”**

- 36-009 The elements of the definition of s.3(1) will have to be discussed in detail, but before doing so it will be convenient to define a few other terms used in connection with bills of exchange. First, the person who draws the bill is known as “the drawer”. Secondly, the person on whom the bill is drawn, i.e. the person to whom the drawer’s order is directed, is known as “the drawee”. If the drawee agrees to comply with the instruction of the drawer he may “accept” the bill. By doing so he promises to honour the bill and becomes an “acceptor”. Thirdly, the person to whose order the bill is payable is known as the “payee”. Fourthly, the payee, or any subsequent transferee, may

warrant that the bill will be duly honoured by signing his name at the back of the bill. Such a signature is known as an “indorsement” and the person so signing becomes an “indorser”.

36

**U** Finally, the payee of a bill, who has its physical possession, and any other person, who subsequently obtains its possession either under an indorsement completed by delivery or—in the case of a bearer bill—by mere delivery, is known as “the holder”. If the holder has given value, i.e. consideration for the bill, he is a “holder for value”.<sup>37</sup> If, in addition, he satisfies the requirements of s.29 of the Act, he is a “holder in due course”.<sup>38</sup> It is important to emphasise that a person cannot become a holder—let alone a holder for value or a holder in due course—except insofar as he acquires the possession of the bill as payee, as indorsee or as bearer. A person does not become a holder merely because the object of the bill is to discharge a debt due to him. Thus, where a bill drawn for the payment of a deposit due under a contract of sale is made payable to the order of auctioneers, the vendor is not a holder<sup>39</sup>; but he can, of course, become the holder of the bill, if it is indorsed and delivered to him by the auctioneers. The payee of a bill becomes its holder even if, in reality, it is made out to his order and delivered to him in his capacity as another person’s agent.<sup>40</sup>

## Unconditional order in writing

36-010 A bill of exchange must be an unconditional order in writing.

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**U** “Written” includes “printed” and “writing” includes print.

42

**U** The order given by the drawer to the drawee need not be in any specified form, and it is sufficient that the words used by the drawer constitute an unqualified order. An instruction is considered an “order” even if it is phrased in polite language, provided it is imperative.

43

**U** If, on the other hand, the drawer makes a precative request instead of issuing an order, the instrument is not a bill.

44

**U**

36-011 If the order given by the drawer to the drawee is subject to any qualification,<sup>45</sup> it is not “unconditional” within the meaning of the definition and the instrument is not a bill of exchange. An order to pay out of a particular fund,<sup>46</sup> or “out of my rents in your hands”<sup>47</sup> or “out of S’s

money, as soon as you receive it”<sup>48</sup> is not unconditional. On the other hand, under **s.3(3) of the Act**, an order which is in itself unqualified is unconditional although it is coupled with (a) an indication of a particular fund out of which the drawee is to reimburse himself or a particular account to be debited with the amount, or (b) a statement of the transaction which gives rise to the bill. An order is conditional only when the qualification or limitation is directed to the drawee. Thus, an order of the drawer to the drawee, to pay the bill only if the payee signs a form of receipt printed at the back of the instrument, is conditional.<sup>49</sup> But if the drawer’s instruction that a receipt need be signed is directed not to the drawee but to the payee, the order to the drawee remains unconditional, and the instrument is a bill of exchange.<sup>50</sup> Similarly, an undated cheque is not conditional where there is an agreement between the drawer and the payee that it would not be dated and presented for payment until a dispute between them had been resolved.<sup>51</sup> Whether such an instruction is directed to the drawee or the payee is a question of fact, but an important factor to be taken into account is the part of the bill in which the instruction appears. Where the instruction that a receipt must be signed appeared immediately after the amount of the bill and above the signature of the drawer, it was held that the order to the drawee was conditional.<sup>52</sup> Where the same instruction appeared at the foot of the bill, beneath the signature of the drawer, it was held that the order to the drawee remained unconditional.<sup>53</sup> Thus where the qualifying words appear beneath the drawer’s signature, the courts are not inclined to treat them as forming part of the order addressed to the drawee.

## Bill addressed to drawee

- 36-012 The drawee must be named or indicated in the bill with reasonable certainty.<sup>54</sup> The bill may be addressed to two or more drawees, whether they are partners or not, but an order addressed to two drawees in the alternative or to two or more drawees in succession is not a bill of exchange.<sup>55</sup> A bill of exchange must be drawn by one person on another.<sup>56</sup> It follows that if the drawer draws a bill on himself, the instrument is not a bill of exchange. A draft drawn by a branch of a bank on the main office or on another branch of the same bank is, therefore, not considered a bill of exchange.<sup>57</sup> However, according to **s.5(2) of the Act**, where in a bill the drawer and the drawee are the same person, or where the drawee is a fictitious person or a person not having capacity to contract, the holder may treat the instrument at his option either as a bill of exchange or as a promissory note. The holder of such an instrument is, therefore, for all purposes in as good a position as the holder of a valid bill. If he treats the instrument as a bill of exchange, he retains the rights which a holder usually has against the drawer. If he treats the instrument as a promissory note, he retains against the drawer the rights which a holder has against the maker of a promissory note, whose position is similar to that of an acceptor of a bill of exchange.<sup>58</sup>

## When payable: on demand

- 36-013 According to s.3(1) a bill of exchange may be payable on demand or at a fixed or determinable future time. A bill is payable on demand (a) if it is expressed to be payable on demand, at sight or at presentation, or (b) if no time for payment is mentioned in it.<sup>59</sup> Moreover, where a bill is accepted or indorsed when it is overdue it is, as regards the acceptor or indorser, deemed to be a bill payable on demand.<sup>60</sup>

## At a determinable future time

- 36-014 A bill is payable at a determinable future time within the meaning of the Act if it is expressed to be payable (a) at a fixed period after the date of its issue or after “sight”, i.e. its presentation for acceptance, or (b) on or at a fixed period after the occurrence of a specified event which is certain to happen, though the time of its occurrence may be uncertain.<sup>61</sup> An instrument expressed to be payable on a contingency is not a bill and the happening of the event does not cure the defect.<sup>62</sup> Thus, an order to pay “ten days after the death of X”,<sup>63</sup> or “on 12 January, when X should come of age”,<sup>64</sup> was held to be a valid bill of exchange. On the other hand, it was held that an order to pay “two months next after I marry X”,<sup>65</sup> or “when my circumstances will admit without detriment to myself”,<sup>66</sup> was not a bill of exchange, as the occurrence of such an event could not be considered a certainty. While the principle involved is clear, some authorities may be questioned. The words “when X comes of age” do not describe an event the occurrence of which is more certain than that denoted by the words “two months next after I marry X”. A marriage arrangement may of course be cancelled, but the coming of age of a minor is, likewise, not a certainty as he may die before the relevant date. A strict test would, in fact, lead to treating most future events as mere contingencies. A bill is considered as payable on a contingency if the drawee is given an option concerning the date of payment. Thus, a promissory note payable “on or before 31 December 1956” has been held invalid because the maker’s option concerning the date of payment created a contingency or uncertainty.<sup>67</sup> The same element of uncertainty was held to have been introduced into a note where it was made payable “by” a given date.<sup>68</sup> These principles should apply to a bill payable “on or before” or “by” a specified future date.

## Ambiguity in date

- 36-015

A bill is also invalid if there is an ambiguity as regards its date of payment. In *Korea Exchange Bank v Debenhams (Central Buying) Ltd*<sup>69</sup> the drawer used a standard form of a bill of exchange but struck out the word “sight” and inserted instead of it the letters “D/A”. The completed bill read: “90 days D/A of this first of Exchange pay ...”. The Court of Appeal held that these words were unclear as they did not indicate whether the designated period was to run from the date of the acceptance, the date of the drawing of the bill or from any other date. Megaw LJ added that as the word “sight” had been expressly cancelled on the face of the bill it would have been bold to conclude that the bill was nonetheless payable 90 days after sight. It followed that as the bill was not expressed to be payable at a fixed period after date or after sight it failed to comply with s.11 and was, therefore, invalid.

## Tendency to uphold

- 36-016 Where possible, however, the courts uphold the negotiability of an instrument even if, on a strict construction, it is open to question. In *Hong Kong and Shanghai Banking Corp Ltd v GD Trade Co Ltd*<sup>70</sup> the drawers, who used blank forms of bills of exchange supplied by the bank, inserted the words “90 days after acceptance” in the blank space left between the printed words “At” and “sight”. It was argued, inter alia, that this formulation rendered the instruments payable on a contingency because it was not certain at the outset whether the bills would be accepted or dishonoured by the drawee. Affirming Cresswell J’s decision, the Court of Appeal rejected this argument. The bills were to be read as payable “90 days after acceptance/sight”. As “sight” referred to presentment for acceptance, the bills were payable 90 days following their presentment regardless of whether or not the drawee accepted them. The bills were, accordingly, not payable subject to a contingency. In reaching this conclusion, the Court accepted that as negotiability was the essence of a bill of exchange, a strict construction should be adopted. But their Lordships added:

“Nevertheless [a bill] is a document in use in hundreds of commercial transactions and, in the case of an instrument which has been drawn as a bill with the plain intention that it should take effect as such, the court should lean in favour of a construction which upholds its validity as a bill where that is reasonably possible.”<sup>71</sup>

Moreover, it is arguable that the drawee’s acceptance can remove doubts arising from the manner in which the bill is drawn. The English courts have yet to decide the issue. In *Novaknit Hellas SA v Kumar Bros International Ltd*<sup>72</sup> the drawer made the bill payable “on 60 days from shipment”. The drawee accepted it as payable 60 days after the date of his acceptance. The Court of Appeal held that the instrument so drawn was valid on the ground that “shipment is certain to have taken place prior to presentation of documents including the [bill of exchange]”.<sup>73</sup> Waller LJ was also sympathetic to the argument that the drawee’s qualified acceptance cured any defect as to time of payment, although it was not necessary to decide the issue.<sup>74</sup>

## Date of bill and computation of time of payment

- 36-017 Where a bill, acceptance or indorsement is dated, that date is presumed to be the true one.<sup>75</sup> A bill is not invalid merely because it is post-dated, ante-dated or dated on a Sunday.<sup>76</sup> Where a bill is not payable on demand, the day on which it falls due is determined in accordance with s.14(1) of the Bills of Exchange Act 1882 as amended by s.3(2) of the Banking and Financial Dealings Act 1971. Such a bill is due and payable in all cases on the last day of the time of payment as fixed by the bill, or if that is a non-business day, on the succeeding business day. The 1971 Act repealed the provision for days of grace of the original s.14(1). The meaning of the phrase “non-business day” continues to be governed by s.92 of the 1882 Act,<sup>77</sup> but subject to amendments introduced by the 1971 Act. Non-business days are Bank Holidays,<sup>78</sup> Good Friday, Christmas Day, Sundays,<sup>79</sup> Saturdays,<sup>80</sup> and any day declared as such by the Treasury under s.2 of the 1971 Act.<sup>81</sup> Section 1(1) of the same Act determines which days are “Bank Holidays”, providing for separate days for England and Wales, for Scotland and for Northern Ireland.<sup>82</sup> Additional Bank Holidays may be appointed by Royal proclamation<sup>83</sup>; in the same manner a Bank Holiday may be suspended in any given year.<sup>84</sup>
- 36-018 Where a bill is payable at a fixed period after date, after sight, or after the happening of a specified event, the time of payment is determined by excluding the day from which the time is to begin to run and by including the day of payment.<sup>85</sup> Where a bill is payable at a fixed period after sight, the time begins to run from the date of its acceptance, or if acceptance is refused from the date of noting or of protest.<sup>86</sup> As the term “month” in a bill means calendar month,<sup>87</sup> bills dated, for example, respectively 28, 29 and 30 November, payable at three months after date, all fall due on 28 February in an ordinary year, but in a leap-year the first falls due on the 28th and the second and third on the 29th. It is assumed that none of these due dates is a non-business day.

## A sum certain in money

- 36-019 According to s.3(1) of the Act, a bill of exchange must be for a sum certain in money. An order<sup>88</sup> requiring the drawee to pay a sum of money and do some other act, e.g. deliver up goods to the payee,<sup>89</sup> is not a bill of exchange. A sum is certain within the meaning of the Act, although it is required to be paid:
- (a)with interest;

(b)by stated instalments with or without a provision that upon default in payment of any instalment the whole shall become due<sup>90</sup>; and

(c)according to an indicated rate of exchange or according to a rate of exchange to be ascertained as directed by the bill.<sup>91</sup>

A Canadian authority, however, suggests that if interest on the bill is stated to run from the date of the making of the advance, the sum is uncertain as its calculation then depends on extrinsic facts.<sup>92</sup> For the same reason, the amount of the bill is uncertain if interest is to be charged at the rate applied to advances to “most credit-worthy customers”.<sup>93</sup> It remains to be seen whether a formula such as “interest at 2 per cent above prime” will be considered on the same basis. When the bill is payable with interest, it runs, in the absence of stipulation to the contrary, from the date of the bill or, if it is undated, from the date of issue.<sup>94</sup> Section 3(1) has been augmented by s.2(1) of the Decimal Currency Act 1969, according to which a bill, drawn on or after 15 February 1971, is invalid “if the sum payable is an amount of money wholly or partly in shillings or pence”.<sup>95</sup> A bill covering a given amount “plus bank charges” has been held to be for an uncertain amount.<sup>96</sup>

## Discrepancy between words and figures

36-020 Where the sum payable is expressed in words and also in figures, and there is a discrepancy between the two, the sum denoted by the words is the amount payable.<sup>97</sup> But if the words are unclear, e.g. “pay to my order twenty-five, fifty pence”, the figures, e.g. £25.50 may be used to clarify the intention of the drawer.<sup>98</sup> In the case of a cheque in which the amount expressed in words differs from that expressed in figures, the banking practice is to return the cheque unpaid, with the remark “words and figures differ”.

## The payee

36-021 According to s.3(1) of the Act, a bill of exchange must be payable to a specified person or to bearer. A bill may be made payable to the order of the drawer or of the drawee.<sup>99</sup> An instrument which is made payable for a specified purpose, e.g. “cash or order”, is not a bill of exchange, as it is not payable to a specified person or to bearer.<sup>100</sup> A bill payable to “cash or bearer” should, on the other hand, be considered valid, as it is payable to the bearer. Difficulties may arise when the drawer leaves the space meant for the name of the payee blank. In *Daun and Vallentin v Sherwood*<sup>101</sup> it was held that a promissory note, which did not specify the name of the payee, was payable to bearer “because that is the natural legal effect”. It cannot be argued that a bill of exchange payable to “—or order” should be regarded as payable to bearer, as the words “or order” obviate such an interpretation. The drawer of such a bill has, however, the intention of creating a negotiable

instrument, and one manner of giving effect to his intention is to treat the bill as payable to himself. Thus, in *Chamberlain v Young and Tower*<sup>102</sup> it was held that an instrument which read “pay—order” should be construed as meaning “pay my order” and be considered a bill of exchange. In *R. v Randall*<sup>103</sup> an instrument reading “pay—or order” was held not to be a bill. An attempt has been made to distinguish the cases on the ground that the addition of the word “my” to the phrase “pay—or order” would be meaningless. But the phrase could easily be read as “pay myself or order”, a formula commonly used in bills payable to the drawer’s own order which are transferable by his indorsement and delivery. It is to be doubted whether the decision in *R. v Randall* would be followed at present.

## Bearer bills

36-022 A bill of exchange may be payable either to order or to bearer.<sup>104</sup> A bill is payable to bearer either if it is expressed to be so payable or if the last indorsement is in blank.<sup>105</sup> It is payable to order either if it is expressed to be so payable or if it is expressed to be payable to a particular person and does not contain words prohibiting transfer or indicating an intention that it should not be transferable.<sup>106</sup> The Act does not state explicitly whether a bill which is drawn as payable to bearer may be converted into an order bill by the execution of a special indorsement, i.e. an indorsement which specifies the name of the indorsee.<sup>107</sup> According to an Australian authority such a bill remains payable to bearer regardless of the indorsement.<sup>108</sup> But this view may be questioned as, under s.34, “any holder may convert [a] blank indorsement by writing above the indorser’s signature a direction to pay the bill to or to the order of himself or some other person”. Although this provision does not apply to a bill drawn payable to bearer but only where the bill has been indorsed in blank, it tends to reflect the policy of the Act. As a bill which has become payable to bearer by reason of the blank indorsement can be converted into an order bill, it is difficult to see why a bill which is originally drawn as payable to bearer may not be equally converted into an order bill by the execution of a special indorsement.

## Bills payable to order

36-023 Where the bill is payable to order it must specify with reasonable certainty the identity of the payee.<sup>109</sup> A bill may be made payable to two or more payees jointly or to one or more out of several payees in the alternative. It may also be made payable to the holder of an office for the time being.<sup>110</sup> Where there is difficulty in establishing the identity of the payee because of some ambiguity in his description in the bill, resort must be had to the intention of the drawer.<sup>111</sup> Extrinsic evidence is admissible to identify a misnamed payee or one designated by description only.<sup>112</sup> However, if it is impossible to ascertain the identity of the payee, e.g. due to the lack of

evidence regarding the drawer's intention, the bill is invalid, unless it may be treated as payable to a fictitious or non-existing person.

## Fictitious or non-existing payee

- 36-024 According to s.7(3) of the Act, where a bill is made payable to a fictitious or non-existing person, it may be treated as payable to bearer. In *Bank of England v Vagliano Bros*<sup>113</sup> the plaintiffs, Vagliano Bros, were in the habit of accepting bills drawn on them by Vucina and payable to the order of P & Co. A clerk of the plaintiffs forged such a bill. The plaintiffs, who did not discover the forgery of Vucina's signature as drawer by the clerk, accepted the bill and made it payable at the defendant bank. The clerk then added an indorsement of P & Co to the bill, presented it to the bank and obtained payment. An action brought by the plaintiffs for a declaration that the bank was not entitled to debit their account with the amount of the bill was dismissed. The House of Lords held that the bill was payable to a fictitious or non-existing person and, therefore, to bearer. Although a firm by the name of P & Co did exist, the person who actually drew the bill—i.e. the clerk—had no intention that the bill should be paid to it. Thus a fictitious or non-existing person may be not only a creation of fiction (e.g. "Ivanhoe") or a person who does not exist at the time the bill is drawn (e.g. a dissolved company), but also a real payee whose name is written on the bill as a mere pretence. Whether a payee is fictitious or not depends, accordingly, on the intention of the drawer.
- 36-025 The principle of the *Vagliano Bros* case was applied in *Clutton & Co v Attenborough*,<sup>114</sup> where a clerk induced his employer to draw cheques payable to one John Brett by falsely representing that a person of that name was entitled to a remuneration for certain work done for the employer. It was held that the payee, John Brett, was a non-existing person. As the employer, the drawer, intended to make the cheques payable to a John Brett who had completed some work for him, and as there was in fact no such person in existence, this decision appears well founded. However, the position is different if the drawer is induced, by a fraudulent misrepresentation of another person, to draw a cheque payable to a designated real person. Such a cheque is not payable to a fictitious or non-existing person and, therefore, may not be treated as payable to bearer.<sup>115</sup> The reason for this is that, although the motive which induces the drawer to draw the bill is the misrepresentation, e.g. his being misled into believing that he owes money to the payee, the drawer has, nevertheless, the intention of creating an instrument payable to that designated person.<sup>116</sup> Conceptually, though, a person may be non-existing even if the drawer intends to make the bill payable to him. An example is a bill payable to a payee who passed away before the date of issue.<sup>117</sup>

## Destruction of negotiability

- 36-026

On occasions a drawer may wish to create a bill of exchange, but without allowing for its transfer or negotiation. This can be achieved by including in the bill words prohibiting transfer. When a bill contains words prohibiting transfer, or indicating an intention that it should not be transferable, it is valid as between the parties thereto, but may not be transferred.<sup>118</sup> This effect can be achieved by drawing a bill payable to the order of a specified payee “only”. There cannot be a holder, let alone a holder in due course, capable of suing on it.<sup>119</sup> The intention to prohibit negotiation or transfer must, however, appear clearly on the face of the bill. If the drawer makes a bill payable to a particular person, without adding the words “or order”, but does not add words prohibiting transfer, it is treated as payable to that person’s order and is negotiable.<sup>120</sup>

## Cancellation of “or order” or “or bearer”

- 36-027 A problem which awaits a direct determination concerns the effect of the mere cancellation of the words “or order” or “or bearer” in a bill written on a standard form. If the drawer strikes out these words, it may be assumed that his purpose is to prohibit transfer. The bill, however, does not “contain words prohibiting transfer or indicating an intention that it should not be transferable”. [Section 8\(1\) of the Act](#) governs only the effect of a bill containing such words. A strict interpretation of this section would probably lead to the conclusion that a mere cancellation of the words “or order” or “or bearer” does not destroy the negotiability of the bill, but renders it payable to the particular payee named therein. Under [s.8\(4\)](#), such a bill is, however, payable to that payee’s order. Such an effect may be desirable where the drawer has cancelled the words “or bearer” in a bill executed on a standard form. The cancellation of the words “or bearer” would, on this interpretation, affect the bill’s transferability; by becoming an order bill, it would cease to be transferable by mere delivery, and would require the payee’s indorsement to effect transfer. But this line of argument produces a strange result where the standard form, used by the drawer, includes the printed words “or order”. The cancellation of these words would, again, leave the bill payable to the named payee and hence to that payee’s order. The cancellation would therefore be without any practical effect. This, however, may be an inescapable conclusion from a strict construction of [s.8](#).

## “A/C payee only” on crossed cheques

- 36-028 Since 1992, one type of bill of exchange—namely, a cheque—can be rendered non-transferable by the execution of a crossing accompanied by the words “A/C payee only”. The provision to this effect, in the [Cheques Act 1992](#), reversed the law as decided in a series of late nineteenth and twentieth century cases,<sup>121</sup> which had held that the words in question did not have the effect of destroying the negotiability of a crossed cheque. Notably, the negotiability of other types of

bills of exchange could always be destroyed by the addition to the instrument of the words “not negotiable”.<sup>122</sup>

## Definition and requirements of acceptance

36-029 The drawee’s assent to the order given to him by the drawer is known as “acceptance”.<sup>123</sup> There are two requirements concerning the form of an acceptance. First, it must be written on the bill and signed by the drawee; the mere signature of the drawee without additional words is sufficient.<sup>124</sup> If the drawee writes “accepted” on the bill but does not sign, or writes an acceptance in a separate letter, this is insufficient.<sup>125</sup> An acceptance of the drawee written on the back of the bill is, probably, valid.<sup>126</sup> Secondly, the acceptance must not express that the drawee will perform his promise by any other means than payment of money.<sup>127</sup> Thus, if the drawee writes on a bill “payable in bills” or “payable in goods”, this is not an acceptance.<sup>128</sup> At the same time, an acceptance to pay out of funds standing to the credit of a special account, e.g. an external account, is a promise to pay money and constitutes a valid acceptance.<sup>129</sup> By accepting the bill the drawee engages to pay it when it falls due,<sup>130</sup> and thus becomes primarily liable on the bill. As the bill is drawn on a specified drawee, the signature on the bill of any other person, even when accompanied by words indicating an intention to accept it, is not an acceptance,<sup>131</sup> and will probably be construed as an indorsement.<sup>132</sup> If a bill is addressed to no one, and a person writes an acceptance on it, he is not liable as acceptor of a bill, but may be liable as the maker of a promissory note.<sup>133</sup>

## Time for acceptance

36-030 The drawee’s acceptance gives the bill additional currency. In most cases a bill will be presented soon after it has been signed and delivered by the drawer and before it falls due.<sup>134</sup> But a bill may be accepted even before it has been signed by the drawer or while it is otherwise incomplete,<sup>135</sup> and likewise when it is overdue, or after it has been dishonoured previously by non-acceptance or by non-payment.<sup>136</sup> If a bill is accepted by the drawee when it is overdue, it becomes, as against him, payable on demand.<sup>137</sup> When a bill payable at a fixed date after sight is dishonoured by non-acceptance, and the drawee subsequently accepts it, the holder is entitled to have the bill accepted as of the date of the first presentment for acceptance.<sup>138</sup> When the acceptance of a bill payable at a fixed period after sight is undated, the holder is entitled to insert the true date of acceptance.<sup>139</sup> When an acceptance is undated, there is a presumption that it has been given within a reasonable time after the date of issue of the bill and before it falls due.<sup>140</sup>

## General and unqualified acceptance

36-031 An acceptance may be either general or qualified.<sup>141</sup> It is general when the drawee assents, without any qualification, to the order of the drawer. It is qualified if the drawee varies in express terms the effect of the bill as drawn, i.e. modifies the order of the drawer. In particular an acceptance is qualified if it is:

- (a)conditional, i.e. makes payment by the acceptor dependent on the fulfilment of a condition;
- (b)partial, i.e. for less than the amount specified by the drawer;
- (c)local, i.e. an acceptance to pay only at a particular specified place;
- (d)qualified as to time; and
- (e)if the bill is drawn on more than one drawee and is not accepted by all of them.<sup>142</sup>

An acceptance, however, is not qualified merely because it makes the bill payable at a particular place, provided it does not state that the bill is payable only there.<sup>143</sup>

## Delivery

36-032 According to s.21(1) of the Act, every contract on a bill, whether it be the drawer's, the acceptor's or an indorser's, is incomplete and revocable until the delivery of the bill; but where an acceptance is written on a bill and the drawee gives notice that he has accepted it, the acceptance then becomes complete. Thus, an acceptance becomes complete not at the time it is written, but when the acceptor gives notice of it.<sup>144</sup> Delivery of the accepted bill would, however, constitute notice of the acceptance.

## Constructive transfer of possession

36-033 Under s.2 of the Act, delivery means the transfer of possession, whether actual or constructive, from one person to another. In most cases possession is transferred by the physical delivery of the bill. A constructive transfer of the possession of a bill may occur in the following cases:

- (a)when a person originally holds the bill for himself but subsequently holds it as an agent;
- (b)when a bill is originally held by one person as the agent of a second person but subsequently as agent of a third person;

(c)when a person originally holds the bill as an agent of another person but subsequently holds it for himself.<sup>145</sup>

## Authorised delivery

36-034 As between immediate parties, and as regards a remote party other than a holder in due course, the delivery, in order to be effective, must be made by the party drawing, accepting or indorsing the bill, as the case may be. It may, of course, be effected by that party in person but it is also valid if effected by that party's agent, bailee or messenger.<sup>146</sup> Evidence may be called to show that the delivery has been conditional or for a special purpose only and not for the purpose of transferring the property in the bill.<sup>147</sup> However, evidence is not admissible to show that delivery of a bill by an acceptor was made conditionally, under an agreement to renew the bill at maturity, because the effect of such evidence would be to contradict the terms of a written instrument.<sup>148</sup> The position of a party to the bill who is not a holder in due course is, to a certain extent, strengthened by the rule that when a bill is no longer in the possession of the person who has signed it as drawer, a valid and unconditional delivery by him is presumed until the contrary is proved. The same presumption applies as regards the acceptor and indorsers.<sup>149</sup> If the bill is in the hands of a holder in due course, a valid delivery of the bill by all parties prior to him so as to make them liable is conclusively presumed.<sup>150</sup>

## Inchoate instruments

36-035 According to s.20(1), where a simple signature on a blank paper is delivered by the signer in order that it may be converted into a bill, it operates as a *prima facie* authority to fill it up as a complete bill for any amount, using the signature for that of the drawer, or of the acceptor, or of an indorser; and, in like manner, when a bill is wanting in any material particular, the person in possession of it has a *prima facie* authority to fill up the omission in any way he thinks fit.<sup>151</sup> In order that any such instrument may, when completed, be enforceable against any person who became a party to it prior to its completion, it must be filled up within a reasonable time and strictly in accordance with the authority given. What amounts to a reasonable time is a question of fact.<sup>152</sup> If such a paper is not filled up within a reasonable time or in strict accordance with the authority given, a mere holder cannot enforce it.<sup>153</sup> However, under the proviso to s.20(2), if such an instrument is after completion negotiated to a holder in due course, it is valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up within a reasonable time and strictly in accordance with the authority given.<sup>154</sup>

- 36-036 Section 20 applies only where the blank signed paper is delivered by the signer in order that it may be converted into a bill.<sup>155</sup> A blank signed paper may however be delivered for some other purpose, such as its retention by the signer's agent pending instructions. If this paper is fraudulently converted into a bill, it is probably not enforceable under s.20 even if it comes into the hands of a holder in due course. Section 20(2) provides that "if any *such instrument* after completion is negotiated to a holder in due course it shall be valid and effectual ...". It stands to reason that the words "such instrument" in this subsection refer to the type of paper described in s.20(1), i.e. to "a blank paper ... delivered by the signer in order that it may be converted into a bill". It appears to follow that if the signer does not deliver the paper with the intention of its being converted into a bill, s.20(2) does not apply.<sup>156</sup>

## Common law estoppel

- 36-037 Where the blank instrument had been delivered with an intention of its being converted into a negotiable instrument, the drawer might be estopped at common law from alleging that it was completed in a different manner than that intended, even in situations where s.20 would not protect the holder. In *Lloyds Bank Ltd v Cooke*<sup>157</sup> the defendant signed his name on blank stamped paper, delivered it to C and authorised him to fill it up as a promissory note for £250 payable to the plaintiffs, and to deliver it to them as security for an advance to be made by them to C. C fraudulently filled up the form as a note for £1,000 and obtained an advance of that amount from the plaintiffs, who had no notice of the fraud. As the plaintiffs were the original payees of the bill they were not holders in due course and could not rely on the proviso to s.20(2). However, the defendant was held to be estopped at common law from denying the validity of the note as between himself and the plaintiffs. This principle applies only when the blank paper is intended by the drawer to be completed as a negotiable instrument. In *Wilson and Meeson v Pickering*<sup>158</sup> the plaintiff delivered a blank form of a cheque, crossed "not negotiable", to his servant and instructed him to insert the amount of £2 and make it payable to a certain firm. The servant filled in the amount of £54 4s. and made the cheque payable to the defendant, to whom he was indebted to this amount. It was held that the plaintiff was entitled to recover from the defendant the amount of £54 4s. paid by the drawee bank. Lord Greene MR said:

"... the authority of *Cooke's* case cannot in my opinion be extended beyond the particular facts there in question ... [A]part, of course, from some specific representation of authority or some holding out or some special character of the agent from which his authority would naturally be inferred, the rule that a person who signs an instrument in blank cannot be heard as against a person who has changed his position on the faith of it, to assert that the instrument as filled in is a forgery or that it was filled in excess of the agent's authority, is confined to the case of negotiable instruments."<sup>159</sup>

The instrument in *Cooke's* case was such a negotiable instrument. In *Pickering's* case the cheque, crossed “not negotiable”, was not a fully negotiable instrument.

## Completion after security indorsement

- 36-038 A bill drawn payable to the drawer's order is incomplete until indorsed by him. If the bill bears the indorsement of a third party, who has indorsed it with the intention of making himself liable as guarantor,<sup>160</sup> the drawer may, under s.20, complete the bill by indorsing it, and may recover against the third party.<sup>161</sup>

## Footnotes

32 For detailed works on the subject, see Chalmers and Guest on Bills of Exchange and Cheques, 18th edn (2017); for the special aspects respecting the use of bills of exchange in international trade, see Benjamin's Sale of Goods, 11th edn (2021), Ch.22.

33 In *Weir v National Westminster Bank*, 1944 S.L.T. 1251 it was held that a withdrawal form did not constitute a bill of exchange.

34 e.g. requires the drawee to employ staff and to pay their salary: *Dickie v Singh*, 1974 S.L.T. (Notes) 3.

35 *Aspinall's Club Ltd v Al-Zayat* [2007] EWCA Civ 1001 at [27] (Lloyd LJ: “The fact that it is not dated does not prevent the payee from presenting it for payment immediately”). However, banking practice indicates that an undated cheque is not a valid payment instruction such that the bank is entitled to ignore it: *Griffiths v Dalton* [1940] 2 K.B. 264, 265, and R. Cranston, E. Avgouleas, K. van Zwieten, C. Hare and T. van Sante, Principles of Banking Law, 3rd edn (2018), p.376.

36 The Law Commission has recently published its recommendations with a draft Bill to allow for the legal recognition of electronic trade documents, including bills of exchange and promissory notes (Electronic trade documents: Report and Bill (2022) Law Com. No.405). The Law Commission recommends that the Bill provides that an electronic trade document can be indorsed thereby removing any uncertainty that may arise about whether an electronic trade document can be indorsed given that it may not have a “back”.

37 The Act occasionally used inconsistent terminology, e.g. by referring to a “holder for value” as a “holder who has taken for value” or a “holder who has given value”; see *Barclays Bank Ltd v Astley Industrial Trust Ltd* [1970] 2 Q.B. 527, 538–539.

38 As regards the position of the drawer, see below, paras 36-029, 36-031, 36-114; as regards the drawee, see below, para.36-029 and as regards the acceptor and acceptance, see below,

paras 36-113, 36-116; as regards the payee, see below, para.36-021; as regards indorsers and endorsements, see below, paras 36-090—36-091, 36-116; as regards the position of a holder, see below, para.36-095 (holder for value), below, para.36-093 (holder in due course), and below, paras 36-092—36-099 (rights of holders).

39 *Pollway Ltd v Abdullah [1974] 1 W.L.R. 493, 495.*

40 *Silk Bros v Security Pacific National Bank (1987) 72 A.L.R. 535, 538–539 Aust.*

41 s.3(1). In *Banque Cantonale de Genève v Sanomi [2016] EWHC 3353 (Comm)* at [32]–[36], Blair J, having been referred to the requirement in s.83(1) of the Act that a promissory note must be in writing, held that there is a principle (admittedly, of uncertain scope) to the effect that oral evidence is not admissible to contradict the terms of the written instrument.

42 s.2. The Law Commission has recently published its recommendations with a draft Bill to allow for the legal recognition of electronic trade documents, including bills of exchange and promissory notes (Electronic trade documents: Report and Bill (2022) Law Com. No.405). The Law Commission recommends that a trade document in electronic form should be capable of being possessed provided that certain criteria are met. However, the Law Commission did not consider there to be a need to introduce an express statutory provision on writing in electronic trade documents in the Bill, because it considers that the position in domestic law is already clear, namely that “a trade document in electronic form can satisfy a requirement for writing.” (Law Com. No.405, paras 9.2–9.12). See also Smart legal contracts: advice to Government (2021) Law Com. No.401, from para.3.79.

43 *Ruff v Webb (1794) 1 Esp. 129*, in which “Mr. N will much oblige Mr. W by paying to the order of R 20 guineas in his account” was held to be imperative and thus a valid order, but it is to be doubted if such language would be considered imperative at present. cf. *R. v Ellor (1784) 1 Leach C.C. 323.*

44 *Little v Slackford (1828) Mood. & M. 171*, where an instrument reading “Please to let the bearer have seven pounds, and place it to my account, and you will oblige” was held not to be a bill of exchange. cf. *Hamilton v Spottiswoode (1849) 4 Exch. 200, 210.*

45 As regards a qualification concerning the time of payment, see below, para.36-014.

46 s.3(3).

47 *Jenney v Herle (1723) 2 Ld. Raym. 1361.*

48 *Dawkes v Lord De Loraine (1771) 3 Wils. K.B. 207*. See also *Buck v Robson (1878) 3 Q.B.D. 686*; *Fisher v Calvert (1879) 27 W.R. 301.*

49 *Bavins Jnr & Sims v London and South Western Bank Ltd [1900] 1 Q.B. 270.*

50 *Nathan v Ogdens Ltd (1905) 93 L.T. 553* (affirmed (1905) 94 L.T. 126). As regards “claused bills”, see Chalmers and Guest on Bills of Exchange and Cheques, 18th edn (2017), para.2-020.

51 *Aspinall's Club Ltd v Al-Zayat [2007] EWHC 362 (Comm)* at [10] (summary judgment), although the Court of Appeal, *[2007] EWCA Civ 1001*, allowed the defendant’s appeal on the ground, inter alia, that the cheque might have been a sham because the parties did not

have a common intention that it would be paid on first presentation within two banking days as required by s.16(3) of the Gaming Act 1968 (since repealed and replaced by the Gambling Act 2005); cf. *The Ritz Hotel Casino Ltd v Al-Daher [2014] EWHC 2847 (QB)*, where the provision by a casino of a cheque cashing facility for members was held not to constitute the (prohibited) provision of “credit” for the purposes of the Gambling Act 2005.

52 *Bavins Jnr & Sims v London and South Western Bank Ltd*, above.

53 *Nathan v Ogdens Ltd*, above.

54 s.6(1).

55 s.6(2).

56 s.3(1).

57 *Capital and Counties Bank v Gordon [1903] A.C. 240, 250*. The instrument is equivalent to a promissory note of a bank: *Commercial Banking Co of Sydney Ltd v Mann [1961] A.C. 1, 7*. In *Abbey National Plc v JSF Finance & Currency Exchange Ltd [2006] EWCA Civ 328* at [12], Sir Andrew Morritt C. said that “the legal effect of such an instrument is identical to that of a bankers’ draft”. Generally as regards bankers’ drafts, see Chalmers and Guest on Bills of Exchange and Cheques, 18th edn (2017), paras 2-003, 2-012 and 2-040.

58 s.89(2).

59 s.10(1).

60 s.10(2).

61 s.11.

62 s.11. To invalidate the bill, the contingency need be apparent on the face of the instrument. English courts are unlikely to follow the decision to the contrary of the Nova Scotia Supreme Court in *Eastern Elevator Services Ltd v Wolfe, 119 D.L.R. (3rd) 643 (1981)*.

63 *Colehan v Cooke (1742) Willes 393, 399*. The following were held to be certain events: “12 months after notice”—*Clayton v Gosling (1826) 5 B. & C. 360*; “two months after demand in writing”—*Price v Taylor (1860) 5 H. & N. 540*.

64 *Goss v Nelson (1757) 1 Burr. 226*.

65 *Pearson v Garrett (1693) 4 Mod. 242*.

66 *Ex p. Tootell (1798) 4 Ves. Jr. 372*. The following were held to be contingencies: “30 days after the arrival of the ship P.”—*Palmer v Pratt (1824) 2 Bing. 185*; “90 days after sight or when realised”—*Alexander v Thomas (1851) 16 Q.B. 333*.

67 *Williamson v Rider [1963] 1 Q.B. 89, CA*. See also (from South Africa) *Salot v Naidoo 1981 (3) S.A. 959*; *Standard Credit Corp Ltd v Kleyn 1988 (4) S.A. 441*. Contrast: *John Burrows Ltd v Subsurface Surveys Ltd [1968] S.C.R. 607, 614* (Canada); *Creative Press Ltd v Harman (1973) I.R. 313* (Ireland); *Emu Brewery Mezzanine Ltd v ASIC [2006] WASCA 105* (Australia); *Re York Street Mezzanine Pty Ltd [2007] FCA 922* (Australia); *Club Securities Ltd v Hurley [2008] 1 N.Z.L.R. 711* (New Zealand).

68 *Claydon v Bradley [1987] 1 W.L.R. 521*.

69 [1979] 1 Lloyd’s Rep. 100.

70 [1998] C.L.C. 238.

71 [1998] C.L.C. 238 at 242.

72 [1998] Lloyd’s Rep. Bank. 287, CA.

- 73 [1998] *Lloyd's Rep. Bank.* 287, 292, per Waller LJ, and also Chadwick LJ at 295. See also *Credit Agricole Indosuez v Ecumet (UK) Ltd Unreported 29 March 2001*, where Tomlinson J was uncertain as to whether this reasoning was part of the *ratio decidendi* in *Novaknit Hellas*.
- 74 [1998] *Lloyd's Rep. Bank.* 287, 292, following dicta in *Hong Kong and Shanghai Banking Corp Ltd v GD Trade Co Ltd [1998] C.L.C. 238, 243*, where it was also unnecessary to decide the issue. cf. *Credit Agricole Indosuez v Ecumet (UK) Ltd Unreported 29 March 2001*, where Tomlinson J regarded the terms of the acceptance as the “critical element” in *Novaknit Hellas*. See also Chalmers and Guest on Bills of Exchange and Cheques, 18th edn (2017), para.2-089 (acceptor may be liable as the maker of a promissory note).
- 75 s.13(1).
- 76 s.13(2).
- 77 This section excludes non-business days when computing time where the Act requires something to be done in less than three days. See also s.1(4) of the 1971 Act.
- 78 s.92(b); see also s.4(1) of the 1971 Act.
- 79 s.92(a).
- 80 Added to s.92(a) by s.3(1) of the 1971 Act.
- 81 s.92(d) of the 1882 Act, inserted by s.4(4) of the 1971 Act. Under s.92(c)—which is not affected by the 1971 Act—non-business days include any day appointed by Royal proclamation as public fast or thanksgiving.
- 82 Sch.1.
- 83 s.1(3) of the 1971 Act. New Year’s Day is appointed a Bank Holiday by Royal proclamation under the said section of the Act.
- 84 s.1(2).
- 85 s.14(2).
- 86 s.14(3).
- 87 s.14(4).
- 88 As to “order”, see above, para.36-011.
- 89 *Martin v Chauntry (1747) 2 Str. 1271*; cf. *Re Boyse (1886) 33 Ch. D. 612, 621*. See also *Dickie v Singh, 1974 S.L.T. (Notes) 3* (instrument promising payment of a certain amount coupled with an undertaking to employ staff and to pay their salaries, held not to be a promissory note).
- 90 For a Canadian case in point, see *Canada Permanent Trust Co v Kowal (1981) 120 D.L.R. (3d) 760*.
- 91 s.9(1).
- 92 *Macleod Savings and Credit Union Ltd v Perrett (1981) 118 D.L.R. (3d) 193*.
- 93 *Bank of Montreal v Dezcam Industries Ltd (1983) 147 D.L.R. (3d) 359*.
- 94 s.9(3).
- 95 But note saving in s.2(2), concerning a bill dated on or after 15 February 1971 but proved to have been drawn earlier.
- 96 *Dalgety Ltd v John J. Hilton Pty Ltd [1981] 2 N.S.W.L.R. 169* Aust.
- 97 s.9(2). See *Saunderson v Piper (1839) 5 Bing. N.C. 425*; *Garrard v Lewis (1882) 10 Q.B.D. 30, 34, 35*.

- 98 *Phipps v Tanner* (1833) 5 Car. & P. 488.
- 99 s.5(1).
- 100 *North and South Insurance Corp Ltd v National Provincial Bank Ltd* [1936] 1 K.B. 328; *Cole v Milsome* [1951] 1 All E.R. 311; *Orbit Mining and Trading Co v Westminster Bank* [1963] 1 Q.B. 794.
- 101 (1895) 11 T.L.R. 211.
- 102 [1893] 2 Q.B. 206.
- 103 (1811) Russ. & Ry 195. Contrast the Scottish case of *Henderson, Sons & Co Ltd v Wallace and Pennell*, 1902 40 S.L.R. 70, in which an instrument in the form of a bill of exchange, reading “pay—or order”, was treated as a promissory note.
- 104 s.8(2).
- 105 s.8(3).
- 106 s.8(4).
- 107 Below, para.36-088.
- 108 *Miller Associates (Australia) Pty Ltd v Bennington Pty Ltd* [1975] 7 A.L.R. 144; *Chappenden* (1981) 55 A.L.J. 135.
- 109 s.7(1).
- 110 s.7(2).
- 111 *Bird & Co v Thomas Cook & Son Ltd* [1937] 2 All E.R. 227, 230–231.
- 112 *Willis v Barrett* (1817) 2 Stark. 29; *Soares v Glyn* (1845) 8 Q.B. 24.
- 113 [1891] A.C. 107.
- 114 [1897] A.C. 90. See also (from Canada) *Royal Bank of Canada v Concrete Column Clamps* [1977] 2 S.C.R. 456; *Canada Trust Co v The Queen* [1982] 2 F.C. 722; *Fok Cheong Shing Investments Co Ltd v Bank of Nova Scotia* [1982] 2 S.C.R. 488; *Boma Manufacturing Ltd v CIBC* [1996] 3 S.C.R. 727; *Bank of Nova Scotia v Toronto-Dominion Bank* (2001) 145 O.A.C. 106; *Rouge Valley Health System v TD Canada Trust* [2012] ONCA 17; *Raza Kayani LLP v Toronto-Dominion Bank* [2014] ONCA 862.
- 115 *Vinden v Hughes* [1905] 1 K.B. 795; *North and South Wales Bank Ltd v Macbeth* [1908] A.C. 137.
- 116 It is doubtful whether the drawee may treat as payable to bearer a cheque whose payee is fictitious or non-existent, if the printed words “or bearer” following the payee’s name have been struck out and a crossing accompanied by the words “not negotiable—a/c payee only” have been added thereto: *Rhostar (Pvt) Ltd v Netherlands Bank of Rhodesia Ltd* [1972] 2 S.A.L.R. 703, 709–711. As from 1992, such a cheque is, in any event, non-transferable and so, it is submitted, incapable of being payable to bearer under s.7(3): below, para.36-167.
- 117 *Canada Trust Co v The Queen* [1982] 2 F.C. 722 Can.
- 118 s.8(1). See, e.g. *Banque Cantonale de Genève v Sanomi* [2016] EWHC 3353 (Comm) at [29] (a promissory note case).
- 119 See *Hibernian Bank Ltd v Gysin and Hanson* [1939] 1 K.B. 483. As regards the effect of words limiting negotiability written by the acceptor, see *Meyer & Co v Decroix, Verley et Cie* [1891] A.C. 520. The words “not negotiable” have a special meaning when written on a

- crossed cheque; as regards these and the addition of the words “a/c payee only” to a crossed cheque, see below, paras 36-164 et seq.
- 120 s.8(4).
- 121 And see below, para.36-164.
- 122 *Hibernian Bank Ltd v Gysin and Hanson [1939] 1 K.B. 483*.
- 123 s.17(1).
- 124 s.17(2)(a).
- 125 At common law an acceptance written on a separate paper was sufficient: *Pierson v Dunlop (1777) 2 Cowp. 571*; *Mason v Hunt (1779) 1 Doug. 297*; *Wynne v Raikes (1804) 5 East 514*.
- 126 *Young v Glover (1857) 3 Jur.(N.S.) 637*.
- 127 s.17(2)(b).
- 128 *Russell v Phillips (1850) 14 Q.B. 891*.
- 129 *Banca Popolare di Novara v John Livanos & Sons Ltd [1965] 2 Lloyd's Rep. 149*.
- 130 s.54(1); *Philpot v Briant (1828) 4 Bing. 717, 720*.
- 131 *Jackson v Hudson (1810) 2 Camp. 447*; *Davis v Clarke (1844) 6 Q.B. 16*; *Steele v M'Kinlay (1880) 5 App. Cas. 754, 770*. As regards acceptance of bills drawn on a partnership, see *Re Barnard, Edwards v Barnard (1886) 32 Ch. D. 447*. As regards acceptance for honour, see below, para.36-142.
- 132 s.56.
- 133 *Fielder v Marshall (1861) 30 L.J. C.P. 158*; *Mason v Lack (1929) 140 L.T. 696*; *Haseldine v Winstanley [1936] 2 K.B. 101*.
- 134 When a bill is payable on demand it is usual to present it simultaneously for acceptance and for payment. As to how far it is necessary to present a bill for payment, see below, paras 36-105—36-107.
- 135 s.18(1); *London and South Western Bank Ltd v Wentworth (1880) 5 Ex. D. 96*.
- 136 s.18(2).
- 137 s.10(2).
- 138 s.18(3).
- 139 s.12. Similarly, he is entitled to add the date of issue of a bill payable at a fixed time after date.
- 140 *Roberts v Bethell (1852) 12 C.B. 778*.
- 141 s.19(1).
- 142 s.19(2). See also *Banca Popolare di Novara v John Livanos & Sons Ltd [1965] 2 Lloyd's Rep. 149, 155* (concerning an acceptance to pay out of a designated account); *Geo Thompson (Aust) Pty Ltd v Vittadello [1978] V.R. 199, 207* (concerning an acceptance of a bill drawn on a partnership by only one of the partners who was acting in his personal capacity).
- 143 s.19(2)(c), proviso. See *Halstead v Skelton (1843) 5 Q.B. 86*; *Ex p. Hayward (1887) 3 T.L.R. 687*; *Banku Polskiego v KJ Mulder & Co [1941] 2 K.B. 266*; *affirmed [1942] 1 K.B. 497*. As to what constitutes a particular place, see *Eimco Corp v Tutt Bryant Ltd [1970] 2 N.S.W.R. 249*. cf. *Day v Bate (1979) 41 F.L.R. 222 Aust*.
- 144 *Cox v Troy (1822) 5 B. & Ald. 474*; *Bank of Van Diemen's Land v Bank of Victoria (1871) L.R. 3 P.C. 526*.
- 145 See, e.g. *Bosanquet v Forster (1841) 9 C. & P. 659*; *Belcher v Campbell (1845) 8 Q.B. 1*.

- 146 *Citibank NA v Brown, Shipley & Co* [1991] 1 *Lloyd's Rep.* 576; *Dextra Bank and Trust Co Ltd v Bank of Jamaica* [2002] 1 *All E.R. (Comm)* 193, PC; *Abbey National Plc v JSF Finance & Currency Exchange Co Ltd* [2006] EWCA Civ 328.
- 147 s.21(2). As regards conditional delivery, see *Bell v Viscount Ingestre* (1848) 12 Q.B. 317, 319; *Castrique v Buttigieg* (1855) 10 Moo. P.C. 94, 108.
- 148 *New London Credit Syndicate Ltd v Neale* [1898] 2 Q.B. 487; applied in *Banque Cantonale de Genève v Sanomi* [2016] EWHC 3353 (Comm) at [36].
- 149 s.21(3). See *Colin v Gibson* (1927) 27 S.R. (N.S.W.) 328, 331; *Equitable Securities Ltd v Neal* [1987] 1 N.Z.L.R. 233, 240; *Midland Bank Plc v Brown Shipley & Co Ltd* [1991] 1 *Lloyd's Rep.* 576, 583; *National Bank of Canada v Tardival Associates* (1994) 109 D.L.R. (4th) 126; *Surrey Asset Finance Ltd v National Westminster Bank*, *The Times*, 30 November 2000, permission to appeal refused [2001] EWCA Civ 60. The same presumption applies as regards the maker of a note; see s.89(2), *Yan v Post Office Bank Ltd* [1994] 1 N.Z.L.R. 154.
- 150 s.21(2); as to the application of this provision to a holder who takes the bill from a holder in due course, see *Insurance Corp of Ireland v Dunluce Meats* [1991] N.I. 286. As to who is a holder in due course, see s.29, discussed in para.36-072, below.
- 151 s.20(1). See generally *Crutchly v Mann* (1814) 5 *Taunt.* 529; *Schultz v Astley* (1836) 2 *Bing. N.C.* 544; *Scard v Jackson* (1875) 34 L.T. 65n.; *London and South Western Bank Ltd v Wentworth* (1880) 5 *Ex. D.* 96; *Carter v White* (1882) 20 Ch. D. 225 (affirmed (1883) 25 Ch. D. 666); *France v Clark* (1884) 26 Ch. D. 257, 262; *Dunn v Jefferson* (1925) 69 S.J. 725. See also s.12 concerning the position when a bill or acceptance is undated. As regards the application of this provision where a bill is indorsed for accommodation before it is signed by the drawer, see *Bank of Nova Scotia v Hogg*, 24 O.R. (2nd) 494 (1979) Can.
- 152 s.20(2).
- 153 *Herdman v Wheeler* [1902] 1 K.B. 361.
- 154 s.20(2), proviso. See *Montague v Perkins* (1853) 22 L.J. C.P. 187; *Barker v Sterne* (1854) 9 Ex. 684; *Garrard v Lewis* (1882) 10 Q.B.D. 30; *Dunn v Jefferson* (1925) 69 S.J. 725; *Guildford Trust Ltd v Goss* (1927) 43 T.L.R. 167. As to the definition of a holder in due course, see below, paras 36-072 et seq.
- 155 However, if the proviso to s.20(2) does not apply, the holder may, nevertheless, succeed in an action on the bill if he can, on the facts, plead a common law estoppel precluding the drawer or acceptor from alleging the invalidity of the bill: *France v Clark* (1884) 26 Ch. D. 257, 262; *Lloyds Bank Ltd v Cooke* [1907] 1 K.B. 794; discussed below, in which the plaintiff, as original payee, could not claim to be a holder in due course.
- 156 For this type of case, see *Baxendale v Bennett* (1878) 3 Q.B.D. 525; *Smith v Prosser* [1907] 2 K.B. 735 (in which, however, liability might have been based on the principle established subsequently in *Lloyd v Grace, Smith & Co* [1912] A.C. 716).
- 157 [1907] 1 K.B. 794. cf. *RE Jones Ltd v Waring and Gillow Ltd* [1926] A.C. 670.
- 158 [1946] K.B. 422.
- 159 [1946] K.B. 422 at 427. cf. *Mercantile Credit Co Ltd v Hamblin* [1965] 2 Q.B. 242, 274–275, 278–279.
- 160 The so-called “security indorsement”, provided for by s.56 of the Bills of Exchange Act, below, para.36-115.

- 161 *Glenie v Bruce Smith* [1908] 1 K.B. 263; *Re Gooch* [1921] 2 K.B. 593; *Gerald McDonald & Co v Nash & Co* [1924] A.C. 625 (distinguishing *Steel v M'Kinlay* (1880) 5 App. Cas. 754); *National Sales Corp Ltd v Bernardi* [1931] 2 K.B. 188 (in which it was held that the drawer's indorsement may in such cases be either above or below that of the third party); *McCall Bros Ltd v Hargreaves* [1932] 2 K.B. 423 (in which it was held that although an indorsement, in these cases, is given by way of guarantee, there is no need for a separate memorandum to satisfy the Statute of Frauds). See also above, para.36-035.

## **(ii) - Capacity and Authority of Parties**

**Chitty on Contracts 34th Ed.**

**Consolidated Mainwork Incorporating First Supplement**

**Volume II - Specific Contracts**

**Chapter 36 - Bills of Exchange and Banking**

**Section 1. - Negotiable Instruments**

**(b) - Bills of Exchange<sup>32</sup>**

**(ii) - Capacity and Authority of Parties**

### **Capacity to contract on a bill**

- 36-039 According to s.22(1) of the Act, capacity to incur liability as a party to a bill is co-extensive with capacity to contract. A drawer, acceptor or indorser who has no capacity to contract is not liable on the bill. However, the fact that one party to the bill has no capacity does not, in itself, release the other parties from their liability.<sup>162</sup> The section provides that nothing in it shall enable a corporation to make itself liable as a drawer, acceptor or indorser of a bill unless it is competent to do so under the law relating to corporations. At common law, a corporation incurred no liability in drawing, accepting or indorsing a bill of exchange, unless expressly or impliedly authorised by its memorandum to do so. In the case of a trading company the fact of its incorporation for trading purposes conferred on it, among other incidental powers, the capacity to draw, accept and indorse bills of exchange.<sup>163</sup> It appears that a non-trading company, on the other hand, had no capacity to draw, accept or indorse bills unless such powers were expressly or by clear implication conferred on it in its memorandum.<sup>164</sup> If a company entered into a contract which was beyond its capacity, the transaction was ultra vires and void.<sup>165</sup> However, so far as third parties are concerned, the ultra vires rule has been abolished for most companies by statute.<sup>166</sup> The current statutory provision is s.39(1) of the Companies Act 2006, which provides that “the validity of an act done by a company shall not be called into question on the ground of lack of capacity by reason of anything in the company’s constitution”. Beyond that, the Companies Act does not confer on companies a specific capacity to draw, accept or indorse bills of exchange, but merely regulates the exercise of the capacity where it exists.<sup>167</sup>

## Capable parties liable

- 36-040 Section 22(2) provides that, where a bill is drawn or indorsed by a minor or a corporation having no capacity or power to incur liability on a bill, the drawing or indorsement entitles the holder to enforce the bill against other parties to it. Thus, a bill remains negotiable even though it has been drawn or indorsed by a party who has no capacity so to do. However, it remains unenforceable against the incapacitated party, even if the incapacity is subsequently removed. It has been held that, if a minor draws a post-dated cheque, dating it a few days after his coming of age, he is not liable on it.<sup>168</sup>

## Signature essential to liability

- 36-041 Under s.23 of the Act, a person is liable as a drawer, acceptor or indorser of a bill only if he has signed it in such a capacity. However, s.91 of the Act provides that where any instrument is required to be signed by any person, it is not necessary that he should sign it with his own hand, and his signature may be written by some other person who acts under his authority. In such cases the signature must be in the name of the principal and not the agent. An agent who signs the name of his principal without authority is not liable on the bill personally, as he has not signed it in his own name.<sup>169</sup> But when an agent signs a bill in his own name, the agent alone is bound and not the principal, even if the payee is aware that the signer is an agent.<sup>170</sup>

## Sufficient signature

- 36-042 The Act does not provide what amounts to a sufficient signature. It has been held that a signature written by pencil<sup>171</sup> is sufficient, and it appears that a lithographed or stamped signature would, too, suffice.

<sup>172</sup>

- Where the maker of a promissory note, instead of signing underneath the undertaking, wrote "I William Smith promise to pay", it was held that the writing of the name constituted a valid signature.<sup>173</sup>

## Trade or assumed name

- 36-043 Section 23(1) of the Act provides that where a person signs a bill in a trade or assumed name, he is liable as if he had signed it in his own name.

## Partnerships

- 36-044 Section 23(2) makes special provisions for the liability of a partnership. It provides that the signature of the name of a firm is equivalent to the signature, by the person so signing, of the names of all the persons liable as partners in that firm. But this section has a limited scope of application. If a bill drawn on the partnership is accepted by one of the partners in his personal capacity by signing it in his own name, the other partners are not bound.<sup>174</sup>

## Personal liability of company's director

- 36-045 Under s.349(4) of the Companies Act 1985, if a director or other officer of a company signed or authorised to be signed on behalf of the company any bill of exchange, promissory note, cheque or order for money or goods in which its name was not mentioned in legible characters, he was liable to a fine; and he was further personally liable to the holder of the bill, etc. unless the instrument was duly paid by the company. Where a bill was presented for payment and dishonoured, the bill was not “duly paid” for the purposes of s.349(4).<sup>175</sup> The courts applied this subsection strictly so that directors or other officers of the company were held liable where the company’s name was misstated even to a relatively minor degree.<sup>176</sup> However, where the misstatement was attributable to the holder of the bill, etc. that holder was estopped from holding the company’s signatory liable.<sup>177</sup> Nevertheless, s.349(4) could operate harshly, especially on junior employees of the company, and there were calls for its repeal. The Company Law Review took this view in its Final Report,<sup>178</sup> as did the government,<sup>179</sup> and, with effect from 1 October 2008, s.349(4) was repealed by the Companies Act 2006.<sup>180</sup> The Company, Limited Liability Partnership and Business (Names and Trading Disclosures) Regulations 2015<sup>181</sup> now require every company to disclose its registered name on (inter alia) its bills of exchange, promissory notes, endorsements and order forms,<sup>182</sup> and also on cheques purporting to be signed by or on behalf of the company.<sup>183</sup> Under s.83 of the Companies Act 2006, if legal proceedings are brought by a company to enforce a contract made in the course of a business in respect of which the company was, at the time the contract was made, in breach of these regulations, the legal proceedings will be dismissed if the defendant shows (a) that he has a claim against the company arising out of the contract which

he has been unable to pursue because of the breach of the regulations, or (b) that the company's breach of the regulations has caused him to suffer financial loss in connection with the contract, unless (in either case) the court is satisfied that it is just and equitable to permit the proceedings to continue. The company and any officer of the company may be subject to a criminal penalty for breach of the regulation.<sup>184</sup>

## Non est factum

36-046 There is one important exception to the rule that a person is liable on a bill which he has signed. This exception relates to the defence of non est factum.<sup>185</sup> If the person signing the bill is induced by the fraud of another to believe that he is signing a document which is essentially or fundamentally different, e.g. if he believes himself to be signing a contract of guarantee<sup>186</sup> or merely to be witnessing another's signature,<sup>187</sup> the mistake will render his signature null and void. He will not be liable on the bill even at the suit of a holder in due course. The mistake, however, must occur without negligence. The person signing the bill is not entitled to disown his signature, unless he proves that he has exercised reasonable care.<sup>188</sup> Thus, in *Crédit Lyonnais v PT Barnard & Associates Ltd*<sup>189</sup> two bills of exchange were accepted on behalf of the defendants by their general manager who, being ignorant of the French language in which the bills were drawn, believed them to be mere receipts acknowledging the arrival of a consignment of watches in the United Kingdom. Mocatta J held the defendants liable to a holder in due course of the bills as, in his Lordship's opinion, any prudent man would have subjected the instruments to an examination and on noticing such words as "bank" and "Lloyds", which appeared in the bills, would have been put on inquiry.

## Forged or unauthorised signature

36-047 Section 24 of the Bills of Exchange Act provides that where a *signature* on a bill is forged or placed on it without the authority of the person whose signature it purports to be, the forged or unauthorised signature is wholly inoperative, and no right to retain the bill, enforce it or discharge it can be acquired through or under that signature unless the party against whom it is sought to retain it or enforce payment of the bill is precluded from setting up the forgery or want of authority. The word "signature" is not defined in the Act, but the language of s.24 indicates that it refers to any type of signature on a bill, i.e. that of the drawer, drawee or of an indorser.

## Meaning of forgery

36-048

The word “forgery” is, likewise, not defined in the [Act](#). [Section 24](#) distinguishes between a “forged” signature on a bill and a signature “placed thereon without the authority of the person whose signature it purports to be”. Under the [Forgery Act 1861](#),<sup>190</sup> which was in force when the [Bills of Exchange Act 1882](#) was passed, the placing of an unauthorised signature on a bill was not a forgery. The position was changed by [s.1 of the Forgery Act 1913](#), which has been superseded in turn by [s.9\(1\)\(d\) of the Forgery and Counterfeiting Act 1981](#), which is basically similar. [Section 9\(1\)\(d\)](#) treats a document as a forgery “if it purports to have been made ... on the authority of a person who did not in fact authorise its making in those terms”. This obvious departure from the [1861 Act](#), originally effected by the [1913 Act](#), has had an important implication regarding the analysis of the nature of a signature made by an agent who abuses the authority to sign his principal’s name on bills. Before the coming into force of the [1913 Act](#), in *Morison v London County and Westminster Bank Ltd*,<sup>191</sup> where an agent had authority to draw cheques on his principal’s account, it was held that the fraudulent misuse of that authority did not render the cheques forgeries. After 1913, in *Kreditbank Cassel v Schenkers Ltd*,<sup>192</sup> a manager of a company fraudulently drew and indorsed bills on the company’s behalf for his own purposes. It was held that his signatures on these bills were forgeries within the meaning of the [Forgery Act 1913](#) and that the bills were, thus, void. Obviously, the position ought to be the same under the [1981 Act](#).

## Ratification of forged or unauthorised signature

- 36-049 In view of this, it is doubtful whether such a fraudulent signature may be ratified by the principal. On the one hand, [s.24](#) provides that nothing in it affects the ratification of an unauthorised signature not amounting to a forgery, and the section distinguishes between an unauthorised signature and a forged one. On the other hand, under the [1981 Act](#), an unauthorised fraudulent signature amounts to a forgery, and most authorities indicate that a forgery may not be ratified.<sup>193</sup> The basis of this doctrine is that as the forger does not act and does not purport to act under the authority of the person whose signature he forges, there is no room for the adoption of his act by way of ratification. However, in the case of a fraudulent unauthorised signature, although it is technically a forgery, the agent purports to sign the bill in the name of his principal. It may perhaps be argued that, for the purpose of ratification, the distinction between a forged and an unauthorised signature should continue to be recognised, especially as it is stressed in the proviso to [s.24](#).

## Estoppels: statutory

- 36-050 [Section 24](#) is stated to be subject to the “provisions of this Act”. This refers to the provisions of [ss.54](#) and [55](#). Under [s.54\(2\)](#) an acceptor is estopped from denying to a holder in due course the genuineness of the drawer’s signature. According to [s.55\(2\)](#) an indorser is estopped from denying

to a holder in due course the genuineness and regularity of the signatures of the drawer and all previous indorsers.<sup>194</sup>

## Estoppel: common law

- 36-051 Apart from these statutory estoppels, a party may by his own conduct be precluded from pleading that his purported signature is a forgery. In *Leach v Buchanan*<sup>195</sup> the acceptance of a firm was forged on a bill. Before purchasing the bill, the holder inquired whether the acceptance was genuine and the firm assured him that it was. It was held that the firm was estopped from alleging subsequently that the acceptance was forged. In *Greenwood v Martins Bank*<sup>196</sup> a husband came to know that his wife had forged his signature upon several cheques, but did not inform the bank until the death of the wife, which occurred eight months after he became aware of the forgeries. It was held that as this delay had caused the bank the loss of its right of action against the wife, the husband was estopped from alleging that the signatures were not his own. The principle, though, is not as wide as might be anticipated at first glance. In the first place an estoppel can be pleaded only by a person who has relied on a statement of another person to his disadvantage. Secondly, the estoppel is bound to fail unless the customer has actual knowledge of the facts. Constructive notice is inadequate.<sup>197</sup>

## Forged indorsement: bearer bills

- 36-052 The effect of a forged indorsement depends on whether the bill is payable to bearer or to order. A bearer bill is transferred by mere delivery<sup>198</sup> and the rights of the holder against the drawer and the indorsers do not depend on the transferor's indorsement. If he is a holder in due course, who is entitled to enforce the bill despite any defects in the title of prior parties,<sup>199</sup> the fact that an indorsement was forged would appear to be immaterial.

## Forged indorsements: order bills

- 36-053 A bill payable to order is transferred by indorsement and delivery.<sup>200</sup> The rights of a holder of an order bill appear, thus, to depend on the validity of the indorsement. Whether a person may be a holder in due course of an order bill despite the forged indorsement is not altogether certain, but three arguments indicate a negative answer. The first argument against considering such a person a holder in due course follows from the definition, in s.2 of the Act, of the word "holder", i.e. "the payee or indorsee of a bill or note who is in possession of it, or the bearer thereof". A holder in due

course, it is argued, must be a “holder”; when an indorsement is forged the person holding under it is not an indorsee and thus not a holder.<sup>201</sup> The difficulty with this argument is that the word “indorsee” is not defined in the Act and the presumption that a person who takes the bill under a defective indorsement is not an indorsee is not directly supported by authorities based on the **Bills of Exchange Act 1882**. The second argument is that, according to **s.29 of the Act**, a person can be a holder in due course only if he takes a bill which is complete and regular, and that a forged indorsement renders the bill irregular. However, **s.29** refers to completeness and regularity *on the face of the bill*, and it is difficult to agree that a forgery necessarily renders the bill irregular on its face. The third argument is that **s.38(2) of the Act** extends to a holder in due course the right to enforce the bill despite any defect in the title of the transferor, but not if the transferor has no title at all. While it is true that a forger has no title to the bill, it is difficult to agree that the distinction between a defective title and the absence of title has any room within the law of negotiable instruments. If it had, then a person who took a bill from a thief—who could have no title to the bill—could never be a holder in due course. Such an interpretation would defeat the main object of the law of negotiable instruments: it would then be necessary for a transferee to trace the title of the transferor before taking a bill.<sup>202</sup>

## Cases

- 36-054 There is no authority decided after the coming into force of the **1882 Act** in which the rights of a holder, who took in good faith and for value an order bill bearing a forged indorsement of the payee, constituted a main issue. Cases decided before the **Bills of Exchange Act 1882** held that such a person could not get a good title.<sup>203</sup> In *Lacave & Co v Crédit Lyonnais*<sup>204</sup> Collins J, obiter, expressed his view that **s.24 of the Act** was only declaratory of pre-existing law and that a person who took an order bill with a forged indorsement could not obtain a good title. Authority thus supports the view that a person cannot obtain a good title under a forged indorsement on an order bill.<sup>205</sup>

## Instruments signed by agents

- 36-055 The rights of the parties to a bill signed in representative form are governed by **ss.25 and 26 of the Act**. **Section 25** governs the position of a third party who takes a bill signed by an agent. It provides that a signature by procurement operates as a notice that the agent has limited authority to sign, and that the principal is bound only in so far as the agent has acted within the limits of his actual authority. The effect of this section is that a holder in due course of such a bill cannot enforce it against the principal if the agent has exceeded his authority.<sup>206</sup> Moreover, the fact that the bill purports to be signed by an agent constitutes a “red flag”. A collecting banker who takes such a bill without inquiry may be considered as having acted negligently and thus may lose the

protection against actions in conversion conferred on him by [s.4 of the Cheques Act 1957](#).<sup>207</sup> This rule may, however, be less stringently applied in the case of bills signed by bodies corporate, as these can only act through their agents.<sup>208</sup>

## Signature in representative form

36-056 [Section 26\(1\)](#) provides that a person who signs a bill (whether as drawer, acceptor or indorser) in representative form, i.e. by adding words indicating that he signs on behalf of his principal, does not incur liability on the bill. However, the mere addition to a signature of words describing the signatory as an agent, or as acting in a representative character, does not, in itself, exempt him from personal liability.<sup>209</sup> The determining factor is whether the words, indicating the signatory's position as agent, are meant to describe his occupation, or whether they are meant to show that he signs the bill on behalf of his principal. Thus, where a bill was drawn on a company and accepted by it, and, at the drawer's request, the directors indorsed it as "B. Co Ltd, J.S. & E.D., Directors", it was held that they were personally liable.<sup>210</sup> Where a promissory note was signed by "J. S., Managing Director" beneath a rubber stamp setting out the name of the company, the managing director was held not to be personally liable on the bill.<sup>211</sup> The best explanation of the provision is to be found in *Bondina v Rollaway Shower Blinds Ltd*<sup>212</sup> in which the signatures of two directors of the company, on whose account the cheques were drawn, was executed in ink beneath the company's name, which was printed on the cheque. One of the directors, against whom the payee sought to enforce payment, denied that he was personally liable on the instrument. Dillon LJ said that, when the director executed his signature on the cheque, he adopted not only the writing designating the payee's name and the amount but also the printing of the company's name and of the numbers which set out the company's account. In this way, the director indicated that the cheque was drawn on the company's account and that there was no intention to create an instrument imposing joint liability. The intention of the signatory is, thus, of importance, and it may, it appears, be determined by extrinsic evidence.<sup>213</sup>

## Construction to uphold validity

36-057 According to [s.26\(2\)](#) in determining whether a signature on a bill is that of the principal or that of an agent by whose hand it is written, the construction most favourable to the validity of the instrument is to be adopted. This provision was discussed in *Rolfe Lubell & Co v Keith*<sup>214</sup> in which the plaintiff agreed to supply goods to a company provided that two of its directors indorsed in their personal capacity bills of exchange drawn for the price. The defendant, who was one of the directors, indorsed the bills but added to his signature by means of a rubber stamp the words: "For and on behalf of the [company]; director". Kilner-Brown J observed that as the company assumed

liability as acceptor of the bills, an indorsement executed by it would be meaningless and of no value. In view of this patent ambiguity in the bills it was permissible to call evidence to clarify the intention of the parties. On the basis of the evidence, his Lordship concluded that the words imprinted by means of the rubber stamp were of no significance. He emphasised that the “only way in which validity [could] be given to this indorsement [was] by construing it to bind someone other than the acceptor”.<sup>215</sup> This interpretation had the additional merit of giving currency and hence full validity to the bills.

## End result

- 36-058 In the majority of cases the result of ss.25 and 26 is that, where an agent exceeds his authority, neither he nor his principal are liable on the bill. However, although the agent is not liable on the bill, he can be sued either in deceit (if he committed a fraud) or in an action for breach of warranty of his authority to sign.<sup>216</sup>

## Footnotes

- 32 For detailed works on the subject, see Chalmers and Guest on Bills of Exchange and Cheques, 18th edn (2017); for the special aspects respecting the use of bills of exchange in international trade, see Benjamin’s Sale of Goods, 11th edn (2021), Ch.22.
- 162 *Wauthier v Wilson* (1912) 28 T.L.R. 239 (father liable on note made jointly by himself and his minor son).
- 163 *Re Peruvian Rys* (1867) L.R. 2 Ch. App. 617.
- 164 *Bateman v Mid-Wales Ry* (1866) L.R. 1 C.P. 499.
- 165 *Ashbury Railway Carriage & Iron Co v Riche* (1875) L.R. 7 H.L. 653.
- 166 Companies that are charities remain subject to the rule (see *Companies Act 2006* s.42).
- 167 *Companies Act 2006* s.52.
- 168 *Ex p. Kibble* (1875) L.R. 10 Ch. App. 373; *Hutley v Peacock* (1913) 30 T.L.R. 42. As to whether a bill made by a person after attaining majority for the satisfaction of a debt contracted during his minority can be enforced by a holder in due course, see *Belfast Banking Co v Doherty* (1879) 4 L.R.Ir. 124; *Smith v King* [1892] 2 Q.B. 543; *Hutley v Peacock*, above. See also Vol.I, para.11-050.
- 169 The agent may, however, be sued for a false representation of authority: *Starkey v Bank of England* [1903] A.C. 114.
- 170 *Leadbitter v Farrow* (1816) 5 M. & S. 345, 349; *Ex p. Rayner* (1868) 17 W.R. 64.
- 171 *Geary v Physic* (1826) 5 B. & C. 234. And see Chalmers and Guest on Bills of Exchange and Cheques, 17th edn (2009), para.3-023.

This appears from *Ex p. Birmingham Banking Co (1868) L.R. 3 Ch. App. 651, 653–654*; *Bird & Co v Thomas Cook & Son Ltd [1937] 2 All E.R. 227*. And see the observations of Lord Denning in *Goodman v J Eban Ltd [1954] 1 Q.B. 550*, which is inconsistent with his dictum in the later case of *Lazarus Estates Ltd v Beasley [1956] 1 Q.B. 702, 710*. cf. *Silk Bros v Security Pacific National Bank (1987) 72 A.L.R. 535, 540 Aust*. See also s.2, defining “writing”: see above, para.36–010. The Law Commission considers that the law of England and Wales is already sufficiently flexible to accommodate electronic signatures of electronic trade documents, including bills of exchange and promissory notes, without the need for an express statutory provision (Electronic trade documents: Report and Bill (2022) Law Com. No.405, paras 9.13–9.25). See also Electronic Execution of Documents (2019) Law Com. No.386, Ch.3.

- 173 *Taylor v Dobbins (1720) 1 Stra. 399*; *Ruff v Webb (1794) 1 Esp. 129*.
- 174 *Geo Thompson (Aust) Pty Ltd v Vittadello [1978] V.R. 199, 206–208, 219–220*.
- 175 Personal liability under s.349(4) could occur even where the bill had not been presented for payment. A bill is dishonoured by non-payment when presentment is excused and the bill is overdue and unpaid (*Bills of Exchange Act 1882* s.47(1)(b)). Presentment is excused where the drawee is not bound, as between himself and the drawer, to pay the bill and the drawer had no reason to believe that it would be paid if presented (*Bills of Exchange Act 1882* s.46(2)(c), as applied in *Fiorentino Comm Giuseppe Srl v Farnesi [2005] EWHC 160 (Ch), [2005] 1 W.L.R. 3718*, where a director was held personally liable under s.349(4) despite the fact that the cheque had not been presented for payment).
- 176 See, e.g. *Fiorentino Comm Giuseppe Srl v Farnesi*, above, where the company’s name was stated as “Portofino Collections (London)” instead of “Portofino Collections (London) Ltd” on a cheque.
- 177 *Durham Fancy Goods Ltd v Michael Jackson (Fancy Goods Ltd) [1968] 2 Q.B. 839, CA*.
- 178 Company Law Review Steering Group, Final Report (2001), para.11.57.
- 179 White Paper, Modernising Company Law (July 2002), Cm.5553-I and Cm.5553-II; White Paper, Company Law Reform (March 2005) Cm.6456.
- 180 *Companies Act 2006* s.1259 and Sch.6. *Companies Act 2006 (Commencement No.5, Transitional Provisions and Savings) Order 2007* (SI 2007/3495) arts 8, 12 and Sch.4.
- 181 SI 2015/17 (in force on 31 January 2015), made under the *Companies Act 2006* s.82, and revoking the *Companies (Trading Disclosures) Regulations 2008* (SI 2008/495).
- 182 reg.24(1)(b).
- 183 reg.24(1)(c).
- 184 reg.28(1), and *Companies Act 2006* s.84.
- 185 See Vol.I, paras 5-049 et seq.
- 186 *Foster v Mackinnon (1869) L.R. 4 C.P. 704*.
- 187 *Lewis v Clay (1897) 14 T.L.R. 149*.
- 188 *Foster v Mckinnon*, above; *Saunders v Anglia Building Society [Gallie v Lee] [1971] A.C. 1004*.
- 189 [1976] 1 Lloyd’s Rep. 557, especially at 561.
- 190 s.22 concerned forgery of bills and notes.

- 191 [1914] 3 K.B. 356, 366. Although the decision of the Court of Appeal was delivered after the coming into effect of the 1913 Act, this Act was not relied upon as it had not been in force at the time of the trial in the King's Bench Division.
- 192 [1927] 1 K.B. 826.
- 193 *Ex p. Edwards* (1841) 2 Mon. D. & D. 241; *Brook v Hook* (1871) L.R. 6 Ex. 89. See also *Williams v Bayley* (1866) L.R. 1 H.L. 200; *Imperial Bank of Canada v Begley* [1936] 2 All E.R. 367, 374; *Stoney Stanton Supplies (Coventry) Ltd v Midland Bank Ltd* [1966] 2 Lloyd's Rep. 373. Contrast *M'Kenzie v British Linen Co* (1881) 6 App. Cas. 82, 99 (which was a Scottish authority and in which the three first-cited English authorities were not mentioned).
- 194 Other sections which are covered by the proviso are ss.60, 64 and 80.
- 195 (1802) 4 Esp. 226. See also *Brook v Hook*, above; *M'Kenzie v British Linen Co*, above.
- 196 [1933] A.C. 51. See also *Brown v Westminster Bank* [1964] 2 Lloyd's Rep. 187. cf. *Ontario Woodsworth Memorial Foundation v Grozbord*, 48 D.L.R. (2d) 385 (1965); *Jervis B Webb Co v Bank of Nova Scotia*, 49 D.L.R. (2d) 692 (1965); *Walpole & Patterson Ltd v National Bank of New Zealand* [1975] 1 N.Z.L.R. 7.
- 197 *Price Meats Ltd v Barclays Bank Plc* [2000] 2 All E.R. (Comm) 346. cf. *Patel v Standard Chartered Bank* [2001] 1 Lloyd's Rep. Bank. 229, in which it was held that Nelsonian knowledge, i.e. wilful blindness, would have the same effect as express knowledge.
- 198 s.31(2).
- 199 s.38(2).
- 200 s.31(3).
- 201 See Chalmers and Guest on Bills of Exchange and Cheques, 18th edn (2017), para.3-066.
- 202 That this is not so, see *Chichester v Hill* (1882) 52 L.J. Q.B. 160.
- 203 *Mead v Young* (1790) 4 Term Rep. 28; *Esdaile v La Nauze* (1835) 1 Y. & C. Ex. 394; *Johnson v Windle* (1836) 3 Bing. N.C. 225; *Bobbett v Pinkett* (1876) 1 Ex. D. 368.
- 204 [1897] 1 Q.B. 148.
- 205 cf. *Embiricos v Anglo-Austrian Bank* [1905] 1 K.B. 677 as regards problems of private international law concerning the validity of forged indorsements.
- 206 *Morison v London County and Westminster Bank Ltd* [1914] 3 K.B. 356, especially at 367; *Sniderman v McGarry*, 60 D.L.R. (2d) 404, 408 (1966).
- 207 *Midland Bank Ltd v Reckitt* [1933] A.C. 1 (decided under s.82 of the Bills of Exchange Act 1882, replaced and re-enacted by s.4 of the Cheques Act 1957).
- 208 *Re Land Credit Co of Ireland* (1869) L.R. 4 Ch. App. 460, 468; *Alexander Stewart & Son v Westminster Bank Ltd* [1926] W.N. 126 (reversed on a different point [1926] W.N. 271). cf. *Kreditbank Cassel v Schenkers Ltd* [1927] 1 K.B. 826.
- 209 As regards signature of agent on a cheque form on which the principal's name is printed, see *Sniderman v McGarry*, 60 D.L.R. (2d) 404 (1966).
- 210 *Elliott v Bax-Ironside* [1925] 2 K.B. 301; cf. *Kettle v Dunster and Wakefield* (1927) 43 T.L.R. 770. See also Vol.I, para.21-100.
- 211 *Chapman v Smethurst* [1909] 1 K.B. 927. See also *HB Etlin Co Ltd v Asselstyne*, 32 D.L.R. (2d) 489 (1962). cf. *Jones v John Barr & Co (Pty) Ltd* [1967] 3 S.A.L.R. 292, 301 et seq.

- 212 [1986] 1 All E.R. 564. cf. *Holtz v G Parckdale Refrigeration Ltd*, 30 O.R. (2d) 513 (1980) Can; *Plascon Evans Paints (Tvl) Ltd v Ming* [1980] 3 S.A. 378; *Bank of Nova Scotia v Radocsay*, 33 O.R. (2d) 785 (1981) Can.
- 213 *HB Etlin Co Ltd v Asselstyne*, above; *Rolfe Lubell & Co v Keith* [1979] 1 All E.R. 860; *Heller Factors Pty Ltd v Toy Corp Pty Ltd* [1984] 1 N.S.W.L.R. 121 (Aust).
- 214 [1979] 1 All E.R. 860.
- 215 [1979] 1 All E.R. 860 at 863.
- 216 *Polhill v Walter* (1832) 3 B. & Ad. 114; *West London Commercial Bank Ltd v Kitson* (1884) 13 Q.B.D. 360; *Starkey v Bank of England* [1903] A.C. 114. cf. *Gowers v Lloyds and National Provincial Foreign Bank Ltd* [1938] 1 All E.R. 766.

## (iii) - The Consideration for a Bill

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Volume II - Specific Contracts

Chapter 36 - Bills of Exchange and Banking

Section 1. - Negotiable Instruments

(b) - Bills of Exchange<sup>32</sup>

(iii) - The Consideration for a Bill

### Value and holder for value

- 36-059 Section 27(1) provides that valuable consideration for a bill may be constituted by (a) any consideration sufficient to support a simple contract<sup>217</sup>; and (b) an antecedent debt or liability. Such debt or liability is deemed valuable consideration whether the bill is payable on demand or at a future time. Thus, while past consideration is insufficient to support a simple contract, it can, nevertheless, constitute good consideration for a bill. For example, if a person whose banking account is overdrawn negotiates to his bankers a cheque, drawn by a third party, to reduce the overdraft, the banker becomes a holder for value of the cheque.<sup>218</sup> The pre-existing debt of the overdraft is a sufficient consideration for the negotiation of the cheque to the banker.

### Past consideration

- 36-060 The meaning of s.27(1)(b) was discussed in *Oliver v Davis*.<sup>219</sup> The plaintiff lent the first defendant £350 and obtained from him a post-dated cheque for £400. Before the presentment of the cheque, the first defendant persuaded the second defendant to draw a cheque for £400 in favour of the plaintiff. The cheque was forwarded to the plaintiff but, before its presentment, was countermanded by the second defendant. The second defendant did not receive any consideration for the cheque from either the plaintiff or the first defendant, and the plaintiff did not change his position in reliance on the cheque. It was held that no valuable consideration within the meaning of s.27(1) was given for the cheque. Evershed MR pointed out that the alleged consideration in this case was

not the debt of the drawer (the second defendant) but that of a third party (the first defendant). He explained that the main object of s.27(1)(b) is to establish that a past obligation of the drawer or acceptor of a cheque is valuable consideration. If the alleged consideration for the bill is not an antecedent debt or liability of the drawer or acceptor but of a third party, there must, at least, be some connection between the receipt of the bill and the antecedent debt or liability. His Lordship added that when a cheque or bill has been post-dated, the courts have, in the absence of express evidence, implied a promise of the payee (creditor) to forbear from claiming the debt from the drawer (debtor) until the date of the bill. In such cases the forbearance is valuable consideration. But even where there is an antecedent debt or liability on the part of the drawer or acceptor, it does not always follow that there is consideration for the bill, as there may be no connection between the past obligation and the giving of the bill. A fortiori, when the debt or liability is that of a third party, the matter is a question of evidence.

## Need to move from promisee

- 36-061 This analysis of Evershed MR, it is submitted, overlooks one important aspect. Section 27(1) does not modify the well-known principle that consideration must move from the promisee. It is true that a consideration given for a bill by one *party* accrues, on occasions, for the benefit of other parties to the bill.<sup>220</sup> But it does not follow that an obligation, whether past or present, given by a *stranger* to the bill is valuable consideration for it. It is true that if, at the request of the drawer or the acceptor, the payee or holder of the bill forbears from claiming a debt due to him from a third party, there is valuable consideration for the bill.<sup>221</sup> But the consideration is the forbearance of the holder, not the antecedent obligation of the third party (debtor).<sup>222</sup> If, on the other hand, the drawer draws the bill in favour of the payee not in order to induce him to give time to the third party (debtor), but, for example, in order to pay a debt of this third party, there is no valuable consideration for the bill. This is not due to the fact that the obligation of the third party (debtor) is past, but because no consideration for the bill is given by the promisee, i.e. the holder or payee. It is submitted that an antecedent debt or liability of a stranger to the bill cannot, in itself, constitute consideration.<sup>223</sup> This submission has the weight of authority behind it.<sup>224</sup> However, it seems that there may be consideration to support a cheque drawn in respect of a third party's debt where there exists a commercial relationship between the drawer of the cheque and the third party debtor.<sup>225</sup>

## Pollway Ltd v Abdullah

- 36-062 Support for this submission is to be found in two cases. The first is a dictum in *Pollway Ltd v Abdullah*.<sup>226</sup> The defendant purchased a property in an auction and gave the auctioneers a cheque payable to their order and covering the amount of the deposit due under the terms of the sale. Subsequently, the defendant refused to proceed with the sale and stopped payment of the cheque.

He resisted the auctioneers' action to enforce the cheque on the ground that no consideration was furnished by them. Rejecting this argument, the Court of Appeal held that the consideration for the cheque was either the auctioneers' warranty to the defendant—as drawer of the cheque—of their authority to take the cheque as named payees in diminution of his obligation to pay the full price to the vendors or the auctioneers' acceptance of the cheque in the place of payment of the deposit in cash. Roskill LJ emphasised that the vendors' undertaking to sell could not be regarded as consideration for the cheque, as this consideration did not move from the auctioneers, i.e. the payees.

## Hasan v Wilson

<sup>36-063</sup> The second case is *Hasan v Wilson*.<sup>227</sup> The plaintiff, a broker acting on behalf of an unnamed government, was entitled to an amount of £50,000 by way of agreed damages for the breach of a contract for the sale of gold coins concluded through his efforts between his principals and S. To facilitate further negotiations and as the plaintiff was not prepared to take a cheque drawn by S, the latter induced the defendant, a respectable businessman, to draw one cheque payable to the plaintiff for £50,000 and another cheque payable to S's wife for £5,000. In exchange for these cheques, S gave the defendant a cheque for £55,000, drawn by S's wife on the account of a certain company. It was clear from the facts that the defendant agreed to furnish his cheques solely for the purpose of assisting one of his friends, who stood to make a profit from the deal negotiated between S and the plaintiff. To protect himself, the defendant arranged for the special clearance of the cheque drawn by S's wife. When this cheque was dishonoured for want of funds, the defendant promptly stopped his own two cheques. Dismissing the action brought by the plaintiff as holder of the defendant's cheque for £50,000, Goff J held that “the antecedent debt or liability referred to in s.27(1)(b) must be an antecedent debt or liability of the promisor or drawer of the relevant bill of exchange and not of a stranger to the bill”.<sup>228</sup> The amount of £50,000 owed by S to the plaintiff could, therefore, not constitute a consideration for the defendant's cheque payable to the plaintiff. The consideration furnished by means of the cheque drawn by S's wife had, of course, failed in toto when it was dishonoured.

## Need not be adequate

<sup>36-064</sup> Apart from the exception concerning past consideration, and some other exceptions,<sup>229</sup> the doctrine of consideration remains unmodified in the case of negotiable instruments. An important general rule is that consideration need not be adequate.<sup>230</sup> However, the inadequacy of the consideration given by the holder for a bill may be evidence of bad faith or of knowledge of defects in the title of the transferor.<sup>231</sup>

## Effect of s.27(2)

- 36-065 Section 27(2) provides that, where value has at any time been given for a bill, the holder is deemed to be a holder for value as regards the acceptor and all persons who became parties to the bill prior to such time. Thus, any party who takes the bill after consideration has been given for it is deemed a holder for value. This is, to a certain extent, a modification of the rule that consideration must move from the promisee. Two cases illustrate the effect of this provision. In *Scott v Lifford*<sup>232</sup> a debtor asked the creditor to give him time. It was agreed that the debtor would accept a bill drawn on him by his uncle, the defendant, in favour of the creditor. The bill was dishonoured by the acceptor and the creditor sued the defendant, as drawer. It was held that, as the creditor (holder) gave value for the bill to the debtor (acceptor), the creditor was a holder for value of the bill and was entitled to sue the defendant (drawer) although the latter received no value. However, as the creditor gave time to the debtor against this bill, it may be argued that the drawer in fact obtained consideration by the creditor's forbearance. In *Diamond v Graham*<sup>233</sup> H gave G his own cheque in return for G's cheque, which was payable to D's order and in reliance on which D gave H a loan. It was held that D was a holder for value of G's cheque. Consideration for G's cheque was given, in the first place, by H when he drew his own cheque in favour of D and, secondly, by D himself when he granted the loan to H on the basis of G's cheque. Emphasising that each one of these two considerations was adequate Danckwerts LJ said:

“There is nothing in the subsection which appears to require value to have been given by the holder as long as value has been given for the cheque ...”<sup>234</sup>

An important effect of s.27(2) is that a transferee of a bill, e.g. a banker, who gives value for it to the transferor becomes a holder for value and can sue previous parties to the bill even if these did not obtain any consideration for it.<sup>235</sup>

## Review by Court of Appeal

- 36-066 The most recent analysis of s.27(1) and (2) is to be found in the Court of Appeal's decision in *MK International Development Co Ltd v Housing Bank*.<sup>236</sup> A relative of King Hussein of Jordan, one N, required office space and some financial accommodation during a few months spent in London in 1983 and 1984. K made the required arrangements through two companies controlled by him. The plaintiffs, MK, provided the necessary space against N's undertaking to reimburse an amount of £1,000 towards expenses and Y Ltd granted N a substantial loan. When N defaulted, K wrote directly to King Hussein, using MK's letterhead, asking that pressure be put on N to repay his debts. In due course, K received a letter from the Royal Court, enclosing a cheque for £50,965,

drawn by the H Bank in Amman on the Arab Bank in London and made payable to MK or bearer. However, before MK had the time to clear the cheque, N contacted the King's staff and denied the existence of any indebtedness to K. The cheque was thereupon countermanded and accordingly dishonoured by the Arab Bank by non-payment. The Court of Appeal held that leave to serve a summons outside the jurisdiction ought to be granted as the contract was made in England and was governed by English law. Their Lordships further concluded that, as there was an arguable case on the issue respecting the consideration given for the cheque, the H Bank was to be granted unconditional leave to defend. The issue in question arose, principally, as the cheque was payable to MK whilst the amount covered by it—except the £1,000 respecting the office expenses—was due to Y or to K. MK sought to overcome the apparent absence of consideration by raising four arguments.

## Argument respecting subs.(1)(a)–(b)

36-067 MK's first argument was that N's debts furnished past consideration which, under s.27(1)(b), was adequate to support an undertaking given in a negotiable instrument. MK's second and complementary plea was that there was a "consideration sufficient to support a simple contract", within the meaning of s.27(1)(a) as, in reliance on the cheque, K and MK forbore to enforce their respective claims against N. Mustill LJ pointed out that<sup>237</sup>:

"… the line between the two ways of putting the case seems vanishingly thin, for if the antecedent debt is to furnish any useful consideration this must be because it is regarded as nullified by the substitution of the new obligation; and the distinction between a contract which causes the old debt to cease to exist and one which requires the creditor not to enforce it appears of little practical significance."

However, as the authorities treated the pleas as distinct, his Lordship dealt with them separately. As regards s.27(1)(b), Mustill LJ concluded that N's antecedent liabilities did not furnish a valid consideration for the cheque drawn by the H Bank in favour of MK. N was a stranger to the cheque and hence his past debts, due to Y or to K, did not constitute a valid consideration for the cheque drawn in favour of MK. Mustill LJ then turned to subs.1(a) and the forbearance issue. Agreeing that such forbearance would usually constitute good consideration, his Lordship pointed out that only a small amount, from the total sum of the cheque, was owed by N to MK. Could MK's forbearance to enforce that minute claim furnish valuable consideration for the total amount of the cheque? Mustill LJ took the view that the answer to this question did not depend on whether consideration had to be adequate rather than real, but on whether a partial absence of consideration provided a good defence to MK's action on the cheque. He pointed out that, although this question had not been the subject of a direct decision, it was established that "an ascertained cross-claim under the contract which formed the consideration for the bill [was] a good defence pro tanto as against an immediate party". His Lordship concluded:

“There seems no logical reason why, if subsequent failure of an ascertained part of the consideration is a defence as between immediate parties, the same should not be so where, as to part, the consideration was never there in the first place.”

This reasoning led Mustill LJ to the conclusion that MK could have a good cause of action on the bill, albeit limited to the amount of the debt owed to it. His Lordship emphasised, however, that due to the dearth of direct authority, he did not feel the “confidence which one ought to be able to feel on a point so apparently simple”.<sup>238</sup>

## Critique of decision respecting s.27(1)

- 36-068 It is important to recall that the instant judgment was delivered in respect of issues raised in a preliminary hearing. A final answer would undoubtedly depend on the facts to be established at a trial. The issue would be whether MK’s indulgence or forbearance was related to the issuing of the cheque and, further, on whether it was exercised in reliance on a request—express or implied—attributable to the H Bank. Thus, if, on the facts, the relevant forbearance constituted a consideration for the payment to be obtained from the King, would it, necessarily, be also a consideration for the H Bank’s own undertaking in the cheque? From a purely commercial point of view, the H Bank issued its cheque at the instruction of the King’s staff and the consideration obtained for it was the amount debited to the relevant account. It may be asserted, as against this point, that MK may still have forborne from exercising its rights against N when it received the cheque. The real issue is whether it could be shown on the facts that the claim against N could or would have been pursued but for MK’s receipt of the cheque. A great deal might, for instance, depend on the length of time that had passed between the date on which the cheque was received by MK and the date on which it was dishonoured by the Arab Bank.

## MK’s case: s.27(2)

- 36-069 The third attempt to establish the existence of a valid consideration centred on an argument based on s.27(2). It was argued that as the King had given value for the cheque, MK was deemed to be a holder for value. Mustill LJ indicated that the authorities suggested that s.27(2) applied only where the instrument had been negotiated and not in favour of the original payee. He was, further, inclined to the view that, in any event, the consideration specified in s.27(2) would have to move from a promisee of the cheque and not from a stranger, such as the King. The fourth and final attempt to establish the presence of consideration was based on the fact that the cheque was payable to “MK or bearer”. Mustill LJ observed that, if the cheque was, accordingly, payable to bearer, then the

King could well be considered its first holder. Under s.27(2), the consideration furnished by him would then support the claim of any subsequent holder, such as MK.

## Lienee as holder for value under s.27(3)

- 36-070 Section 27(1) and (2) define the type of consideration that is adequate in the context of the law of bills of exchange. Subsection (3) makes special provisions respecting the position of a lienee: where the holder of a bill has a lien on it, arising either from a contract or by implication of law, he is deemed to be a holder for value to the extent of the sum for which he has the lien.<sup>239</sup> A holder who has taken a bill against payment of part of its sum to the transferor is entitled to recover the whole amount of the bill, and on recovery becomes trustee for the person entitled to the remainder of the money, after deducting the amount he has advanced.<sup>240</sup>

## Accommodation bill or party

- 36-071 Accommodation bills are dealt with by s.28, which provides that an accommodation party to a bill is a person who has signed a bill as drawer, acceptor or indorser without receiving value therefor and for the purpose of lending his name to some other person. An accommodation party is liable on the bill to a holder for value; and it is immaterial whether, when such holder took the bill, he knew such party to be an accommodation party or not.<sup>241</sup> A bill which is signed by one or more accommodation parties is frequently spoken of as an accommodation bill, but this is incorrect. An accommodation bill is a bill in which the acceptor (i.e. the principal debtor according to the terms of the instrument) is in substance a mere surety for some other person who may or may not be a party thereto.<sup>242</sup> The bill is discharged when it is honoured by the accommodated party.<sup>243</sup>

## Holder in due course

- 36-072 Section 29 provides that four requirements must be fulfilled before a person may be considered a holder in due course.<sup>244</sup> First, he must take the bill when it is complete and regular on its face. Secondly, he must take it before it is overdue<sup>245</sup> and without notice that it was previously dishonoured, if such was the fact. Knowledge that a bill is bound to be dishonoured may also be relevant. Thus, a Canadian authority suggests that a holder, who has taken a cheque with the knowledge of its having been countermanded, is not a holder in due course.<sup>246</sup> Thirdly, he must take it in good faith and without having notice of any defect in the title of the person who negotiates the bill to him. In particular the title of the person who negotiates the bill is defective when he

obtained the bill or its acceptance by fraud, duress or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith or under circumstances amounting to fraud.<sup>247</sup> Last, a holder in due course must take the bill for value, i.e. consideration.<sup>248</sup> Apart from these requirements, it follows from the language of s.29 that a holder in due course must be a “holder who has taken a bill ...”.<sup>249</sup> It has been held that these words refer to a holder to whom the bill has been negotiated and that the original payee of a bill cannot, therefore, be a holder in due course.<sup>250</sup> The second requirement specified in s.29 has not given rise to much litigation and the last has been discussed above in relation to a holder for value; but it will be useful to examine in detail the other two requirements.

## Regularity

- 36-073 Whether a bill is complete and regular on its *face* is a question of fact, and must be determined by looking only at the bill. However, an Australian authority suggests that in cases of doubt there is room for expert evidence and that regard may be had to banking practice.<sup>251</sup> The word “face” in s.29 includes the back of the bill.<sup>252</sup> A bill is not considered complete if any material detail is missing, e.g. the name of the payee, the amount payable or any necessary indorsement.<sup>253</sup> A bill is not incomplete merely because it has not been accepted.<sup>254</sup> When the blanks in a bill, which was incomplete when issued, are filled up before it comes into the hands of a holder in due course, he is entitled to enforce it even if it has not been completed strictly in accordance with the drawer’s authority.<sup>255</sup>
- 36-074 A bill is considered irregular whenever anything on the face or the back of the bill can give rise to doubts or is out of the ordinary, e.g. if there is a discrepancy between the words and figures denoting the amount,<sup>256</sup> or if the bill is pasted together after having been torn.<sup>257</sup> But a bill is, in all probability, not irregular merely because it is post-dated.<sup>258</sup> The indorsement of the payee is irregular when it differs materially from the name written by the drawer on the front of the bill.<sup>259</sup> Thus, if a bill is indorsed “J. Williams” instead of “John Williams”, the indorsement is not irregular. But where a payee is described on the face of the bill by the wrong name (e.g. W. Williams) and then indorses the bill in his true name (e.g. John Williams) the discrepancy between the front and the back of the bill renders the bill “irregular” within the meaning of s.29.<sup>260</sup> In order to achieve regularity the payee should in such cases add an indorsement in the misnomer by which he was described by the drawer. Titles and descriptions of the payee mentioned on the front of the bill, such as “Mr” or “Dr”, may be omitted in the indorsement without impairing its regularity, but the omission of the word “company” may be of considerable significance and its omission, certainly on a foreign bill, renders an indorsement irregular.<sup>261</sup> If the indorsements on the back of the bill are not arranged in their correct sequence, the bill is not, necessarily, irregular. Thus, where the indorsement of the payee was written beneath those of two directors of the company

which drew the bill, evidence was admitted to show that they signed their names above the payee's indorsement in order to assume liability towards him as guarantors. The bill was, therefore, not irregular on its face.<sup>262</sup>

## Good faith

- 36-075 As regards the requirement that the holder must take the bill in good faith and without knowledge of the defects in the title of the transferor, s.90 specifies that a thing is deemed to be done in good faith where it is in fact done honestly, whether it is done negligently or not. In *Jones v Gordon*<sup>263</sup> Lord Blackburn said that in order to establish that a holder did not take a bill in good faith:

“... it is necessary to show that the person who gave value for the bill, whether the value given be great or small, was affected with notice that there was something wrong about it when he took it. I do not think it is necessary that he should have notice of what the particular wrong was”.

The word “notice” which appears in this dictum, as well as in s.29, means actual though not formal notice, i.e. either knowledge of the facts, or a suspicion of something wrong combined with a wilful disregard of the means of knowledge. While the doctrine of constructive notice does not apply in the law of negotiable instruments, the holder is not entitled to disregard a “red flag” which has raised his suspicions.<sup>264</sup> The knowledge in question may be that of the holder himself or that of an executive in his employment, even if that person's involvement is contrary to the holder's interest.<sup>265</sup>

## Notice of facts respecting underlying transaction

- 36-076 The defect of title or suspicious circumstance, knowledge of which precludes the holder or transferee from holding the bill in due course, may relate not only to a matter pertinent to the transferor's title to the bill but also to one concerning its negotiation or issuing. Thus, in a Canadian authority, *Williams and Glyn's Bank v Belkin Packaging Ltd*,<sup>266</sup> it was held that a bank's knowledge, that promissory notes discounted by it had been issued with a view to their being retained by the payee and replaced by a subsequent issue of notes if a certain commercial event took place, constituted notice of a defect which precluded the bank from becoming a holder in due course.<sup>267</sup> The rule is, however, subject to one limitation, which was defined in *Österreichische Länderbank v S'Elite Ltd*.<sup>268</sup> A bill of exchange was negotiated to the plaintiff bank by the drawer who, to the bank's knowledge, was insolvent. The acceptors dishonoured the bill and sought leave to defend an action to enforce it on the ground that the transfer of the bill involved an undue

preference under s.44(1) of the Bankruptcy Act 1914.<sup>269</sup> Their argument was that, in view of these circumstances, the negotiation was tainted with fraud within the meaning of s.29 of the Bills of Exchange Act. Rejecting this argument, the Court of Appeal held that to vitiate the rights of a holder in due course the alleged circumstances had to involve a common law fraud.

- 36-077 An altogether different approach is taken by Canadian authorities, which have held that a finance company, which has a close business relationship with a dealer, may not claim to be a holder in due course of bills of customers of the dealer negotiated by him to the finance company in connection with purchases by the customers from the dealer, financed by the company.<sup>270</sup> However, it is difficult to agree that, if such a finance company has no “notice” within the meaning of s.29 of any irregularity or suspicious circumstance concerning a transaction financed by it, it may not be a holder in due course of bills negotiated to it by the dealer.

## Basic rights of holder in due course

- 36-078 A holder in due course takes the bill free from any defects in the title of all prior parties as well as from any equities available to prior parties among themselves, and is entitled to enforce payment against all parties liable on the bill.<sup>271</sup> The same rights accrue to any holder (whether for value or not) who derives his title from a holder in due course, provided he is not himself a party to any fraud affecting the bill.<sup>272</sup> Mere knowledge of a fraud or illegality by a person who has derived his title from a holder in due course does not deprive him of these rights.<sup>273</sup> It is noteworthy that in certain circumstances the rights of a holder in due course may be enforced even by the drawer of the bill. This is the position where, after the dishonour of the bill by the acceptor, the drawer regains its possession by paying it to the holder in due course.<sup>274</sup>

## Presumption of good faith

- 36-079 Every party whose signature appears on a bill is prima facie deemed to have become a party thereto for value.<sup>275</sup> Every holder of a bill is prima facie deemed to be a holder in due course; but if the acceptance, issue or subsequent negotiation of the bill was affected with fraud, duress or illegality, the burden of proof is shifted, and the holder must prove that, subsequent to the alleged fraud or illegality, value was in good faith given for the bill.<sup>276</sup> Thus, once a fraud is proved, the burden of proof is shifted to the holder who must then show not only that value has been given for the bill, but also that he took the bill in good faith and without notice of the fraud.<sup>277</sup> If the holder can discharge this onus he is, again, in the position of a holder in due course. Thus, in *Bank für Gemeinwirtschaft AG v City of London Garages*,<sup>278</sup> where the holder proved that he had discounted bills in good

faith and without any knowledge or suspicion of illegality connected with them, the court refused to grant the drawer, the acceptors and the indorsers leave to defend an action brought by the holder in summary procedure under RSC Ord.14 r.1 (see now CPR Pt 24).

## Position of original payee

- 36-080 As the original payee of the bill is not a holder in due course,<sup>279</sup> he cannot be deemed to be one under s.30(2). But there is authority for the view that, when the bill is in the hands of a payee who has taken it in good faith and for value, the drawer or acceptor can escape liability only if he is able to prove that the payee was aware of a defect. In *Talbot v Von Boris*<sup>280</sup> a husband forced his wife to become together with him the joint maker of a promissory note. It was held that the onus was on the wife, who had to prove that the payee was aware of the duress. This case was, however, decided before it was held by the House of Lords that the original payee of a bill could not be a holder in due course. As s.38(2) of the Act confers a right to enforce a bill despite defects in title of prior parties only on a holder in due course, it is to be doubted whether the rights of the original payee are not defeated by defects of this type.<sup>281</sup> On this basis, it could be questioned whether *Talbot v Von Boris* was rightly decided although, in *Hasan v Wilson*,<sup>282</sup> Goff J, who considered himself bound by this decision, said that a defect, such as duress or fraud committed by a third party, would constitute a defence only if the payee was proved to have had notice thereof. More recently, in *Dextra Bank & Trust Co Ltd v Bank of Jamaica*,<sup>283</sup> the Privy Council, applying *Talbot v Von Boris* and *Hasan v Willson*, stated that the payee of a cheque, obtained by a third party from the drawer in fraud of the drawer, would acquire good title to the cheque provided that the payee had no notice of that fraud.<sup>284</sup>

## Effect of Consumer Credit Act 1974

- 36-081 It will be recollected that s.123(1) prohibits the taking of bills of exchange and of promissory notes by an “owner” or “creditor” in discharge of sums payable under “regulated agreements” and that s.123(3) prohibits the taking of any negotiable instrument (including a cheque) as security for the payment of such sums.<sup>285</sup> Under s.123(2), cheques may be taken in discharge of payment of amounts due under regulated agreements, but negotiation is prohibited except to a banker. Significant exemptions from the restrictions imposed by s.123 are made in two Orders. The first exempts consumer hire agreements, which have a connection with a country outside the United Kingdom, provided the goods are hired in the course of the hirer’s business.<sup>286</sup> The second exempts credit transactions financing international trade where credit is provided to the debtor in the course of his business.<sup>287</sup> Such agreements are not “regulated agreements” and hence fall outside the ambit of s.123.

## Bill taken in violation

- 36-082 What is the position of a person who takes a negotiable instrument in disregard of the Act and what are the rights of a transferee? According to s.125(1) a person who takes a negotiable instrument (other than a cheque) in payment in contravention of s.123(1) or who takes a negotiable instrument (including a cheque) as security in contravention of s.123(3) is not a holder in due course and is not entitled to enforce it. But the Act does not appear to affect the rights of a person to whom such an instrument is negotiated. Provided the transferee is not himself the owner or creditor of the regulated agreement within the meaning of the Act,<sup>288</sup> his taking the instrument by way of transfer is not prohibited by s.123. Moreover, under s.125(4), nothing in the Act affects the rights of a holder in due course of any negotiable instrument. It is therefore clear that the Act contemplates the enforcement by a transferee—who is a holder in due course—of an instrument extracted from the debtor or hirer in contravention of s.123. Another surmise—based on reading ss.123 and 125 together with ss.29 and 30 of the Bills of Exchange Act 1882—is that a person may be a holder in due course of an instrument although he discounts it with the knowledge of its having been taken by the transferor in violation of subss.(1) or (3) of s.123. This startling conclusion is based on the fact that neither the taking of the instrument by the owner or creditor nor its negotiation is deemed to be a defect of title for the purposes of s.29 of the 1882 Act.<sup>289</sup> Consistently, the taking and the negotiation of such an instrument have not been added to the list of factors which, under s.30(2) of the 1882 Act, shift on the transferee or holder the onus of proving good faith and the furnishing of value.

## Negotiation of cheque to non-banker

- 36-083 The effect of the negotiation of a cheque, taken for payment of an amount due under a regulated agreement, to a person other than a banker is governed by s.125(2):

“Where a person negotiates a cheque in contravention of s.123(2), his doing so constitutes a defect in his title within the meaning of the Bills of Exchange Act 1882.”

The phrase “defect of title” occurs in s.29(1)(b), according to which a person, who takes a bill of exchange with notice of a defect in the transferor’s title, is not a holder in due course. It follows that a person (other than a banker), who discounts a cheque with the knowledge of its having been drawn for payment of an amount due under a regulated agreement, is not a holder in due course. However, the burden of proving the discounter’s knowledge of the relevant facts rests on the drawer of the cheque: the prohibited negotiation has not been added to the list of factors which, under s.30(2), shifts the onus of proof on the person seeking to enforce the bill.

## Indemnity

- 36-084 It is important to emphasise that a person who at the suit of a holder in due course is forced to pay a bill or note taken from him in contravention of s.123(1) or (3), or a cheque negotiated in contravention of s.123(2), is entitled to be indemnified by the creditor or owner. But this right—conferred by s.125(4) of the Consumer Credit Act 1974—is of little consolation to the consumer where the creditor or owner is insolvent.<sup>290</sup>

## Footnotes

- 32 For detailed works on the subject, see Chalmers and Guest on Bills of Exchange and Cheques, 18th edn (2017); for the special aspects respecting the use of bills of exchange in international trade, see Benjamin's Sale of Goods, 11th edn (2021), Ch.22.
- 217 As regards a situation in which the consideration is illegal, e.g. under the *Gaming Act 1968* (since repealed and replaced by the *Gambling Act 2005*), see *Ladup v Shaik [1983] Q.B. 225*.
- 218 *McLean v Clydesdale Banking Co (1883) 9 App. Cas. 95*. See also *Ex p. Richdale (1882) 19 Ch. D. 409; Royal Bank of Scotland v Tottenham [1894] 2 Q.B. 715; Barclays Bank Ltd v Astley Industrial Trust Ltd [1970] 2 Q.B. 527, 539*. For a modern case concerning the meaning of “consideration sufficient to support a simple contract” within the meaning of s.27(1)(a), see *Sharp v Ellis [1972] V.R. 137*. As regards a consideration which fails *in toto*, see *Miller Associates (Australia) Pty Ltd v Bennington Pty Ltd (1975) 7 A.L.R. 144 noted in (1981) 55 A.L.J. 135*.
- 219 *[1949] 2 K.B. 727*.
- 220 e.g. in the case of a person who, without giving consideration for it, obtains it from a holder in due course: s.29(3); and see below, respecting s.27(2).
- 221 For a recent example, see *Banque Cantonale de Genève v Sanomi [2016] EWHC 3353 (Comm)* at [48]–[62].
- 222 *[2016] EWHC 3353 (Comm)* at [47].
- 223 In *Crears v Hunter (1887) 19 Q.B.D. 341*, cited by Evershed MR, the holder of a promissory note forbore from claiming a debt due to him from a third party at the request of the maker of the note. Consideration moved from the maker. See also the decision of Somervell LJ in *Oliver v Davis*, above, especially at 741. The view taken in cases decided in Australia and New Zealand is that past consideration furnished by a third party constitutes good consideration under s.27(1)(a) provided there is a close link between the issuing of the bill and the consideration provided in the underlying transaction: *Electrical Technologies Ltd v Auckland Electrical Services Ltd [1995] 3 N.Z.L.R. 726* and cases there cited including *Walsh, Spriggs, Nolan and Finney v Hoag & Bosh Pty Ltd (1976) 12 A.L.R. 411* Aust;

- Bonior v Asiery Ltd [1968] N.Z.L.R. 254; Finch Motors Ltd v Quin [1980] 2 N.Z.L.R. 513; International Ore and Fertilizer Corp v East Coast Fertilizer Co Ltd [1987] 1 N.Z.L.R. 9.*
- 224 *Oliver v Davis [1949] 2 K.B. 727; Hasan v Willson [1977] 1 Lloyd's Rep. 431; MK International Development Co Ltd v Housing Bank [1991] 1 Bank. L.R. 74; Lomax Leisure Ltd v Miller [2008] 1 B.C.L.C. 262, [47]–[50]; Confezioni v Rozenthal [2011] EWHC 4105 (QB) at [19]–[27].* See generally, Chalmers and Guest on Bills of Exchange and Cheques, 18th edn (2017), paras 4-023 et seq.; Byles on Bills of Exchange and Cheques, 30th edn (2020), paras 19-011 et seq.
- 225 *Autobiography Ltd v Byrne [2005] EWHC 213 (Ch);* distinguished in *Lomax Leisure Ltd v Miller [2008] 1 B.C.L.C. 262, [47]–[50].* See further, E.P. Ellinger, E. Lomnicka and C.V.M. Hare, Ellinger's Modern Banking Law, 5th edn (2011), pp.400, 435–436.
- 226 *[1974] 1 W.L.R. 493, 497.*
- 227 *[1977] 1 Lloyd's Rep. 431.*
- 228 *[1977] 1 Lloyd's Rep. 431* at 440–441. See also *AEG (UK Ltd v Lewis [1993] 1 C.L. 132, noted in [1993] J.B.L. 275.* Contrast *Walsh, Spriggs, Nolan and Finney v Hoag & Bosh Pty Ltd (1976) 12 A.L.R. 411* Aust. And see *Geva (1981) 39 C.L.J. 360.*
- 229 As to which, see below.
- 230 *Jones v Gordon (1877) 2 App. Cas. 616; Adib el Hinnawi v Yacoub Fahmi [1936] 1 All E.R. 638.*
- 231 *Jones v Gordon*, above. See also *Allen v Davis (1850) 20 L.J. Ch. 44; Simons v Cridland (1862) 5 L.T. 523.*
- 232 *(1808) 1 Camp. 246.*
- 233 *[1968] 1 W.L.R. 1061; cf. Pollway Ltd v Abdullah [1974] 1 W.L.R. 493, 497.*
- 234 *[1968] 1 W.L.R. 1061, 1064.*
- 235 Below, paras 36-098 et seq.
- 236 *[1991] 1 Bank. L.R. 74.*
- 237 *[1991] 1 Bank. L.R. 74* at 78.
- 238 *[1991] 1 Bank. L.R. 74* at 79. Mustill LJ referred to Robert Goff J's words in *Hasan v Wilson [1977] 1 Lloyd's Rep. 431* at 440–441, cited above, para.36-063, and to *Oliver v Davis [1949] 2 K.B. 727; Diamond v Graham [1968] 1 W.L.R. 1061; and Pollway v Abdullah [1974] 1 W.L.R. 493.* But cf. *Walsh, Spriggs, Nolan and Finney v Hoag & Bosh Pty Ltd (1976) 12 A.L.R. 411* Aust.
- 239 s.27(3); and see *Redfern v Rosenthal (1902) 18 T.L.R. 718; Re Keever [1967] Ch. 182; Barclays Bank Ltd v Astley Industrial Trust Ltd [1970] 2 Q.B. 527, 539* (showing that if, in addition, the requirements of s.29(1) are satisfied, such a lien would render the holder a holder in due course); *Bank of Credit and Commerce Int SA v Dawson [1987] F.L.R. 342.*
- 240 *Reid v Furnival (1833) 1 Cr. & M. 538.* A stay of proceedings may in such a case be granted, if in an action on the bill, it turns out that the claimant is trustee of part of the sum and the defendant has a claim which could be pleaded by way of set-off against the beneficiary of the trust: *Barclays Bank Ltd v Aschaffenburger Zellstoffwerke AG [1967] 1 Lloyd's Rep. 387.*
- 241 s.28. The person accommodated is not discharged if the bill is not duly presented for payment (s.46(2)), or by the absence of notice of dishonour (s.50(2)) or of protest (s.51(9)).
- 242 Chalmers and Guest on Bills of Exchange and Cheques, 18th edn (2017), para.4-042.

- 243 s.59(3).
- 244 The rights of a holder in due course are stated in s.38(2).
- 245 As to when a bill payable on demand becomes overdue, see s.36(3).
- 246 *Galco Enterprises Ltd v Hatty* (1979) 27 N.B.R. (2d) 608.
- 247 s.29(2).
- 248 The orthodox view, which relies on the wording of s.29(1), is that a holder becomes a holder in due course only insofar as he acquires the bill for value or, in other words, furnishes consideration for it: Chalmers and Guest on Bills of Exchange and Cheques, 18th edn (2017), para.4-057. But see *Clifford Chance v Silver* [1992] N.P.C. 103 in which the Court of Appeal, on a summary judgment application, held that, under s.27(2), the holder in due course could, equally, attain his status in reliance on value provided by a previous party. For a critique, see *Hitchens* [1993] J.B.L. 571.
- 249 But he may become a holder in due course by reason of his having a lien over the bill: s.27(3) and *Barclays Bank Ltd v Astley Industrial Trust Ltd* [1970] 2 Q.B. 527, 539.
- 250 *RE Jones Ltd v Waring and Gillow Ltd* [1926] A.C. 670, 680, HL; *Lloyds Bank Ltd v Chartered Bank of India, Australia and China* [1929] 1 K.B. 40, 57, 75, CA.
- 251 *Heller Factors Pty Ltd v Toy Corp Pty Ltd* [1984] 1 N.S.W.L.R. 121, 140–142.
- 252 *Arab Bank Ltd v Ross* [1952] 2 Q.B. 216, 226.
- 253 *Whistler v Forster* (1863) 14 C.B.(N.S.) 248, 258 (indorsement of payee missing on a bill payable to order); *Slingsby v District Bank* [1931] 2 K.B. 588 (*affirmed* [1932] 1 K.B. 544); *Arab Bank Ltd v Ross*, above. Section 2 of the Cheques Act 1957, however, creates an exception as regards discounting bankers: see below, para.36-383.
- 254 *National Park Bank of New York v Berggren & Co* (1914) 110 L.T. 907.
- 255 s.20. And see above, para.36-035.
- 256 For an extreme case, concerning a difference between the description of the currency accompanying the amount in words and its description preceding the amount in figures, see *Banco di Roma v Orru* [1973] 2 Lloyd's Rep. 505.
- 257 See on this point *Scholey v Ramsbottom* (1810) 2 Camp. 485; *Ingham v Primrose* (1859) 7 C.B.(N.S.) 82; *Redmayne v Burton* (1860) 2 L.T. 324.
- 258 *Hitchcock v Edwards* (1889) 60 L.T. 636 and see below, para.36-157.
- 259 *Arab Bank Ltd v Ross* [1952] 2 Q.B. 216.
- 260 Although the indorsement is valid for the purpose of transferring the title, provided there was an intention to make the bill payable to this payee: s.31(3) and *Arab Bank Ltd v Ross*, above.
- 261 *Arab Bank Ltd v Ross*, above.
- 262 *Lombard Banking Ltd v Central Garage and Engineering Co Ltd* [1963] 1 Q.B. 220. See also *Yeoman Credit Ltd v Gregory* [1963] 1 W.L.R. 343.
- 263 (1877) 2 App. Cas. 616, 628. See also *Bank of Cyprus (London) Ltd v Jones* (1984) 134 New L.J. 522. As to the distinction between negligence and lack of good faith, see *Raphael v Bank of England* (1855) 17 C.B. 161. See also *Baker v Barclays Bank Ltd* [1955] 1 W.L.R. 822.
- 264 *Raphael v Bank of England*, above.
- 265 *Bank of Credit and Commerce Int SA v Dawson and Wright* [1987] F.L.R. 342.
- 266 [1982] 6 W.W.R. 481, Can SC.

- 267 And see *Bank of Credit and Commerce Int SA v Dawson and Wright*, above. Note also that, where a defect of title was cured before that date on which delivery became unconditional, the transferee's status as a holder in due course is not impaired by notice of the original defect: *Clifford Chance v Silver* [1992] N.P.C. 103.
- 268 [1980] 2 All E.R. 651, overruling *Banca Popolare di Novara v John Livanos & Sons Ltd* [1965] 2 Lloyd's Rep. 149.
- 269 Now the Insolvency Act 1986 ss.239, 340.
- 270 *Rand Investments Ltd v Bertrand*, 58 D.L.R. (2d) 372 (1966); *Keelan v Norray Distributing Ltd*, 62 D.L.R. (2d) 466 (1967). See also *Stenning v Radio and Domestic Finance Ltd* [1961] N.Z.L.R. 7. Contrast *Automobile Finance of Australia Ltd v Henderson* (1928) 23 Tas.L.R. 9; *Scottish Loan Finance Co Ltd v Payne* (1935) 52 W.N.(N.S.W.) 175.
- 271 s.38(2). But see para.36-070 above, and below, para.36-099.
- 272 s.29(3).
- 273 *May v Chapman* (1847) 16 M. & W. 355.
- 274 *Jade International Steel Stahl und Eisen GmbH & Co Kg v Robert Nicholas (Steels) Ltd* [1978] Q.B. 917, 924, 926; *First Discount Ltd v Cranston* [2002] EWCA Civ 71 at [4] and [17].
- 275 s.30(1).
- 276 s.30(2), and see *Berrett v Smith* [1965] N.Z.L.R. 460. See also *Banque du Rhône SA v Fuerst Day Lawson Ltd* [1968] 2 Lloyd's Rep. 153, where it was held that if the holder, who seeks to enforce the bill, resides in a foreign jurisdiction and the drawee alleges that the acceptance was obtained by means of fraud, the court may—under RSC Ord.23 r.1, preserved by CPR—order the holder to give security for costs.
- 277 *Tatam v Haslar* (1889) 23 Q.B.D. 345; *Baker v Barclays Bank Ltd* [1955] 1 W.L.R. 822; *Bank of Cyprus (London) Ltd v Jones* (1984) 134 New L.J. 522.
- 278 [1971] 1 W.L.R. 149. See also *Barclays Bank Ltd v Astley Industrial Trust Ltd* [1970] 2 Q.B. 527, 536–537; *Begley Industries Ltd v Cramp* [1977] 2 N.Z.L.R. 207.
- 279 See above, para.36-072; *RE Jones Ltd v Waring and Gillow Ltd* [1926] A.C. 670.
- 280 [1911] 1 K.B. 854. cf. *Herdman v Wheeler* [1902] 1 K.B. 361, 372, 375; *Lloyds Bank Ltd v Cooke* [1907] 1 K.B. 794, 807–808.
- 281 *Ayres v Moore* [1940] 1 K.B. 278, 286 et seq.
- 282 [1977] 1 Lloyd's Rep. 431, 441.
- 283 [2002] 1 All E.R. (Comm) 193.
- 284 At [22]. And see *Abbey National Plc v JSF Finance & Currency Exchange Co Ltd* [2006] EWCA Civ 328, where, for the purposes for an interlocutory application, the Court of Appeal held that the payee's knowledge should be assessed taking account of the wider circumstances in which the transaction took place, including the fact that there had been a number of similar, previous transactions which the payee knew to be fraudulent.
- 285 See above, para.36-007. See also below, paras 41-197 et seq.
- 286 Consumer Credit (Negotiable Instruments) (Exemption) Order 1984 (SI 1984/435).
- 287 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001/544 art.60C(8).

- 288 Note that under [s.189](#) the terms “creditor” and “owner” include assignees of a regulated agreement but do not include transferees of bills of exchange.
- 289 The list of factors which constitute a defect of title, enumerated in [s.29\(2\)](#), is not exhaustive. But in view of the specific designation of a prohibited negotiation of a cheque to a non-banker as a defect of title within the meaning of the Act, it seems probable that the failure to equally include the negotiation of instruments taken in contravention of subss.(1) and (3), precludes its being treated as a defect of title on an *eiusdem generis* basis.
- 290 But note that the drawer may be able to base a defence on the rationes of the decisions cited above.

## **(iv) - Transfer of Bills**

**Chitty on Contracts 34th Ed.**

**Consolidated Mainwork Incorporating First Supplement**

**Volume II - Specific Contracts**

**Chapter 36 - Bills of Exchange and Banking**

**Section 1. - Negotiable Instruments**

**(b) - Bills of Exchange<sup>32</sup>**

**(iv) - Transfer of Bills**

### **Negotiation of a bill**

36-085 A bill is negotiated when it is transferred from one person to another in such a manner as to constitute the transferee the holder of the bill.<sup>291</sup> A bill payable to bearer is negotiated by mere delivery.<sup>292</sup> A bill payable to the order of a specified payee is negotiated by the indorsement of the payee, or the holder to whom the bill has been specially indorsed, and delivery of it.<sup>293</sup> Section 31(4) provides that where the holder of a bill payable to his order transfers it for value without indorsing it, the transfer gives the transferee such title as the transferor had in the bill, and the transferee, in addition, acquires the right to have the indorsement of the transferor.<sup>294</sup> However, until this has been obtained the transferee is in the position of an assignee of a chose in action, and has no better title than the assignor.<sup>295</sup> He does not have a right to indorse the bill in the transferor's name and it has been suggested that he may not be able to sue on the bill without joining the transferor as a party to the action.<sup>296</sup>

Section 31(5) provides that where a person is under an obligation to indorse a bill in representative manner, he is entitled to indorse in terms negativing personal liability.<sup>297</sup>

### **Valid indorsement<sup>298</sup>**

36-086 Section 32 explains when an indorsement is valid and effective to negotiate a bill:

(a) According to [s.32\(1\)](#) it must be written on the bill itself and be signed by the indorser. The signature of the indorser on the bill, without additional words, is sufficient. An indorsement written on an allonge (i.e. an attached slip) or a “copy” of a bill, issued or negotiated in a country where such copies are recognised, is deemed to be written on the bill itself. Although it is usual to indorse a bill on its back it has been held that an indorsement on the front of the bill is valid. <sup>[299](#)</sup>

(b) According to [s.32\(2\)](#), the indorsement must transfer the entire bill. A partial indorsement, that is to say, an indorsement which purports to transfer to the indorsee a part only of the amount payable, or which purports to transfer the bill to two or more indorsees severally, does not operate as a negotiation of the bill.

(c) According to [s.32\(3\)](#), where a bill is payable to the order of two or more payees or indorsees who are not partners, all must indorse it, unless the one indorsing has authority to indorse for the others. But where the bill is payable to two payees in the alternative, the indorsement of either is sufficient. <sup>[300](#)</sup>

(d) According to [s.32\(4\)](#) where, in a bill payable to order, the payee or indorsee is wrongly designated, or his name is misspelt, he may indorse the bill as therein described, adding, if he thinks fit, his proper signature. This subsection is not imperative in terms. If, despite the misnomer, it is clear whom the drawer had in mind, then the indorsement of this person in his correct name is valid. <sup>[301](#)</sup> An indorsement of the payee by the name written in the bill is also valid. <sup>[302](#)</sup>

(e) According to [s.32\(5\)](#) where there are two or more indorsements on a bill, the indorsements are deemed to have been made in the order in which they appear on the bill, until the contrary is proved.

(f) According to [s.32\(6\)](#) an indorsement may be made in blank or special. It may also contain terms making it restrictive. <sup>[303](#)</sup>

## Conditional indorsements

36-087 According to [s.33](#), where a bill purports to be indorsed conditionally, the condition may be disregarded by the payer, and payment to the indorsee is valid whether the condition has been fulfilled or not.

## Indorsement in blank and special indorsement

36-088 An indorsement in blank specifies no indorsee, and a bill so indorsed becomes payable to bearer. A special indorsement specifies the person to whom, or to whose order, the bill is to be payable. The provisions of the Act relating to a payee apply with the necessary modifications to an indorsee

under a special indorsement. When a bill has been indorsed in blank, any holder may convert the blank indorsement into a special indorsement by writing above the indorser's signature a direction to pay the bill to or to the order of himself or some other person.<sup>304</sup> A holder is, further, entitled to strike out an indorsement of a previous party. The indorser whose indorsement has been struck out and all subsequent indorsers are then discharged.<sup>305</sup> An indorser often strikes out his previous indorsement when he honours the bill after its dishonour by the acceptor or drawer, in order to avoid liability if the bill is lost. By doing so he does not lose his right of recourse against prior indorsers or the drawer.

## Restrictive indorsement

- 36-089 The indorsement of a bill to a specified person without the words "or order" is not restrictive and the bill, which remains negotiable, is to be treated as if these words were included.<sup>306</sup> An indorsement is restrictive if it either prohibits further transfers or if it specifies that it is not a transfer but a mere authority to the indorsee to deal with the bill as thereby directed, e.g. if it is indorsed "Pay D only", or "Pay D for the account of X", or "Pay D or order for collection".<sup>307</sup> The statement in an indorsement, that the consideration has been furnished by a third party, does not render it a restrictive indorsement.<sup>308</sup> A restrictive indorsement gives the indorsee the right to receive payment of the bill and to sue any party that his indorser could have sued, but gives him no power to transfer his rights as indorsee unless it expressly authorises him to do so.<sup>309</sup> However, the acceptor is not liable to the indorser if the indorsee, after obtaining payment of the bill under the restrictive indorsement, misappropriates the proceeds.<sup>310</sup> Where a restrictive indorsement authorises further transfer, all subsequent indorsees take the bill with the same rights and subject to the same liabilities as the first indorsee under the restrictive indorsement.<sup>311</sup> As an indorsee, who takes a bill bearing a restrictive indorsement, is aware of the limitation of the title of the transferor, he cannot be a holder in due course.

## Overdue or dishonoured bill

- 36-090 A bill remains negotiable until it is either restrictively indorsed or discharged. However, if an overdue bill is transferred, the transferee takes it subject to any equities available to the acceptor, drawer or indorser.<sup>312</sup> Such equities include an agreement not to transfer the bill,<sup>313</sup> and probably the illegality of the consideration,<sup>314</sup> but neither the absence of consideration<sup>315</sup> nor a personal right of set-off available to the acceptor against the drawer.<sup>316</sup> A bill payable on demand is deemed to be overdue when it appears on its face to have been in circulation for an unreasonably long time; what constitutes an unreasonably long time is a question of fact.<sup>317</sup> The holder of a bill is

presumed to have taken it before it became overdue, provided the indorsement is not dated after the date of maturity.<sup>318</sup> If a person takes a bill, knowing that it has been dishonoured, he is in the same position as if he took an overdue bill.<sup>319</sup>

## Negotiation to party already liable

- 36-091 Section 37 provides that where a bill is negotiated back to the drawer or to an indorser or to the acceptor such party may, subject to the provisions of ss.59 to 64 (respecting the discharge of the bill), reissue and further negotiate the bill; but he is not entitled to enforce payment of the bill against any party to whom he was previously liable. It has been held that, as against the acceptor, such a drawer or indorser would be in the position of a holder in due course, provided the person from whom he acquired the bill enjoyed such a status.<sup>320</sup>

## Rights of holder: generally

- 36-092 The rights of the holder depend primarily on whether he is a “mere holder”, a “holder for value” or a “holder in due course”. In certain cases it is also relevant whether a dispute is between “immediate parties” or “remote parties”.<sup>321</sup> Immediate parties are those who, in addition to the privity created by the bill, have a direct legal relationship with each other. The drawer and the acceptor, the drawer and the payee and an indorser and his indorsee are usually parties who have entered into a contract with one another, such as an agreement to extend credit, a sale of goods or an arrangement for the discount of negotiable instruments; they are therefore predominantly immediate parties. But in certain circumstances even these parties may be remote parties, e.g. where the drawer makes the bill payable to the payee’s order, or where the drawee executes his acceptance, at the request of a stranger to the bill. It is maintained by some writers that, generally, the defences which can be pleaded against a remote party are more restricted than those available against an immediate party.<sup>322</sup> It will be shown, however, that the distinction between remote and immediate parties is relevant mainly in respect of actions brought on a bill by a holder for value. The superior rights of a holder in due course are defined in s.38(2) of the Act, which does not draw a distinction between remote and immediate parties.<sup>323</sup> At the other end of the scale, a mere holder, who has not furnished value, appears to hold the bill subject to virtually all equities available against prior parties, including immediate parties.

## Rights of holder in due course

- 36-093

According to s.38(2) a holder in due course holds the bill free from any defects in the title of previous parties as well as from any equities available to prior parties among themselves and may enforce payment against all parties liable on the bill. Defects of title, which under s.29(2) include fraud, duress, force and fear and illegality connected with the issuing, with the acceptance or with the negotiation of the bill,<sup>324</sup> are directly related to the bill itself and before the passage of the Act were known as “equities attaching to the instrument”.<sup>325</sup> The term “equities available to prior parties among themselves”, employed in s.38(2), is not defined in this provision or indeed elsewhere in the Act. In all probability it means personal defences, available to parties among themselves, which do not stem from the bill. By way of illustration consider defences based on an underlying contract of sale, such as the unsuitability of the goods or the failure to ship them on time. By conferring on the holder in due course the right to enforce the bill despite defects in the title of previous parties and regardless of personal defences available against them, s.38(2) enables bankers and other financial institutions to discount commercial bills without assuming the risk of becoming involved in disputes concerning the underlying business transaction.<sup>326</sup> Thus, where the discounter is a holder in due course, he can enforce the bill of exchange against the drawee even if the latter had accepted it in the mistaken belief that a forged bill of lading attached to the bill of exchange was genuine.<sup>327</sup> The position of a holder in due course is further safeguarded by the following sections of the Act: 12, 20(2) (completion of inchoate instruments), 21(2) (delivery), 54(2), 55(2) and 64(2).<sup>328</sup> In effect, to defeat an action by a holder in due course it is necessary to establish a defect in his own title in which case, of course, he is not a holder in due course.<sup>329</sup>

## Rights of mere holder

36-094 Section 38(1) prescribes that a holder (or “mere holder”) has the right to bring an action on the bill in his own name,<sup>330</sup> but does not indicate what type of defence is available against him. From a comparison of the language of this subsection with s.38(2) it emerges that, as against an action by a mere holder, the defendant is entitled to raise defences stemming from a defect in title of prior parties and at least some personal defences available against them. This view derives support from old authorities which, in view of the absence of explicit regulation of the question in the Act, remain good law. Thus, it has been held that absence of consideration<sup>331</sup> and total failure of consideration<sup>332</sup> are valid defences against a mere holder. Partial failure of consideration is a valid defence where a liquidated amount is involved,<sup>333</sup> but cannot be raised where the amount involved is an unascertained or unliquidated demand.<sup>334</sup> Thus, an acceptor does not have a valid defence to an action on the bill where arbitration proceedings are brought by him against the payee in respect of the underlying contract of sale. Neither can the claim involved be raised by way of a set-off or a counterclaim.<sup>335</sup> A fortiori, a right against a previous party which has no direct bearing on the bill or on the transaction related to it, such as an independent right of set-off, cannot be raised as a defence to the holder’s action on the bill.<sup>336</sup>

## Rights of holder for value

- 36-095 The rights of a holder for value are not defined in the Act. In most regards his position is similar to that of a mere holder.<sup>337</sup> Thus, his action on the bill would be defeated if the bill was obtained by means of fraud or of duress or where the consideration furnished was illegal.<sup>338</sup> This proposition derives support from the language of the Act. Under s.29(2) fraud, duress, force and fear and illegality of consideration are factors which render the transferor's title defective. Section 38(2) explicitly grants the right to enforce the bill despite such defects in the transferor's title to a holder in due course but does not purport to confer them on a holder for value. It follows that, subject to specific defences conferred on a holder for value by other provisions of the Act, his rights—like those of a mere holder—are governed by s.38(1) of the Act, which only confers on the holder a right to bring an action on the bill in his own name.

## Total failure of consideration

- 36-096 Can a holder for value enforce the bill where there has been a total or partial failure of the consideration furnished to the person who is sued on the bill or where no consideration has been furnished to him? As the holder for value has furnished consideration to the transferor, the absence of consideration between prior parties to the bill does not constitute a valid defence against him.<sup>339</sup> Moreover, when a person becomes a party to a bill without obtaining consideration, he usually acts as an accommodation party. Under s.28(2), such a party is liable to a holder for value who takes the bill with full knowledge of this fact.

## Partial failure of consideration

- 36-097 In respect of partial failure of consideration, it is important to recall the distinction between immediate parties and remote parties. An immediate party is entitled to plead partial failure of consideration as a defence to an action by a holder for value, provided the “partial failure” involves an ascertained and liquidated amount. Thus, if a seller supplies only one half of the goods, he cannot recover more than half the amount of the bill drawn for the price and accepted by the buyer.<sup>340</sup> But if the goods turn out to be of an inferior quality, this defect cannot be raised as a defence to the seller's action on the bill.<sup>341</sup> An illustration in point is the decision of the Court of Appeal in *Thoni GmbH v RTP Equipment Ltd.*<sup>342</sup> To settle an account related to the supply of hoses, the defendants agreed to accept the plaintiffs' bill of exchange for Ö.Sch. 1m. and to make, in addition, certain fixed periodic payments. When a subsequent shipment comprised defective

hoses, the plaintiffs claimed to be entitled to a refund. They ceased to make the periodic payments and dishonoured the bill of exchange. Granting leave to defend an action on the bill, Buckley LJ stressed that there was an arguable defence in respect of a substantial and defined part of the amount of the bill. His Lordship based this conclusion on the finding that it was established on the facts that the defendants' indebtedness was limited to Ö.Sch. 400,897. There was, therefore, a *prima facie* defence in respect of the balance of Ö.Sch. 599,103 as the consideration furnished for this amount had failed.

## As against remote party

- 36-098 Partial failure of consideration does not appear to afford a defence against a remote party who is a holder for value even where the deficiency or loss is liquidated.<sup>343</sup> One authority suggests that total failure of consideration does not provide a defence to an action brought by a holder for value who is a remote party.<sup>344</sup> This view deserves support; as a remote party who is a holder for value has furnished consideration for the bill, it seems irrelevant that a consideration furnished by prior parties has failed. The position differs where an action is brought by an immediate party who furnished for the bill a consideration which, though valid at the time of transfer, has failed in toto at a subsequent point of time. In effect, such a party is not a holder for value *strictu sensu*, and the total failure of consideration is a good defence against him.<sup>345</sup>

## Holder suing for benefit of third party

- 36-099 Normally the holder of a bill of exchange is entitled to judgment for the full sum represented by the bill. But when he sues as agent or trustee for another person, or when he sues wholly or in part for the benefit of another person, any defence or set-off available against that person is available *pro tanto* against the holder.<sup>346</sup> Thus, in *Barclays Bank v Aschaffenburger Zellstoffwerke AG*<sup>347</sup> A accepted bills drawn by B in payment for goods sold to him by B. C purchased the bills from B, paying 73 per cent of their face value and agreeing that when the bills were met on maturity the balance would be paid to B. Two of the bills were dishonoured, and, when sued by C, A sought to rely on a counterclaim in respect of the goods sold by B. It was held that C was a holder for value as to 73 per cent of the claim and trustee for the balance on behalf of B, so that there should be summary judgment for the whole amount of the bills, but with a stay of execution in respect of 27 per cent of that amount.

## Footnotes

- 32 For detailed works on the subject, see Chalmers and Guest on Bills of Exchange and Cheques, 18th edn (2017); for the special aspects respecting the use of bills of exchange in international trade, see Benjamin's Sale of Goods, 11th edn (2021), Ch.22.
- 291 s.31(1).
- 292 s.31(2). "Delivery" is defined in s.2 as the "transfer of possession, actual or constructive, from one person to another". Contrast the narrower definition of delivery in s.61(1) of the Sale of Goods Act 1979: "voluntary transfer of possession from one person to another ...". As to which bills are payable to bearer, see above, para.36-022.
- 293 s.31(3). See *Standard Chartered Bank v Dorchester LNG (2) Ltd, The Erin Schulte [2014] EWCA Civ 1382*, where an analogy was made between indorsement of bills of lading under the Carriage of Goods by Sea Act 1992 s.5(2)(b), and the indorsement of bills of exchange: held (at [16]) that "[d]elivery therefore represents an essential element in a series of voluntary acts designed to give effect to the holder's intention to transfer the rights which it represents" and (at [28]) that "completion of an indorsement by delivery requires the voluntary and unconditional transfer of possession by the holder to the indorsee and an unconditional acceptance by the indorsee". As to which bills are payable to order, see above, para.36-023.
- 294 *Walters v Neary (1904) 21 T.L.R. 146*.
- 295 *Whistler v Forster (1863) 14 C.B.(N.S.) 248*. As regards the validity of the assignment of a chose in action conferred by a bill, see *Geo Thompson (Aust) Pty Ltd v Vittadello [1978] V.R. 199, 208–212*.
- 296 *Cunliffe v Whitehead (1837) 3 Bing. N.C. 828, 830; Harrop v Fisher (1861) 10 C.B.(N.S.) 196, 203*.
- 297 And see ss.16(1), 26.
- 298 A valid indorsement may nevertheless be irregular, see above, para.36-074.
- 299 *Young v Glover (1857) 3 Jur.(N.S.) 637; Ex p. Yates (1857) 2 De G. & J. 191*.
- 300 This appears to follow from *Watson v Evans (1863) 32 L.J. Ex. 137*. As to the possibility of having alternative payees, see s.7(2), discussed in para.36-023, above.
- 301 *Bird & Co v Thomas Cook & Son Ltd [1937] 2 All E.R. 227; Arab Bank Ltd v Ross [1952] 2 Q.B. 216*. (But such an indorsement will be irregular and a holder of such a bill cannot be a holder in due course: see above, para.36-074.)
- 302 *Willis v Barrett (1817) 2 Stark. 29*.
- 303 As to restrictive indorsements, see below, para.36-089. As to the effect of a blank indorsement, see s.8(3).
- 304 s.34. And see above, para.36-022.
- 305 *Wilkinson v Johnson (1824) 3 B. & C. 428; Mayer v Jadis (1833) 1 M. & Rob. 247*.
- 306 s.8(4) which, in view of s.34(3), applies to indorsements.
- 307 s.35(1).
- 308 *Buckley v Jackson (1868) L.R. 3 Ex. 135*.
- 309 s.35(2); *Lloyd v Sigourney (1829) 5 Bing. 525*.
- 310 *Williams, Deacon & Co v Shadbolt (1885) 1 Cab. & E. 529; (1885) 1 T.L.R. 417*.
- 311 s.35(3).

- 312 s.36(1) and (2). That a party who takes an overdue bill cannot be a holder in due course, see s.29.
- 313 *Parr v Jewell* (1855) 16 C.B. 684; *Redfern v Rosenthal* (1902) 86 L.T. 855.
- 314 See Chalmers and Guest on Bills of Exchange and Cheques, 18th edn (2017), para.5-041.
- 315 *Sturtevant v Ford* (1842) 4 M. & G. 101; *Ex p. Swan* (1868) L.R. 6 Eq. 344.
- 316 *Oulds v Harrison* (1854) 10 Exch. 572; *Ex p. Swan*, above.
- 317 s.36(3).
- 318 s.36(4). As to when this presumption is rebutted, see *Bounsall v Harrison* (1836) 1 M. & W. 611.
- 319 s.36(5).
- 320 *Jade International Steel Stahl und Eisen GmbH & Co Kg v Robert Nicholas (Steels) Ltd* [1978] Q.B. 917, 924, 926; *First Discount Ltd v Cranston* [2002] EWCA Civ 71 at [4] and [17].
- 321 As regards the rights of the payee of a bill, see above, para.36-080. Note that the transferee of a holder in due course is in a position similar to that of his transferor: s.29(3), discussed above, para.36-078. As regards the effect of fraud and illegality on the position of immediate parties, see also *Universal Import Export v Bank of Scotland*, 1994 S.C.L.R. 944 OH.
- 322 Byles on Bills of Exchange and Cheques, 30th edn (2020), paras 18-013 et seq.; Crawford, Payment, Clearing and Settlement in Canada (2002), Vol.II, pp.986 et seq.; Cowen & Gering, Law of Negotiable Instruments in South Africa, 5th edn, pp.103–109 et seq. The distinction is not fully worked out in decided cases, but see *Watson v Russell* (1864) 5 B. & S. 968; 34 L.J. Q.B. 93 (suggesting that the drawer and the drawee of a cheque are not always immediate parties). See also *Oscar Harris, Son & Co v Vallarman & Co* [1940] 1 All E.R. 185, CA; *Bank Lenmi Le-Israel v Coniplan* (UK) Ltd Unreported 31 July 1987; *Solo Industries UK Ltd v Canara Bank* [2001] 2 Lloyd's Rep. 578 at [39], CA; *GMAC Commercial Finance Ltd v Mint Apparel Ltd* [2010] EWHC 2452 (Comm) at [26]. For a detailed discussion, see Chalmers and Guest on Bills of Exchange and Cheques, 18th edn (2017), paras 4-005 et seq.
- 323 Note that only an indorsee can be a holder in due course (above, para.36-080) and that only his transferor can be regarded an immediate party. From a practical point of view, the circumstances under which a transferee has to take the bill in order to attain the status of a holder in due course are such as to rule out the need to distinguish in his case between an action against an immediate party and an action against a remote party.
- 324 See also above, para.36-072. Cowen & Gering, Law of Negotiable Instruments in South Africa, 4th edn, pp.271–274 (and see 5th edn, pp.103 et seq.) suggests that defects in title are defences in rem whilst personal equities constitute defences in personam. See also Crawford, Payment, Clearing and Settlement in Canada (2002), Vol.II, pp.986 et seq.; Chalmers and Guest on Bills of Exchange and Cheques, 18th edn (2017), paras 4-062—4-069.
- 325 *Re Overend, Gurney & Co Ex p. Swan* (1868) L.R. 6 Eq. 344, 359–362; *Alcock v Smith* [1892] 1 Ch. 238, 263. See also *Sturtevant v Ford* (1842) 4 M. & G. 101, 106.
- 326 It will be shown subsequently that certain personal equities may not be pleaded against any holder, including a mere holder.
- 327 *Robinson v Reynolds* (1841) 2 Q.B. 196; *Guaranty Trust Co of New York v Hannay & Co* [1918] 2 K.B. 623, 652. cf. *Leather v Simpson* (1871) L.R. 11 Eq. 398.

- 328 As regards ss.12 and 20(2), see above, para.36-035; as regards s.21, see above, para.36-032; as regards s.54(2), see below, para.36-113; as regards s.55(2), see below, para.36-114; as regards s.64, see below, para.36-141.
- 329 This can, for example, be done by showing that he holds a bill payable to the order of a specific payee under a forged indorsement: above, para.36-053.
- 330 An action to enforce a negotiable instrument may be brought under Pt 24 of the CPR (previously under RSC Ord.14) under which the claimant applies for summary judgment. As to when leave to defend will be granted, see Byles on Bills of Exchange and Cheques, 30th edn (2020), paras 26-013 et seq.; and *James Lamont & Co Ltd v Hyland [1950] 1 K.B. 585*; *Brown Shipley & Co Ltd v Alicia Hosiery Ltd [1966] 1 Lloyd's Rep. 668*; *Barclays Bank Ltd v Aschaffenburger Zellstoffwerke AG [1967] 1 Lloyd's Rep. 387* (below, para.36-102); *All Trades Distributors Ltd v Agencies Kaufman Ltd (1969) 113 S.J. 995*; *Saga of Bond Street Ltd v Avalon Promotions Ltd [1972] 2 Q.B. 325*; *Cebora SNC v SIP (Industrial Products) Ltd [1976] 1 Lloyd's Rep. 271*; *Montebianco Industrie Tessili SpA v Carlyle Mills (London) Ltd [1981] 1 Lloyd's Rep. 509*. Although these cases were decided under RSC Ord.14, they are likely to remain good law (*Safa Ltd v Banque du Caire [2000] 2 Lloyd's Rep. 600, 605–606*, Waller LJ). See, e.g. *Solo Industries UK Ltd v Canara Bank [2001] 2 Lloyd's Rep. 578* at [22]–[28]; *Isovel Contracts Ltd (in administration) v ABB Building Technologies Ltd [2002] 1 B.C.L.C. 390* at [15]–[22]; *Banque Saudi Fransi v Lear Siegler Services Inc [2007] 2 Lloyd's Rep. 47* at [14]–[16]; *Enka Insaat Ve Sanayi AS v Banca Populare Dell'Alto Adige SpA [2009] EWHC 2410 (Comm)* at [19]–[25]; *National Infrastructure Development Co Ltd v Banco Santander SA [2017] EWCA Civ 27* at [20]–[24].
- 331 *Forman v Wright (1851) 11 C.B. 481, 492–494*; cf. *Easton v Pratchett (1835) 1 Cr. M. & R. 798, 808–809*; *Milnes v Dawson (1850) 5 Exch. 948, 950–951*. Note that s.28(2) does not confer on a mere holder the right to enforce a bill against an accommodation party. As regards the authority of cases decided before the passing of the Act, see above, para.36-006.
- 332 See para.36-098, below, showing this defence as available even against a holder for value.
- 333 *Forman v Wright*, above; *Agra and Masterman's Bank v Leighton (1866) L.R. 2 Ex. 56, 64, 65* (supply of ascertained portion of goods instead of delivery of quantity ordered); *Thoni GmbH v RTP Equipment Ltd [1979] 2 Lloyd's Rep. 282*.
- 334 *Day v Nix (1824) 9 Moo. C.P. 159; 2 L.J. (O.S.) C.P. 133*; *Sully v Frean (1854) 10 Ex. 535; Warwick v Nairn (1855) 10 Exch. 762* (alleged inferiority of quality of goods).
- 335 *Nova (Jersey) Knit Ltd v Kammgarn Spinnerei GmbH [1977] 1 W.L.R. 713*, where the majority of the House of Lords further refused to grant a stay based on the arbitration agreement respecting the underlying contract. But much turns on the construction of the arbitration agreement: as to which, see *Fiona Trust & Holding Corp v Privalov [2007] UKHL 40, [2008] 1 Lloyd's Rep. 254*. See also *Piallo GmbH v Yafriro International Pte Ltd [2013] SGHC 260*, disapproved of by Sing CA in *Cassa di Risparmio di Parma e Piacenza SpA v Rals International Pte Ltd [2016] SGCA 53*. In *Uttam Galva Steels Ltd v Gunvor Singapore Pte Ltd [2018] EWHC 1098 (Comm)*, where there was a challenge to the arbitrator's jurisdiction, Picken J held, at [57], “that there is no rule of English law that an arbitration clause cannot extend to a claim under a bill of exchange, certainly anyway as between the immediate parties to the underlying sale contract and in circumstances where

those parties remain the parties to the bill of exchange" (adding, at [61]–[62], that the reasoning of the Sing CA in the *Rals* case was flawed, having been overly influenced by the fact that the claimants in that case were (third party) indorsees of the relevant promissory notes). *Uttam* is noted by LK Ho (2018) 134 L.Q.R. 548. By contrast, in *China Export & Credit Insurance Corp v Emerald Energy Resources Ltd [2018] EWHC 1503 (Comm)*, application for stay of English proceedings, commenced under non-exclusive jurisdiction clause in promissory note, was refused despite arbitration clause in underlying contract.

- 336 *Burrough v Moss (1830) 10 B. & C. 558, 563; Whitehead v Walker (1842) 10 M. & W. 696; Oulds v Harrison (1854) 10 Exch. 572, 578–579; Re Overend, Gurney & Co Ex p. Swan (1868) L.R. 6 Eq. 344, 359–360.* cf. *Re European Bank Ex p. Oriental Commercial Bank (1870) L.R. 5 Ch. App. 358*. But an agreement made at the time the bill is executed, which contemplates a future set-off, may be an equity affecting the bill: *Holmes v Kidd (1858) 3 H. & N. 891*.
- 337 *Whistler v Forster (1863) 14 C.B.(N.S.) 248, 258.*
- 338 But note that the list of defects, set out in s.29(2) is not exhaustive: see *Williams and Glyn's Bank Ltd v Belkin Packaging Ltd, 123 D.L.R. (3rd) 612 (1981)*.
- 339 *Mills v Barber (1836) 1 M. & W. 425, 430–431; Barber v Richards (1851) 6 Exch. 63.* cf. *Forman v Wright (1851) 11 C.B. 481, 492–494*; see also s.27(2), considered in *MK International Development Co Ltd v Housing Bank [1991] 1 Bank. L.R. 74*; above, para.36-066. As to whether the holder can recover the full amount of the bill or only an amount equal to the value furnished by him, see *Darnell v Williams (1817) 2 Stark. 166; Jones v Hibbert (1817) 2 Stark. 304; Re Bunyard Ex p. Newton (1880) 16 Ch. D. 330, 336*.
- 340 *Agra and Masterman's Bank v Leighton (1866) L.R. 2 Ex. 56, 64, 65.* See also *Forman v Wright*, above, at 492.
- 341 *Glennie v Imri (1839) 3 Y. & C. Ex. 436, 442–443; Agra and Masterman's Bank v Leighton*, above; cf. *Hitchings and Coulthurst Co v Northern Leather Co [1914] 3 K.B. 907*. See also *Fielding and Platt Ltd v Najjar [1969] 1 W.L.R. 357* (where the seller had performed part of the bargain before the buyer dishonoured the bill); *All Trades Distributors Ltd v Agencies Kaufman Ltd*, below (rejection of goods); *Montecchi v Shimco Ltd [1979] 1 W.L.R. 1180; Montebianco Industrie Tessili SpA v Carlyle Mills (London) Ltd [1981] 1 Lloyd's Rep. 509* (the fact that the defect in the goods confers on the drawee a valid counterclaim is no defence to the action on the bill). But note that the buyer may counterclaim. As to whether a stay of proceedings would be granted pending the counterclaim, see *James Lamont & Co Ltd v Hyland Ltd [1950] 1 K.B. 585; All Trades Distributors Ltd v Agencies Kaufman Ltd (1969) 113 S.J. 995; Cebora SNC v SIP (Industrial Products) Ltd [1976] 1 Lloyd's Rep. 271*. For a recent example, see *Oxygen Environmental Ltd v Mullan [2012] NIQB 17* (summary judgment on promissory note but stay of execution pending hearing of counterclaim for breach of underlying contract). Note that the amount of a dishonoured bill can be set off against an amount of damages recoverable under the underlying contract: *Handley Page Ltd v Rockwell Machine Tool Co Ltd [1970] 2 Lloyd's Rep. 459, 465* (affirmed [1971] 2 Lloyd's Rep. 298).
- 342 [1979] 2 Lloyd's Rep. 282.

- 343 *Archer v Bamford* (1822) 3 Stark. 175; cf. *Oscar Harris, Son & Co v Vallarman & Co* [1940] 1 All E.R. 185 (which regards the rule as insufficiently settled to justify on its basis the striking out of an action). See also *GMAC Commercial Finance Ltd v Mint Apparel Ltd* [2010] EWHC 2452 (Comm) at [26]–[33].
- 344 *Watson v Russell* (1864) 5 B. & S. 968; some indirect support for the proposition follows from *Misa v Currie* (1876) 1 App. Cas. 554, especially 566. But even a remote party could not sue if he knew at the time he took the bill that consideration had totally failed; *Lloyd v Davis* (1824) 3 L.J. (O.S.) K.B. 38; cf. *Fairclough v Pavia* (1854) 9 Exch. 690, 695 (where, however, the transferee may have taken the bill from a holder in due course). It is arguable to the contrary, that as s.38(2) precludes the raising of a defence based on defects in title and on personal equities solely as against a holder in due course, a holder for value's rights may be defeated by failure of consideration (which presumably constitutes a personal equity).
- 345 *Solly v Hinde* (1834) 2 Cr. & M. 516 (maker executed promissory note to induce payee to act as executor of maker's will; held that as maker outlived payee, the payee's estate could not enforce the instrument); *Astley and Williams v Johnson* (1860) 5 Hurl. & N. 137 (remote party was suing as agent of immediate party and hence was regarded as immediate party); *Fielding and Platt Ltd v Najjar* [1969] 1 W.L.R. 357. As to whether an injunction may be granted to restrain negotiation where there has been total failure of consideration, see *Patrick v Harrison* (1792) 3 Bro. C.C. 476; *Glennie v Imri* (1839) 3 Y. & C. Ex. 436; *Bainbrigge v Hemingway* (1865) 12 L.T. 74.
- 346 *De La Chaumette v Bank of England* (1829) 9 B. & C. 208 (as explained in *Currie v Misa* (1875) L.R. 10 Ex. 153, 164; (1876) 1 App. Cas. 554, 570); *Thornton v Maynard* (1875) L.R. 10 C.P. 695.
- 347 [1967] 1 Lloyd's Rep. 387. See also *Re Bunyard Ex p. Newton* (1880) 16 Ch. D. 330, 336. cf. *Nova (Jersey) Knit Ltd v Kammgarn Spinnerei GmbH* [1977] 1 W.L.R. 713. See also *GMAC Commercial Finance Ltd v Mint Apparel Ltd* [2010] EWHC 2452 (Comm) at [19]–[25].

## **(v) - General Duties of Holder**

**Chitty on Contracts 34th Ed.**

**Consolidated Mainwork Incorporating First Supplement**

**Volume II - Specific Contracts**

**Chapter 36 - Bills of Exchange and Banking**

**Section 1. - Negotiable Instruments**

**(b) - Bills of Exchange<sup>32</sup>**

**(v) - General Duties of Holder**

### **Outline**

- 36-100 Before the holder is entitled to claim payment of a bill from the drawer and indorsers he must perform several duties. In most cases the failure of the holder to perform these duties discharges the drawer and indorsers and there is authority for saying that the debt, for the payment of which the bill is transferred to holder, is likewise discharged.<sup>348</sup>

### **Necessity of presentment for acceptance**

- 36-101 Presentment of the bill for acceptance is required in the following cases: (a) when the bill is payable after sight, in which case presentment is necessary to determine the maturity of the instrument; (b) when a bill expressly stipulates that it must be presented for acceptance; and (c) when it is drawn payable elsewhere than at the residence or business place of the drawee. In the last two cases it must be presented for acceptance before it can be presented for payment.<sup>349</sup> Where a bill is payable after sight the holder must either present it for acceptance or negotiate it within a reasonable time; otherwise the drawer and indorsers are discharged.<sup>350</sup> What constitutes reasonable time depends on the nature of the bill, the usage of trade with respect to similar bills, and the facts of the particular case.<sup>351</sup>

## Rules as to presentment for acceptance

36-102 Section 41(1) of the Act specifies the following rules for the presentment of a bill for acceptance:

- (a)the presentment must be made by or on behalf of the holder to the drawee or to some person authorised to accept or refuse acceptance on his behalf at a reasonable hour on a business day and before the bill is overdue;
- (b)where a bill is addressed to two or more drawees, who are not partners, presentment must be made to them all, unless one has authority to accept for all in which case presentment may be made to him only;
- (c)where the drawee is dead, presentment may be made to his personal representative;
- (d)where the drawee is bankrupt, presentment may be made to him or to his trustee in bankruptcy;
- (e)where authorised by agreement or usage, presentment through the post office is sufficient.

According to s.41(2) presentment in accordance with the above rules is excused, and the bill may be treated as dishonoured by non-acceptance, in the following cases:

- (a)where the drawee is dead or bankrupt, or is a fictitious person or a person not having capacity to contract;
- (b)where, after the exercise of reasonable diligence, due presentment cannot be effected;
- (c)where, although the presentment has been irregular, acceptance has been refused on some other ground.

The fact that the holder has reason to believe that the bill, on presentment, will be dishonoured does not excuse failure to present it.<sup>352</sup>

## Dishonour by non-acceptance

36-103 According to s.43(1) a bill is dishonoured by non-acceptance if:

- (a)it is duly presented and acceptance is refused or cannot be obtained; and
- (b)if presentment for acceptance is excused and the bill is not accepted.

Where a bill is duly presented for acceptance, and is not accepted within the customary time, the holder must treat it as dishonoured by non-acceptance, and if he fails so to treat it, he loses his immediate right of recourse against the drawer and indorsers.<sup>353</sup> This right of recourse accrues to the holder as soon as the bill is dishonoured by non-acceptance, and he need not present the bill for payment.<sup>354</sup> If after dishonour the drawee offers to accept the bill, it appears that the holder has the option of treating the bill as dishonoured or as accepted.<sup>355</sup>

## Duties as to qualified acceptances

- 36-104 The holder of a bill may refuse to take a qualified acceptance, and if he does not obtain an unqualified acceptance may treat the bill as dishonoured. Where a qualified acceptance is taken, and the drawer or an indorser has not expressly or impliedly authorised the holder to take it, or does not give his assent subsequently, the drawer or indorser is discharged from his liability on the bill. But this does not apply to a partial acceptance, of which due notice has been given. When the drawer or indorser of a bill receives notice of a qualified acceptance, and does not within a reasonable time express his dissent to the holder, he is deemed to have given his assent.<sup>356</sup>

## Presentment for payment

- 36-105 According to s.45 all bills of exchange must, subject to certain provisions of the Act,<sup>357</sup> be presented for payment and if the holder fails to do so the drawer and indorsers are discharged. There are several differences between presentment for acceptance and for payment. First, presentment for acceptance is, mainly, personal as its purpose is to obtain the drawee's undertaking to pay. The bill must, therefore, be presented for acceptance at the drawee's place. Presentment for payment is, on the other hand, for the purpose of obtaining actual payment and the bill must be presented at the place at which it has been made payable. Secondly, the date for presentment for payment is, except in the case of bills payable on demand, determinable from the bill. Presentment for acceptance, on the other hand, can be made whenever suitable to the holder, provided he does so within reasonable time.<sup>358</sup>

## Due presentment

- 36-106 The rules as to what amounts to due presentment for payment are specified in s.45 of the Act, and are as follows: if the bill is not payable on demand, it must be presented for payment when it falls due. If it is payable on demand it must be presented within a reasonable time after its issue in order to render the drawer liable, and within a reasonable time after its indorsement in order to render the indorser liable.<sup>359</sup> The bill must be presented at a reasonable hour on a business day by the holder or his agent, either to the person designated in the bill as payer or to his agent. It must also be presented either at the place specified in the bill, or, if no such place is specified, at the place of business of the drawee, or if this place is not known, at his residence.<sup>360</sup> If no person who is authorised to pay or refuse the bill can be found at the proper place, no further presentment is

required. If the bill has been accepted by two or more persons who are not partners, and no place for presentment is specified, it must be presented to all of them. If the acceptor dies the bill must be presented to his personal representative. When authorised by agreement or usage, presentment through the post office is sufficient.

## Excuses for delay or non-presentment for payment

- 36-107 According to s.46(1) delay in presentment for payment is excused when it is caused by circumstances beyond the control of the holder and not imputable to his default, misconduct or negligence.<sup>361</sup> When the cause of the delay ceases to operate, the bill must be presented with reasonable diligence. According to s.46(2) presentment for payment is dispensed with in five cases. First, it is dispensed with where, after the exercise of reasonable diligence, presentment cannot be effected, e.g. where the bill is made “payable at Guildford” and the drawee neither resides nor has an office there.<sup>362</sup> Secondly, presentment is dispensed with where the drawee is a fictitious person. Thirdly, presentment is excused as regards the drawer, where the drawee is not bound towards the drawer to accept or pay the bill and the drawer has no reason to believe that it would be paid if presented. Thus, if the drawer’s account with his bank is overdrawn, and he has not been granted an overdraft, presentment of his cheque for payment is not necessary.<sup>363</sup> However, the mere fact that the holder has reason to believe that the bill will be dishonoured, does not excuse presentment. Thus, where the holder comes to know that the drawer has requested the acceptor to dishonour the bill, presentment is not excused.<sup>364</sup> Fourthly, as regards the indorser, presentment is excused if the bill has been made for his accommodation and he has no reason to expect that it will be honoured. Finally, presentment for payment may also be waived, either expressly or impliedly.<sup>365</sup>

## Dishonour by non-payment

- 36-108 According to s.47(1) a bill is dishonoured by non-payment either when not paid on presentation or, if presentment for payment is excused, when the bill is overdue and unpaid.<sup>366</sup> According to s.47(2) when a bill is dishonoured by non-payment, the holder obtains an immediate right of recourse against the drawer and indorsers.<sup>367</sup> An action to enforce this right can, however, be brought only if the holder gives notice of dishonour or protests the bill, if either is required.

## Notice of dishonour

- 36-109

According to s.48, when a bill is dishonoured by non-acceptance or non-payment,<sup>368</sup> the holder must send a notice of dishonour and any drawer or indorser to whom no such notice is given is discharged.<sup>369</sup> However, if a bill which is dishonoured by non-acceptance or non-payment comes subsequently into the hands of a holder in due course, his rights are not affected by the failure of a previous holder to send a notice of dishonour. If notice of dishonour is given when a bill is dishonoured by non-acceptance, there is no need for notice of dishonour for non-payment, unless the bill has been accepted after its original dishonour. The rules prescribing the requirements of a valid notice of dishonour are set out at length in s.49 of the Act.<sup>370</sup> It is clear from the language of s.48, that notice need not be given to the acceptor.

## Excuses for delay or failure to give notice

36-110 According to s.50(1), delay in sending notice of dishonour is excused under the same circumstances as delay in presentment for payment.<sup>371</sup> According to s.50(2) notice of dishonour is dispensed with in the following cases: first, notice is dispensed with when after exercise of reasonable diligence it cannot be given, e.g. if the drawer's place of business is closed,<sup>372</sup> or if it fails to reach the drawer or indorser because it is lost in the post.<sup>373</sup> Secondly, notice may be waived, expressly or impliedly, both before and after it becomes due.<sup>374</sup> Thirdly, as regards the drawer, notice is dispensed with:

- (a)where the drawer and drawee are the same person;
- (b)where the drawee is either a fictitious person or does not have capacity to contract;
- (c)where the drawer is the person to whom the bill is presented for payment;
- (d)where the drawee or acceptor is as between the drawer and himself not bound to honour the bill<sup>375</sup>; and
- (e)where the drawer has countermanded payment.<sup>376</sup>

Fourthly, notice is dispensed with as regards an indorser:

- (a)where the indorser is aware that the drawee is a fictitious person or one without capacity to contract;
- (b)where the indorser is the person to whom the bill is presented for payment;
- (c)where the bill was accepted or made for the indorser's accommodation.

According to s.52(3) notice of dishonour is not necessary in order to render the acceptor liable.

## Noting or protest of bill

36-111

Under s.51(1) protest is optional when the dishonoured instrument is an inland bill, i.e. one which is, or on the face of it purports to be, either both drawn and payable within the British Islands or drawn within the British Islands on a person resident therein.<sup>377</sup> Under s.51(2) protest is required when a bill which both is and appears on its face to be a foreign bill, i.e. any bill other than an inland bill, is dishonoured either by non-acceptance or, if not dishonoured previously by non-acceptance, by non-payment. Failure duly to protest such a bill discharges the drawer and indorsers but not the acceptor. A protest is carried out by the presentation of the bill for acceptance or payment, after the dishonour, by a notary public. If the bill is dishonoured when presented by the notary, he makes a copy of it in his register and “notes” on the bill the date of presentment, the answer given and the amount of his fee. After “noting” the bill, a copy of the protest must be sent to each drawer and indorser. The correct procedure for a protest is specified in s.51(3)–(8)<sup>378</sup> of the Act. According to s.93, it is sufficient if the noting of the bill is within the specified time and the formal protest may be extended subsequently. The provisions concerning both excuses for the delay in and dispensation of noting or protest, which are specified in s.51(9), are similar to those prevailing in the case of notice of dishonour. According to s.94 of the Act, when the services of a notary public cannot be obtained, a householder or substantial resident of the place may, in the presence of two witnesses, give a certificate attesting the dishonour of the bill.

## Duties of holder towards the acceptor or drawee

- 36-112 The performance of the duties of the holder, discussed above, is a condition precedent to the liability of the drawer and indorsers. The only duty which the holder owes to the acceptor or drawee is to exhibit the bill when the holder demands payment and to deliver it against payment.<sup>379</sup> As the acceptor is the main obligee of the bill, his liability does not depend on the due sending of notice of dishonour or on the protest of the bill by the holder.<sup>380</sup> Presentment for payment is not necessary to render the acceptor liable if the bill is either accepted generally or if the terms of a qualified acceptance do not require it.<sup>381</sup> Moreover, even if the terms of a qualified acceptance require presentment for payment, the acceptor is not, in the absence of an express stipulation to that effect, discharged if the holder fails to present the bill for payment on the day it is due.<sup>382</sup> But if the acceptance requires presentment for payment, the bill must be so presented before the holder’s right of action against the acceptor matures.<sup>383</sup>

## Footnotes

- 32 For detailed works on the subject, see Chalmers and Guest on Bills of Exchange and Cheques, 18th edn (2017); for the special aspects respecting the use of bills of exchange in international trade, see Benjamin’s Sale of Goods, 11th edn (2021), Ch.22.
- 348 *Soward v Palmer (1818) 8 Taunt. 277; Peacock v Pursell (1863) 32 L.J. C.P. 266.*

- 349 s.39(1), (2), (3). Subs.(4) makes special provisions applicable when a bill is payable elsewhere than at the residence or place of business of the drawee and the holder is unable to present it for acceptance before the day of maturity.
- 350 s.40(1), (2).
- 351 s.40(3). See, e.g. *Fry v Hill* (1817) 7 *Taunt.* 397; *Shute v Robins* (1828) 3 *Car. & P.* 80; *Mellish v Rawdon* (1832) 9 *Bing.* 416; *Straker v Graham* (1839) 4 *M. & W.* 721; *Ramchurn Mullick v Luchmeechund Radakissen* (1854) 9 *Moo. P.C.* 46; *Godfray v Coulman* (1859) 13 *Moo. P.C.* 11.
- 352 s.41(3).
- 353 s.42.
- 354 s.43(2). This right is subject to the provisions of s.65 (acceptance for honour). Before exercising this right of recourse the holder must perform certain duties, i.e. the sending of notice of dishonour (s.48) and, in certain cases, protesting the bill (s.51).
- 355 That a bill may be accepted after its initial dishonour follows from s.18(2), (3).
- 356 s.44. This section also provides that where a foreign bill has been accepted as to part, it must be protested as to the balance.
- 357 i.e. ss.39(4), 46. For discharge of drawer of a cheque, see para.36-151, below; and see further special provisions for the truncation and imaging of cheques: below, paras 36-152 et seq.
- 358 See Chalmers and Guest on Bills of Exchange and Cheques, 18th edn (2017), para.6-022.
- 359 As regards the importance of due presentment for payment, see *Yeoman Credit Ltd v Gregory* [1963] 1 *W.L.R.* 343.
- 360 If the bill cannot be so presented, it may be presented to the drawer or to the acceptor wherever he may be found or at his last place of business or residence: s.45(4)(d).
- 361 See, e.g. *Rouquette v Overmann* (1875) *L.R.* 10 *Q.B.* 525; *Re Francke and Rasch* [1918] 1 *Ch.* 470; *Hamilton Finance Co v Coverley Westray Walbaum & Tosetti Ltd* [1969] 1 *Lloyd's Rep.* 53, 72 (delay by post alleged but not proved).
- 362 *Hardy v Woodroofe* (1818) 2 *Stark.* 319.
- 363 *Wirth v Austin* (1875) *L.R.* 10 *C.P.* 689; *Re Bethell* (1887) 34 *Ch. D.* 561; *Fiorentino Comm Giuseppe Srl v Farnesi* [2005] *EWHC* 160 (*Ch.*), [2005] 1 *W.L.R.* 3718.
- 364 *Hill v Heap* (1823) *Dow & Ry.N.P.* 57. See also *Baker v Birch* (1811) 3 *Camp.* 107.
- 365 As regards waiver of presentment of an accommodation bill, see *Reisler v Kulcsar*, 57 *D.L.R.* (2d) 730 (1966).
- 366 In *Commissioner for Inland Revenue v Thomas Cook (NZ) Ltd* [2003] 2 *N.Z.L.R.* 296, the Court of Appeal of New Zealand held that a demand does not have to be made in order to cause a stale cheque, presentment of which is dispensed with, to be “overdue and unpaid”; although this was later doubted, without deciding the matter, by the Privy Council on appeal in the same case: [2004] *UKPC* 53 at [11].
- 367 This right of recourse is subject to the provisions of ss.65 to 68.
- 368 As regards notice sent before actual dishonour, see *Eaglehill Ltd v J Needham Builders Ltd* [1973] *A.C.* 992.
- 369 If the holder presents the bill for payment through a collecting bank he is entitled to await its return before giving notice: *Lombard Banking Ltd v Central Garage and Engineering Co Ltd* [1963] 1 *Q.B.* 220.

- 370 Chalmers and Guest on Bills of Exchange and Cheques, 18th edn (2017), paras 6-096 et seq.
- 371 As to which, see para.[36-107](#), above.
- 372 *Allen v Edmundson (1848) 2 Exch. 719, 723*; *Studdy v Beesty (1889) 60 L.T. 647, 649*.
- 373 *Mackay v Judkins (1858) 1 F. & F. 208*.
- 374 *Lombard Banking Ltd v Central Garage and Engineering Co Ltd [1963] 1 Q.B. 220*.
- 375 See, e.g. *Lafitte v Slatter (1830) 6 Bing. 623*; *Wirth v Austin (1875) L.R. 10 C.P. 689*.
- 376 And see *Barclays Bank Ltd v WJ Simms Son & Cooke (Southern) Ltd [1980] 1 Q.B. 677, 702–703*.
- 377 s.4, which also defines the term British Islands. As regards this definition, see below, para.[36-199](#).
- 378 As amended by s.1 of the Bills of Exchange (Time of Noting) Act 1917. See Chalmers and Guest on Bills of Exchange and Cheques, 18th edn (2017), paras 6-143 et seq.
- 379 s.52(4).
- 380 s.52(3).
- 381 s.52(1), (2).
- 382 s.52(2).
- 383 *Halstead v Skelton (1843) 5 Q.B. 86, 93–94*.

## **(vi) - Liabilities of Parties**

**Chitty on Contracts 34th Ed.**

**Consolidated Mainwork Incorporating First Supplement**

**Volume II - Specific Contracts**

**Chapter 36 - Bills of Exchange and Banking**

**Section 1. - Negotiable Instruments**

**(b) - Bills of Exchange<sup>32</sup>**

**(vi) - Liabilities of Parties**

### **Liability of acceptor**

36-113 A bill of exchange does not constitute an assignment of funds which the drawer has in the hands of the drawee, and the holder does not usually have a cause of action against a drawee who has not accepted the bill.<sup>384</sup> Thus, the holder of a cheque has no action for its dishonour against the drawee bank.<sup>385</sup> However, when the drawee accepts the bill, he undertakes to pay it according to the tenor of his acceptance.<sup>386</sup> The acceptor is estopped from denying to a holder in due course:

- (a)the existence of the drawer, the genuineness of the drawer's signature and his capacity and authority to draw the bill;
- (b)if the bill is payable to the drawer's order, the capacity of the drawer to indorse, but not the genuineness and validity of his indorsement;
- (c)if the bill is payable to the order of a third party, the existence of the payee and his capacity to indorse the bill, but not the genuineness and validity of his indorsement.<sup>387</sup>

It should be stressed that these estoppels operate only in favour of a holder in due course, and a mere holder is not entitled to plead them.<sup>388</sup> As the provisions of the Act are not exhaustive, a holder may in certain cases be able to rely on a common law estoppel to preclude the acceptor from raising certain defences. Thus, if before discounting a bill, the holder were assured by the acceptor that a certain indorsement was genuine, the acceptor could not subsequently allege that it was a forgery.<sup>389</sup>

## Liability of drawer and indorser

- 36-114 By drawing the bill, the drawer engages that it will be honoured by the drawee when duly presented, and that if it be dishonoured he will compensate the holder or any indorser who is compelled to pay it, provided the required proceedings on dishonour are taken.<sup>390</sup> A similar engagement is undertaken by each indorser to all subsequent indorsers and to the holder.<sup>391</sup> The drawer is precluded from denying to a holder in due course the existence of the payee and his capacity to indorse the bill, but not the genuineness of his indorsement.<sup>392</sup> The indorser is estopped from denying to a holder in due course the genuineness and regularity in all respects of the drawer's signature and of all previous indorsements.<sup>393</sup> As against an immediate or subsequent indorsee, the indorser is precluded from denying that, at the time of his indorsement, the bill was valid and subsisting and that he had a good title to it.<sup>394</sup> In effect, both the drawer and the indorser undertake that the bill will be honoured by the drawee and, for most purposes, are in a position similar to that of joint guarantors of a debt. Thus, when the bill is dishonoured, the holder is entitled to sue the acceptor, the drawer or the indorser, or all of them together. The drawer and indorser are entitled to the equities of a surety.<sup>395</sup>

## Other signatures

- 36-115 Where a person signs a bill otherwise than as drawer or acceptor, he incurs the liabilities of an indorser to a holder in due course.<sup>396</sup> His liability, though, is incurred only towards subsequent parties. Even if the indorsement is executed for security purposes, the indorser does not assume liability to any holder who, initially, became a party to the bill before him.<sup>397</sup> Furthermore, the indorser's liability is subject to the holder's due performance of the formalities prescribed by the Act in respect of dishonoured bills. On these two points, the position of an indorser differs from that of a guarantor, whose liability would be concurrent with the acceptor's.<sup>398</sup> But whilst a guarantee of a bill, which is known as an aval, is recognised in countries which have adopted the Uniform Law on Bills of the Geneva Convention as well as in the United States,<sup>399</sup> the prevailing view is that an aval is not effective in English law.<sup>400</sup> However, in *G & H Montage GmbH v Irvani*<sup>401</sup> Saville J held that English law would uphold the validity of an aval, if its validity was recognised by the foreign law system governing the instrument. His Lordship further observed that the words commonly used in an aval, e.g. "payment guaranteed", constituted an adequate memorandum within the meaning of the Statute of Frauds. His decision was affirmed, on the same grounds, by the Court of Appeal.<sup>402</sup> This important decision indicates that at least one of the objections traditionally raised against the recognition of an aval in English may not be of substance.

## Indorsement for collection

- 36-116 Not every signature appearing on the back of the bill has the effect of an indorsement. It may be executed for the purpose of facilitating the collection and not the negotiation of the instrument. A person who appends his signature for this purpose is not an indorser and does not assume liability on the bill. Usually he manifests his intention by adding to his signature words indicating that the bill is transmitted solely for collection.<sup>403</sup> In other cases the same intention may be inferred from the circumstances. Thus, it was held by an Australian authority that the signature of the payee on a cheque payable to himself “or bearer” was not to be regarded an indorsement as such a bill was transferable by mere delivery. The payee’s signature was therefore not required to effect transfer and, by signing the bill on its back, he did not purport to assume the liability of an indorser.<sup>404</sup> But this decision may be questioned as, in such a case, the payee’s signature may be executed at the transferee’s request for the very purpose of rendering the payee liable to pay the bill in the event of its dishonour by the drawee. It is arguable that whether or not a particular signature constitutes an indorsement depends on the signer’s intention. In the absence of proof to the contrary, s.56 leads to the conclusion that a signature executed by a person other than the drawer or the drawee constitutes an indorsement.

## Measure of damages for dishonour

- 36-117 The damages for the dishonour of a bill payable in the United Kingdom consist of:
- (a)the amount of the bill;
  - (b)interest thereon either, if the bill is payable on demand, from the date of presentment, or in the case of any other bill, from the date of maturity; and
  - (c)the expenses of noting or of protest, when protest is required.<sup>405</sup>

Section 57 does not specify the rate of interest to be applied. When calculating the appropriate rate of interest for a period from the date of the cause of action to the date of the judgment, the rate payable on judgment debts is a convenient starting point.<sup>406</sup> Historically, the Commercial Court has generally awarded interest at 1 per cent above base rate, unless such rate would be unfair to one or other of the parties or to be otherwise inappropriate.<sup>407</sup> For small claims, it is easier to claim interest at the judgment rate.<sup>408</sup>

## Foreign currency bills

- 36-118

The rule prescribed by s.57 is adequate in respect of bills payable in pounds sterling. Problems arise in respect of bills payable in a foreign currency as, fundamentally, the conversion of the amount so expressed can be based on the rate of exchange prevailing on one of four possible dates:

- (i)the date on which the bill is payable;
- (ii)the date of commencement of proceedings to enforce the bill;
- (iii)the date of judgment; and
- (iv)the date on which payment is actually made.

Traditionally English law favoured the first alternative<sup>409</sup> and, until 1977, this was reflected in ss.57(2) and 72(4) of the Act. Under the former provision the holder of a bill dishonoured abroad was entitled to claim the amount of “re-exchange” of the bill with interest thereon until the actual time of payment. “Re-exchange” meant the amount for which a sight draft had to be drawn at the time and place of dishonour in order to realise the amount of the bill and the expenses resulting from dishonour taking into account the rate of exchange prevailing at that date.<sup>410</sup> Under the latter provision the amount of a bill expressed in foreign currency and drawn out of the United Kingdom but payable within the realm was, in the absence of stipulation to the contrary, to be calculated according to the rate of exchange for sight drafts at the place of payment on the date of maturity.<sup>411</sup>

## New rule

- 36-119 Both ss.57(2) and 72(4) further reflected the principle under which the judgment of an English court for the payment of money had to be expressed in pounds sterling. This rule was, however, reversed by the House of Lords in *Miliangos v George Frank (Textiles) Ltd*<sup>412</sup> in which a foreign seller sued an English buyer for the payment of an amount which was expressed in the contract of sale in Swiss francs and in respect of which the buyer had accepted bills of exchange payable in Switzerland. It was held that the amount payable by the English buyer was to be determined on the basis of the rate of exchange prevailing at the date of actual payment, i.e. the date on which actual enforcement of the judgment was ordered. The judgment itself was expressed in Swiss francs.

## Scope of application

- 36-120 At one stage it was thought that this new rule, which enabled English courts to order the payment of an amount expressed in foreign currency, was applicable only in respect of contracts and bills of exchange governed by a foreign proper law. But in *Barclays Bank International Ltd v Levin Bros (Bradford) Ltd*,<sup>413</sup> Mocatta J held that the same principle applied in respect of a bill of exchange drawn in US dollars for the price of goods supplied by an American exporter to an English purchaser. His Lordship reached this conclusion although the bill was payable in London,

although the proper law governing the buyer's acceptance was that of England and although the currency of payment was, accordingly, the pound sterling. This decision has been reinforced by the repeal of ss.57(2) and 72(4) of the Act.<sup>414</sup>

## Transferor by delivery

- 36-121 Where the holder of a bill payable to bearer negotiates it by delivery without indorsing it, he is called a "transferor by delivery".<sup>415</sup> A transferor by delivery is not liable on the bill, and if it is dishonoured cannot be sued on it even by the immediate transferee.<sup>416</sup> However, by negotiating the bill, the transferor by delivery warrants to his immediate transferee (provided the latter is a holder for value), that the bill is what it purports to be, that he has a right to transfer it and that he is not aware of any fact which renders it valueless.<sup>417</sup> Thus, if it turns out that the bill is a forgery and hence worthless, the transferor by delivery is obliged to reimburse the transferee.<sup>418</sup> The holder of a bill who presents it for payment to the drawer is not a "transferor" and does not warrant its authenticity.<sup>419</sup>

## Footnotes

- 32 For detailed works on the subject, see Chalmers and Guest on Bills of Exchange and Cheques, 18th edn (2017); for the special aspects respecting the use of bills of exchange in international trade, see Benjamin's Sale of Goods, 11th edn (2021), Ch.22.
- 384 s.53(1). That the drawing of the bill does not constitute an equitable assignment follows from *Shand v Du Buisson (1874) L.R. 18 Eq. 283, 288–289*. The position is different in Scotland: s.53(2); as to which, see *Williams v Williams, 1980 S.L.T. 25 Sh Ct* holding that a countermanded cheque would not be effective to constitute an assignment; *Sutherland v Royal Bank of Scotland Plc 1997 S.L.T. 329 OH*.
- 385 *Hopkinson v Forster (1874) L.R. 19 Eq. 74*; *Schroeder v Central Bank (1876) 34 L.T. 735*. But see s.74(3).
- 386 s.54(1).
- 387 s.54(2).
- 388 *Ayres v Moore [1940] 1 K.B. 278*.
- 389 *Brook v Hook (1871) L.R. 6 Ex. 89, 99*, and cases cited in para.36-053, above.
- 390 s.55(1)(a). As regards a bill indorsed for accommodation before its having been signed by the drawer, see *Bank of Nova Scotia v Hogg, 24 O.R. (2d) 494 (1979) Can.*
- 391 s.55(2)(a). But note that under s.16(1) the drawer or indorser may insert in the bill words negating his liability.
- 392 s.55(1)(b).

- 393 s.55(2)(b).
- 394 s.55(2)(c).
- 395 *Duncan Fox & Co v North and South Wales Bank* (1880) 6 App. Cas. 1, especially at 19–20. See also *Rouquette v Overmann* (1875) L.R. 10 Q.B. 525, 537; *Double Diamond Bowling Supply Ltd v Eglington Bowling Ltd* [1963] 2 O.R. 222, 224–226; *Re Securitibank Ltd* [1978] 1 N.Z.L.R. 97, 212; *Guaranty Trust Co of Canada v Seller's Oil Field Service Ltd* (1984) 55 A.R. 348 at [13]–[15]; *Scholefield Goodman & Sons Ltd v Zyngier* [1984] V.R. 445, affirmed [1986] A.C. 562, PC. And see Chalmers and Guest on Bills of Exchange and Cheques, 18th edn (2017), para.7-021. See also below, paras 47–131 et seq.
- 396 s.56.
- 397 *Steele v M'Kinlay* (1880) 5 App. Cas. 745; *Stagg, Mantle & Co v Brodrick* (1895) 12 T.L.R. 12.
- 398 *Stagg, Mantle & Co v Brodrick*, above; Chalmers and Guest on Bills of Exchange and Cheques, 18th edn (2017), paras 7-031 et seq.
- 399 ULB, arts 30–32; Uniform Commercial Code (USA) s.3-419 (Revised Version), under which the aval is treated as a specie of accommodation signature and binding as such: Ellinger, “Negotiable Instruments”, being Ch.4 of the Encyclopedia of Comparative Law (Hamburg, 2001), Vol.IX, para.389.
- 400 *Jackson v Hudson* (1810) 2 Camp. 447, 448; *Steele v M'Kinlay* (1880) 5 App. Cas. 745 at 772. 401 [1988] 1 W.L.R. 1285.
- 402 [1990] 1 Lloyd's Rep. 14; see also, as regards avals on foreign bills, *Banco Atlantico SA v British Bank of the Middle East* [1990] 2 Lloyd's Rep. 504; and see Chalmers and Guest on Bills of Exchange and Cheques, 18th edn (2017), paras 7-039—7-041.
- 403 *Keene v Beard* (1860) 8 C.B.(N.S.) 372, 382; *Gerald McDonald & Co v Nash* [1924] A.C. 625, 634.
- 404 *Miller Associates (Australia) Pty Ltd v Bennington Pty Ltd* (1975) 7 A.L.R. 144; and see *Chappenden* (1981) 55 A.L.J. 135.
- 405 s.57(1). The claim is in damages and not in debt (*Standard Chartered Bank v Dorchester LNG (2) Ltd* [2014] EWCA Civ 1382 at [40]). If the law which governs the party's contract on the instrument is part of the law of the UK, then the measure of damages will be determined in accordance with s.57, but if the law which governs that contract is the law of some foreign country, s.57 will not apply, and the measure of damages will be determined by that law: Chalmers and Guest on Bills of Exchange, 18th edn (2017), para.7-052, applied by Blair J in *Karafarin Bank v Dara (No.2)* [2009] EWHC 3265 (Comm), [2010] 1 Lloyd's Rep. 236 at [25]–[27].
- 406 See “Notes on Awards of Interest” in the White Book 2021, paras 16AI.1 et seq.
- 407 There is no presumption to the effect that base rate plus 1 per cent is the appropriate measure and awards of 2 per cent above base rate are common: see “Notes on Awards of Interest” in the White Book 2021, para. 16AI.7.
- 408 CPR Pt 12 r.12.6 (default judgments). On claims for interest generally, see Chalmers and Guest on Bills of Exchange and Cheques, 18th edn (2017), para.7-047.
- 409 So explained by Lord Wright in *Salim Nasrallah Khoury (Syndic in Bankruptcy) v Khayat* [1943] A.C. 507, 512–513.

- 410 *Re Commercial Bank of South Australia* (1887) 36 Ch. D. 522, 528. And see *Re Gillespie* (1886) 18 Q.B.D. 286.
- 411 But note that it has been suggested that s.72(4) was not meant to cover cases of default: *Barclays Bank International Ltd v Levin Bros (Bradford) Ltd* [1977] Q.B. 270.
- 412 [1976] A.C. 443, especially at 468–469.
- 413 [1977] Q.B. 270.
- 414 Administration of Justice Act 1977 s.4.
- 415 s.58(1).
- 416 s.58(2). But see s.2 of the Cheques Act 1957.
- 417 s.58(3). Note that his liability is not incurred towards subsequent parties: *Miller Associates (Australia) Pty Ltd v Bennington Pty Ltd* (1975) 7 A.L.R. 144.
- 418 *Gurney v Womersley* (1854) 4 E. & B. 133.
- 419 *Guaranty Trust Co of New York v Hannay & Co* [1918] 2 K.B. 623, 631–632.

## **(vii) - Discharge of Bill**

**Chitty on Contracts 34th Ed.**

**Consolidated Mainwork Incorporating First Supplement**

**Volume II - Specific Contracts**

**Chapter 36 - Bills of Exchange and Banking**

**Section 1. - Negotiable Instruments**

**(b) - Bills of Exchange<sup>32</sup>**

**(vii) - Discharge of Bill**

### **Discharge defined**

36-122 A bill is discharged:

- (a)by payment in due course ([s.59](#));
- (b)when the acceptor becomes the holder of it at or after its maturity ([s.61](#));
- (c)by express waiver or renunciation ([s.62](#));
- (d)by cancellation ([s.63](#)); and
- (e)to a certain extent, where a bill is materially altered without the assent of the parties liable on it ([s.64](#)).

The effect of the discharge of a bill is to extinguish all rights of action based thereon, as the bill ceases to be a negotiable instrument.<sup>420</sup> However, the position of a person who, in good faith and for valuable consideration takes a discharged bill that does not show on its face that it has been discharged, gives rise to difficulties. It has been suggested that such a person could claim to be a holder in due course and that he may be entitled to enforce the bill.<sup>421</sup> It should, however, be recollected that a person is a holder in due course only if he takes a bill before it is overdue. The problem could, thus, arise only in the case of a bill payable on demand or, in the case of any other bill, if it was paid before maturity. In these cases it could, perhaps, be argued that an acceptor who failed to indicate on the bill that it had been discharged, should be estopped from pleading this.

## Payment in due course

- 36-123 According to s.59(1), a bill is discharged by payment in due course, i.e. when the drawee pays it at or after maturity to a holder, and does this in good faith and without notice that the holder's title is defective. A holder is defined as the payee or indorsee of a bill who has its possession or the bearer.<sup>422</sup> It is, therefore, doubtful whether payment to a person who obtained the bill under a forged indorsement of the payee constitutes a discharge.<sup>423</sup> It has been held that payment by the acceptor in good faith to a thief, who had stolen a bill payable to bearer, constituted payment in due course.<sup>424</sup> Payment in good faith by the acceptor to an indorsee who has obtained the bill by fraud constitutes a discharge.<sup>425</sup>

## Payment by drawer or indorser

- 36-124 When a bill (not being an accommodation bill)<sup>426</sup> is paid by the drawer or an indorser, it is not discharged. If a bill payable to a third party is paid by the drawer, he is entitled to enforce payment against the acceptor but may not re-issue the bill. If a bill payable to the drawer's own order is indorsed by him to another person but subsequently is paid by the drawer himself, he is restored to his former rights against the acceptor and antecedent parties; he is entitled to strike out his own indorsement and again negotiate the bill. This is also the position of an indorser who pays a bill.<sup>427</sup> When a drawer or indorser pays a bill to a holder, he becomes entitled to the benefit of securities given to the holder by the acceptor. The reason for this is that the drawer and indorsers are considered to be guarantors of the acceptor's debt to the holder, and thus are subrogated to the holder's (creditor's) security rights vis-à-vis the debtor.<sup>428</sup>

## Claims for repayment by drawee or acceptor<sup>429</sup>

- 36-125 The position of a drawee or an acceptor who has paid a bill to a person not entitled to it, gives rise to problems. When such a drawee is a banker, he may be entitled to debit his customer's account despite his having paid the cheque or bill to an unauthorised person.<sup>430</sup> Where the drawee does not acquire such a right, he may attempt to claim repayment of the amount of the cheque or of the bill from the payee as money paid under a mistake of fact. Moreover, even where the drawee is entitled to debit the drawer's account with the amount paid on the bill, the drawee may be induced by commercial considerations to seek a remedy against the payee. The drawee's right to demand repayment from the payee depends on the facts of each case; the principal factors to be taken into

account are the nature of the mistake that induced the drawee to honour the instrument and the capacity in which the payee presented it. The drawee is not entitled to demand repayment from a payee who, having presented the bill as an agent, has remitted the proceeds to his principal.<sup>431</sup> The drawee stands a better chance of succeeding against a payee who has obtained payment for himself. It is well established that restitution will be ordered against a payee who obtains payment with the knowledge that the drawee is acting under a mistake as to the facts.<sup>432</sup> If the payee receives payment in good faith, the drawee or acceptor's rights depend on the nature of the mistake.

## Nature of mistake

- 36-126 To be operative, the mistake must be material. Some authorities suggest that, to be material, a mistake must have some direct bearing on the transaction between the drawee and the payee and that a mistake concerning an extraneous fact, affecting the legal relationship between the drawee and the drawer, is usually irrelevant.<sup>433</sup> But in *Barclays Bank Ltd v WJ Simms Son & Cooke (Southern) Ltd*<sup>434</sup> Robert Goff J described this view as too narrow. His Lordship said that a mistake is material if it leads the bank to the erroneous conclusion that it has the customer's mandate to effect payment. A mistake which does not directly or indirectly mislead the bank as regards its mandate to pay is inoperative.<sup>435</sup> Goff J's analysis derives support from cases according to which the bank is not entitled to reclaim payment made as a result of a mistaken belief that the customer's account has an adequate balance for meeting the instrument.<sup>436</sup> In such a case the bank actually complies with the customer's order to pay on the basis of a mistake. In doing so, it remains within the scope of its authority. His Lordship's opinion derives further support from cases which hold that the bank is entitled to reclaim payment if it has overlooked the customer's countermand even if the payee too has been unaware of the stop order at the time of payment.<sup>437</sup> In such a case the bank makes payment without having its customer's mandate.

## Mistake respecting instrument

- 36-127 The drawee or acceptor is a fortiori entitled to recover payment where the mistake relates to the instrument itself, e.g. where the drawer's signature or a subsequent indorsement is forged or where the amount of the instrument has been fraudulently raised. There are, however, some cases which suggest that even in this type of case the drawee is unable to claim repayment of the amount paid, except where he notifies the payee of the fraud on the very day of payment.<sup>438</sup> But these cases have been questioned; it will be convenient to consider the reasoning in the authorities in point.

36-128

Three reasons are canvassed in the cases which deny the drawee's right to demand restitution of an amount paid on the basis of a mistake of fact relating to a negotiable instrument presented by the payee. First, it is suggested that when the drawee pays the instrument he induces the payee to believe that it is valid; the drawee is therefore precluded from subsequently asserting a forgery or irregularity in the bill.<sup>439</sup> Secondly, at least one authority suggests that the drawee is unable to recover where he is negligent at the time of payment, e.g. where he fails to scrutinise the drawer's signature.<sup>440</sup> Obviously, this argument would enable the drawee to recover the amount paid where he had not acted negligently, e.g. where the forgery was executed so skilfully as to defy detection. Thirdly, it has been said that the drawee loses his right to recover when the payee changes his position in reliance on the payment of the instrument; it is further asserted in this context that, unless the payee is notified about the forgery without any delay, his position is automatically altered to his detriment because a lapse of time deprives him of the opportunity to serve due notice of dishonour on previous parties.<sup>441</sup> As delay in giving notice is, however, excused in cases of this type,<sup>442</sup> this reasoning is not plausible. It has been suggested that the most convincing argument in support of the cases in question is that the holder of a bill or of a cheque is entitled to know promptly upon presentation whether the instrument is to be honoured or not.<sup>443</sup> On this view, the cases in question establish an exception, concerning payment of amounts due on negotiable instruments, to the general rule that entitles the payer to claim repayment of an amount paid under a mistake of fact despite his having been negligent in failing to ascertain the correct position and regardless of a change to the detriment in the payee's position.<sup>444</sup> The existence of such an exception to the general rule has, however, been questioned in two cases.<sup>445</sup> It is there suggested that, even if the cases establishing the exception constitute good law, the exception, as based on these cases, is confined to the payment under a mistake of fact of genuine negotiable instruments and does not affect the payment of instruments which are forgeries *in toto* and hence not negotiable. One difficulty concerning this narrow interpretation is that in many cases the holder has no means of ascertaining whether the instrument concerned is a total forgery (such as a bill bearing a forged signature of the drawer) or a valid instrument.

## Attempt to reconcile

- 36-129 An attempt to reconcile the earlier authorities is to be found in Robert Goff J's decision in *Barclays Bank Ltd v WJ Simms Son & Cooke (Southern) Ltd*.<sup>446</sup> The drawer of a cheque stopped it when he was informed that a receiver was appointed under a mortgage debenture issued by the payee. Due to a clerical error, the bank paid the cheque to the receiver. When the bank discovered its mistake, it recited the drawer's account and claimed repayment. Giving judgment for the bank, Goff J said that, on the basis of the "formidable line of authority" certain simple principles could be deduced<sup>447</sup>:

“(1) If a person pays money to another under a mistake of fact which causes him to make the payment, he is *prima facie* entitled to recover it as money paid under a mistake of fact. (2) His claim may however fail if (a) the payer intends that the payee shall have the money at all events, whether the fact be true or false, or is deemed in law so to intend; or (b) the payment is made for good consideration, in particular if the money is paid to discharge, and does discharge, a debt owed to the payee (or a principal on whose behalf he is authorised to receive the payment) by the payer or by a third party by whom he is authorised to discharge the debt; or (c) the payee has changed his position in good faith, or is deemed in law to have done so.”

## Effect of mistake

- 36-130 These rules led his Lordship to certain conclusions concerning the effect of a mistake of fact resulting in the payment of a cheque. If, despite the existence of the mistake, the bank paid the cheque in compliance with its customer’s mandate, it would be entitled to debit his account. The payment involved would further discharge the customer’s debt to the payee. Goff J concluded that, accordingly, the bank would not be entitled to claim the amount back on the basis of its having been paid under a mistake of fact.<sup>448</sup> But if the bank paid the instrument without having a mandate to do so, it would not be entitled to debit the customer’s account. Unless the customer ratified payment, the bank would be entitled to recover the amount paid from the payee.<sup>449</sup> In the case in question the balance standing to customer’s account was adequate for meeting the cheque. But Goff J intimated that his decision would have been the same even if, on the basis of its mistake, the bank had permitted the customer’s account to become overdrawn.<sup>450</sup>

## General recognition of defence of change in position

- 36-131 The two substantive defences for actions for the recovery of money paid under a mistake of fact, applicable respectively where a bank pays the funds received by it to its customer and the cases respecting payments of negotiable instruments, constitute special applications of the general doctrine under which money is not recoverable from a payee who has changed his position in good faith in reliance on the payment made to him. These two special defences were recognised although the general doctrine or defence was, for many years, held inapplicable in English law.<sup>451</sup> The law in point was, however, finally changed by the House of Lords in 1991 in *Lipkin Gorman v Karpnale Ltd.*<sup>452</sup> C, who was a junior partner in a firm of solicitors, misappropriated money from the firm’s client account and used it for the purchase of gaming chips with which he gambled at

the premises of the defendant club. Occasionally he won and paid part of his gains to the credit of the client account; but in most instances he lost. All in all, C lost £154,695 out of the total amount of £323,224 stolen by him from the firm. The firm brought an action to recover the money from the club. Reversing the decision of the majority of the Court of Appeal, the House of Lords held that the supply of the chips by the club's cashier to C did not constitute the furnishing of a separate lawful consideration by the club. C's transactions with the club involved gambling and, as the contracts so made were void, the club had not furnished value for the funds. The firm was, accordingly, entitled to recover. This finding gave rise to the question of whether the firm was entitled to recover the total amount stolen and placed by C on the betting table or only the net amount lost by him.

## Decision in Lipkin Gorman

- 36-132 Finding that the club had changed its position to the extent of the amounts paid out to C, their Lordships held that only the net amount won by the club was recoverable. In reaching this conclusion, their Lordships expressly gave effect to the doctrine under which an action in restitution does not lie against a person who has in good faith changed his position in reliance on the funds received. In such a case:

“... the injustice of requiring [the defendant] so to repay outweighs the injustice of denying the plaintiff restitution. If the plaintiff pays money to the defendant under a mistake of fact, and the defendant then, acting in good faith, pays the money or part of it to charity, it is unjust to require the defendant to make restitution to the extent that he has so changed his position. Likewise, ... if a thief steals ... money and pays it to a third party, who gives it away to charity, that party should have a good defence to an action for money had and received. In other words, bona fide change of position should of itself be a good defence in cases such as these.”<sup>453</sup>

## Present scope of doctrine

- 36-133 The House of Lords has, thus, introduced the defence of the payee's change in position as a general defence to restitutionary claims.<sup>454</sup> Their Lordship emphasised, at the same time, that not every change in a payee's position would, as a matter of course, entitle him to plead the defence in question. Lord Goff of Chieveley emphasised<sup>455</sup>:

“I am most anxious that, in recognising this defence to actions of restitution, nothing should be said at this stage to inhibit the development of the defence on a case to case

basis, in the usual way. It is, of course, plain that the defence is not open to one who has changed his position in bad faith, as where the defendant has paid away the money with knowledge of the facts entitling the plaintiff to restitution; and it is commonly accepted that the defence should not be open to a wrongdoer.”

Lord Goff added that the mere fact that the payee had spent the money did not, of itself, involve a change in his position that would bring the doctrine into operation. The “expenditure might in any event have been incurred by him in the ordinary course of things”.<sup>456</sup> The payee must have incurred expense that he would otherwise not have incurred<sup>457</sup> or have acted in such a way as to render it unjust that he should now be compelled to refund the payment.<sup>458</sup> Where the payee still retains the benefit of goods or services that he purchased, he may still be held to have been unjustly enriched to their value as a result of the payment.<sup>459</sup>

## Assessment

<sup>36-134</sup> It is to be expected that the principles governing the change of position defence will be refined and articulated in due course.

<sup>460</sup>

**U** It will then be seen also whether the two specific applications of the doctrine, discussed earlier in respect of the payment of funds by a collecting bank to its customer and as regards payments of negotiable instruments, will be redefined in the light of the mainstream of future cases expounding the general doctrine. In the meantime, it is advisable to regard the existing cases, respecting the two specific applications of the doctrine, as basically unaffected.<sup>461</sup>

## Tracing order

<sup>36-135</sup> Where the payee of an amount, paid by a bank under a mistake of fact, is insolvent, the bank may wish to obtain a tracing order so as to enable it to recover the amount involved in specie. Thus, in *Chase Manhattan Bank NA v Israel-British Bank (London) Ltd*<sup>462</sup> the plaintiff, a New York bank, was asked by one of its correspondents to pay a certain amount to the M Bank, another New York bank, for the account of the defendant, an English bank. Due to an error, the plaintiff paid the amount twice. Before the plaintiff noticed its error, the defendant went into liquidation. Granting a tracing order, Goulding J observed that such an order would be available both under the laws

of New York and of England. His Lordship rejected the argument that an equitable tracing order would be granted only where a fiduciary relationship existed between the payer and the payee at the time payment took place. It was “enough that … the payment into the wrong hands itself gave rise to a fiduciary relationship”.<sup>463</sup> Such a relationship eventuated because a person who paid money to another under a factual mistake retained an equitable property in it and the payee’s conscience would be subjected to a fiduciary duty to respect this proprietary right.

<sup>464</sup>



- 36-136 Goulding J’s reasoning has since been strongly criticised (obiter) by Lord Browne-Wilkinson in *Westdeutsche Landesbank Girozentrale v Islington LBC*.<sup>465</sup> *Chase Manhattan* seems no longer to represent good law.<sup>466</sup> There is no basis for the contention that, in the ordinary course, a person retains an equitable (or any) interest in money paid away. Nevertheless, Lord Browne-Wilkinson did concede that, despite Goulding J’s faulty reasoning, *Chase Manhattan* may well have been rightly decided. The recipient bank had known of the mistake made by the paying bank within two days of the receipt of the money. Lord Browne-Wilkinson concluded (at 715):

“Although the mere receipt of money, in ignorance of the mistake, gives rise to no trust, the retention of the moneys after the recipient bank learned of the mistake may well have given rise to a constructive trust.”

<sup>467</sup>



## Acceptor holder at maturity

- 36-137 If at or after maturity of a bill the acceptor becomes its holder, *in his own right*, the bill is discharged.<sup>468</sup> Thus, if a bill is accepted jointly by three drawees, and is at maturity indorsed to one of them, it is discharged, and the remaining acceptors cannot be sued on the bill, although they may be liable to contribute as joint debtors.<sup>469</sup> If the acceptor of a bill becomes the executor of the holder, the bill is discharged.<sup>470</sup> However, this would probably not be the case if the acceptor became an administrator, as he would then not hold the bill “*in his own right*”.<sup>471</sup>

## Waiver

- 36-138 A bill is discharged if at or after its maturity the holder expressly and absolutely renounces his rights against the acceptor either in writing or by delivering the bill to him.<sup>472</sup> The bill is likewise discharged if it is delivered to the acceptor's executors or administrators with an intention that it be discharged. In *Edwards v Walters*,<sup>473</sup> where the holder of a promissory note voluntarily delivered it up, after the death of the maker, to a devisee of his real estate, which he had charged with the payment of his debts, the delivery was held not to operate as a renunciation of the note. The court indicated, however, that if the devisee had been appointed executor or administrator the bill would have been discharged. In *Rimalt v Cartwright*<sup>474</sup> it was held that the acceptance by the holder of an offer by the acceptor to pay a composition was not a "renunciation in writing" of the holder's rights. The liabilities of any party to a bill may in like manner be renounced by the holder before, at, or after its maturity; but such renunciation does not affect the rights of a holder in due course.<sup>475</sup>

## Cancellation

- 36-139 A bill is discharged by an apparent, intentional, cancellation of it by the holder or his agent.<sup>476</sup> In like manner the holder or his agent may discharge any party liable on the bill by cancelling his signature. In such a case any indorser, who would have had a right of recourse against the party whose signature is cancelled, is also discharged.<sup>477</sup> A cancellation is effective only if it is obvious: where a bill, which had been torn into two pieces, was picked up and mended, a holder in due course, who took it subsequently, was allowed to enforce it against the acceptor.<sup>478</sup> A holder may prove that a cancellation was made unintentionally or under a mistake of fact or without his authority, and in that case it is inoperative.<sup>479</sup>

## Alteration of bill

- 36-140 Where a bill or acceptance is materially altered without the assent of all parties, the bill is, by the terms of s.64(1), avoided, except as against a party who has himself made, authorised or assented to the alteration and subsequent indorsers.<sup>480</sup> The section provides that where a bill has been materially altered, but the alteration is not apparent, and the bill is in the hands of a holder in due course, he may avail himself of the bill as if it had not been altered, and may enforce payment of it according to its original tenor. An alteration is considered apparent, if it would be observed by a person who intends becoming a holder of it and who scrutinises it with reasonable care.<sup>481</sup>

The effect of this section is that a holder in due course can enforce a bill according to its original terms. Thus, where a bill has been altered from £500 to £3,500, a holder in due course is entitled to enforce payment of £500.<sup>482</sup> If, before being aware of the alteration of the amount of a cheque, the drawee bank pays a holder in due course the amount as altered, it may be entitled to recover from him the difference between this amount and the original one.<sup>483</sup>

<sup>36-141</sup> The following alterations are, by s.64(2), material: any alteration of the date,<sup>484</sup> the sum payable, the time of payment, the place of payment, and, where a bill has been accepted generally, the addition of a place of payment without the acceptor's assent. The list of alterations specified in this subsection is not, however, exhaustive and whether a specific alteration is material or not is a question of fact.<sup>485</sup> An alteration which is not deliberately made by any person, but is caused by accident, does not invalidate the bill.<sup>486</sup> An alteration made before a bill is completely issued, e.g. the alteration by the drawer of a purported place of drawing inserted by an acceptor, who has accepted a bill before its being signed by the drawer, is not a material alteration,<sup>487</sup> although the same alteration may be material if made after the bill is properly issued.<sup>488</sup>

## Footnotes

<sup>32</sup> For detailed works on the subject, see Chalmers and Guest on Bills of Exchange and Cheques, 18th edn (2017); for the special aspects respecting the use of bills of exchange in international trade, see Benjamin's Sale of Goods, 11th edn (2021), Ch.22.

<sup>420</sup> *Harmer v Steele* (1849) 4 Exch. 1, 13; *Burchfield v Moore* (1854) 23 L.J. Q.B. 261.

<sup>421</sup> *Glasscock v Balls* (1889) 24 Q.B.D. 13, 15. See Chalmers and Guest on Bills of Exchange and Cheques, 18th edn (2017), para.8-003.

<sup>422</sup> s.2.

<sup>423</sup> See above, para.36-053. An exception applies in the case of cheques. See s.60 discussed below in paras 36-356 et seq.

<sup>424</sup> *Smith v Sheppard* (1776), cited in Chitty on Bills, 11th edn, p.278.

<sup>425</sup> *Robarts v Tucker* (1851) 16 Q.B. 560, 576–577, 579.

<sup>426</sup> Which is discharged by the party for whose accommodation it has been made: s.59(3).

<sup>427</sup> s.59(2).

<sup>428</sup> *Duncan Fox & Co v North and South Wales Bank* (1880) 6 App. Cas. 1. See also para.36-114 above.

<sup>429</sup> For a detailed discussion, see E.P Ellinger, E. Lomnicka and C.V.M. Hare, Ellinger's Modern Banking Law, 5th edn (2011), Ch.12. Note that the rights of the acceptor are also affected by s.54(2), as to which see above, para.36-113.

<sup>430</sup> s.60, discussed in paras 36-356 et seq., below.

<sup>431</sup> *Buller v Harrison* (1777) 2 Cowp. 565, 568; *Pollard v Bank of England* (1871) L.R. 6 Q.B. 623, 631; *Bank of Montreal v The King* (1906) 11 O.L.R. 595 (affirmed 38 S.C.R. 258 (1907))

*Can); Gowers v Lloyds and National Provincial Bank [1938] 1 All E.R. 766, 773; National Westminster Bank Ltd v Barclays Bank International Ltd [1975] Q.B. 654.* This doctrine, originally protecting an agent who has changed his position by paying the money received to his principal, has been restated as a general defence to an action in restitution in *Lipkin Gorman v Karpnale Ltd [1991] 2 A.C. 548*. However, this is probably wrong as the defence of an agent who has paid money over to his principal is best regarded as a separate defence with its own rules (*Portman Building Society v Hamlyn Taylor Neck (a firm) [1998] 4 All E.R. 202* at 207, per Millett LJ; *Jones v Churcher [2009] EWHC 722 (QB), [2009] 2 Lloyd's Rep. 94* at [77]–[78]; *Jeremy D Stone Consultants Ltd v National Westminster Bank Plc [2013] EWHC 208 (Ch)* at [244]). But note that the agent can be sued as long as the proceeds remain in his hands; the agent cannot defeat such an action by asserting a lien or right of set-off over the proceeds: *Kleinwort, Sons & Co v Dunlop Rubber Co (1907) 97 L.T. 263; Kerrison v Glyn, Mills Currie & Co (1911) 81 L.J. K.B. 465; RE Jones Ltd v Waring and Gillow Ltd [1926] A.C. 670*. The payment over defence is not available to a trustee who is not acting as an agent: *Skandinaviska Enskilda Banken AB v Conway [2019] UKPC 36* at [82]–[93]. See further, *E Bant*, “*Payment over and change of position: lessons from agency law*” [2007] *L.M.C.L.Q.* 225.

- 432 *Kendal v Wood (1871) L.R. 6 Ex. 243.*
- 433 *Aiken v Short (1856) 1 H. & N. 210; Barclay & Co Ltd v Malcolm & Co (1925) 133 L.T. 512, 513.*
- 434 *[1980] Q.B. 677, 694.* As regards the question of materiality generally, see at 692.
- 435 *[1980] Q.B. 677* at 699–700.
- 436 *Chambers v Miller (1862) 32 L.J. C.P. 30; Pollard v Bank of England (1871) L.R. 6 Q.B. 623, 633; Dominion Bank v Jacobs [1951] 3 D.L.R. 233.* And see Goff J in *Barclays Bank* case, above, at 689; and *Lloyd's Bank Plc v Independent Insurance Co Ltd [1999] 1 Lloyd's Rep. Bank. 1.*
- 437 *Barclays Bank Ltd v WJ Simms Son & Cooke (Southern) Ltd*, above. See also *Southland Savings Bank v Anderson [1974] 1 N.Z.L.R. 118* (suggesting that if the payee was aware of the countermand, he could be sued in deceit). Contrast *Commonwealth Trading Bank v Reno Auto Sales Pty Ltd [1967] V.R. 790 Aust.*
- 438 As regards the right of restitution where notice of the forgery is given on the day of payment, see *Wilkinson v Johnson (1824) 3 B. & C. 428; Cocks v Masterman (1829) 9 B. & C. 902, 908–909.*
- 439 *Price v Neal (1762) 3 Burr. 1354, 1357; London and River Plate Bank Ltd v Bank of Liverpool Ltd [1896] 1 Q.B. 7, 10–11; Bank of Montreal v R. (1906) 11 O.L.R. 595 (affirmed (1907) 38 S.C.R. 258 Can).* See also dicta in *Hart v Frontino and Bolivia South American Gold Mining Co (1870) L.R. 5 Ex. 111, 115; Simm v Anglo-American Telegraph Co (1879) 5 Q.B.D. 188, 196*, per Lindley J (the decision was reversed by the Court of Appeal, but the dictum in question remains unaffected). That a holder does not warrant the genuineness of a bill by presenting it for payment or for acceptance, see *Guaranty Trust Co of New York v Hannay & Co [1918] 2 K.B. 623*. In *BMP Global Distribution Inc v Bank of Nova Scotia [2009] 1 S.C.R. 504* at [32], Deschamps J, delivering the judgment of the Supreme Court of Canada, said: “I do not accept that [*Price v Neal*] provides a basis for an unqualified rule that a drawee

- will never have any recourse against either the collecting bank or the payee where payment has been made on the forged signature of the drawer".
- 440 *Smith v Mercer* (1815) 6 *Taunt.* 76, 81, 87. See also *Price v Neal*, above, but contrast *London and River Plate Bank Ltd v Bank of Liverpool Ltd*, above, which suggests that negligence is not the correct test.
- 441 *Cocks v Masterman* (1829) 9 *B. & C.* 902, 908–909; and see below, paras 36-133 et seq. as regards the position in the light of *Lipkin Gorman's* case, above. See also *BMP Global Distribution Inc v Bank of Nova Scotia* [2009] 1 S.C.R. 504.
- 442 *Bills of Exchange Act 1882 s.50(1)*; above, para.36-110. And note that notice is altogether excused as regards the drawer if the cheque had been stopped: *s.50(2)*; and see *Barclays Bank Ltd v WJ Simms Son & Cooke (Southern) Ltd* [1980] Q.B. 677, 700–703.
- 443 So in *Cocks v Masterman*, above, at 908–909. See also *Mather v Maidstone* (1856) 18 C.B. 273, 294 (where the acceptance itself was forged). See also *BMP Global Distribution Inc v Bank of Nova Scotia* [2009] 1 S.C.R. 504.
- 444 See Vol.I, paras 32-199 et seq.
- 445 *Imperial Bank of Canada v Bank of Hamilton* [1903] A.C. 49; *National Westminster Bank Ltd v Barclays Bank International Ltd* [1975] Q.B. 654. See also *Bank of India v Abeyesinghe* (1927) 29 N.L.R. (Ceylon) 257. See also *BMP Global Distribution Inc v Bank of Nova Scotia* [2009] 1 S.C.R. 504.
- 446 [1980] Q.B. 677, discussed by *Matthews* (1980) 130 New L.J. 587; *Goode* (1981) 97 L.Q.R. 254, who argues that a payee, who receives payment of a stopped cheque without notice, is entitled to retain the amount to the extent that he is entitled to succeed against the drawer. The bank, on the basis of subrogation, is entitled to maintain the debit in the drawer's account to the same extent. See also *Bank of New South Wales v Murphett* [1983] 1 V.R. 489.
- 447 [1980] Q.B. 677 at 695. For a recent example of Goff J's exception (2)(a), see *Leslie v Farrar Construction Ltd* [2016] EWCA Civ 1041 at [51]–[56]. For a recent reference to exception (2)(b), see *ICICI Bank UK Plc v Assam Oil Co Ltd* [2019] EWHC 750 (Comm) at [38]; cf. Re Citibank August 11, 2020 Wire Transfers, 16 February 2021, US District Court for Southern District of New York (Furman J) applying the "discharge for value defense" to unjust enrichment claim under New York law for return of funds wired by mistake.
- 448 See also *Lloyds Bank Plc v Independent Insurance Co Ltd* [2000] Q.B. 110, CA.
- 449 [1980] Q.B. 677 at 699–700.
- 450 [1980] Q.B. 677 at 700. See also *National Westminster Bank Ltd v Barclays Bank International Ltd* [1975] Q.B. 654.
- 451 For its final rejection in the 20th century, see *RE Jones & Co Ltd v Waring & Gillow Ltd* [1926] A.C. 670.
- 452 [1991] 2 A.C. 548.
- 453 [1991] 2 A.C. 548 at 579, per Lord Goff of Chieveley.
- 454 But there remains uncertainty as to whether the defence extends to all restitutionary claims. The defence of change of position is available against restitutionary claims based on unjust enrichment, but even then it is not open to a wrongdoer (*Lipkin Gorman (a firm) v Karpnale Ltd* [1991] 2 A.C. 548 at 580). There is some doubt as to whether it is available against a restitutionary claim based on the vindication of property rights, where the action is subject

- to the bona fide purchaser for value defence (*Foskett v McKeown [2001] 1 A.C. 102* at 129; *Papamichael v National Westminster Bank [2003] 1 Lloyd's Rep. 341* at 376; *Armstrong DLW GmbH v Winnington Networks Ltd [2012] EWHC 10 (Ch)* at [103]). In *Haugesund Kommune v Depfa ACS Bank [2010] EWCA Civ 579, [2012] 2 W.L.R. 199* at [122], where Aikens LJ said that “the defence of change of position is a general defence to all restitution claims (for money or other property) based on unjust enrichment”.
- 455 [1991] 1 A.C. 548 at 580. That an anticipatory mistake may be operative, see *Dextra Bank and Trust Co Ltd v Bank of Jamaica [2002] 1 All E.R. (Comm) 193, PC*; *Commerzbank AG v Gareth Price-Jones [2003] EWCA Civ 1663* (noted by Birks (2004) 120 L.Q.R. 373); cf. *South Tyneside Metropolitan BC v Svenska International Plc [1995] 1 All E.R. 545*, Clarke J.
- 456 [1991] 1 A.C. 548; and see *United Overseas Bank v Jiwani [1976] 1 W.L.R. 964*.
- 457 *Test Claimants in the FII Group Litigation v HMRC (No.2) [2014] EWHC 4302 (Ch)* at [353] (Henderson J).
- 458 See *Commerzbank AG v Price-Jones [2003] EWCA Civ 1663* at [39]–[40], [65]–[70].
- 459 E.P. Ellinger, E. Lomnicka and C.V.M. Hare, *Ellinger's Modern Banking Law*, 5th edn (2011), p.530.
- ❶460 Important recent cases on the availability of the change of position defence include: *Philip Collins Ltd v Davis [2000] 3 All E.R. 808*; *Scottish Equitable Plc v Derby [2001] EWCA Civ 369, [2001] 2 All E.R. (Comm) 274*; and *Crédit Suisse (Monaco) SA v Attar [2004] EWHC 374 (Comm)* (on the need for a causal connection between the mistaken receipt and the change of position); *Dextra Bank & Trust Co Ltd v Bank of Jamaica [2002] 1 All E.R. (Comm) 193*; and *Commerzbank AG v Gareth Price-Jones [2003] EWCA Civ 1663* (on anticipatory change of position); *Niru Battery Manufacturing Co v Milestone Trading Ltd [2002] EWHC 1425 (Comm)*, [2002] 2 All E.R. (Comm) 705, 741; approved [2003] EWCA Civ 1446, [2004] 4 All E.R. (Comm) 193 (on what constitutes “bad faith”); *Barros Mattos Junior v MacDaniels Ltd [2004] EWHC 1188 (Ch)*, [2004] 3 All E.R. 299 (on change of position which constituted an illegal action); *Campden Hill Ltd v Chakrani [2005] EWHC 911 (Ch)* (on retention of benefit acquired as result of change of position); *Abou-Rahmah v Abacha [2006] EWCA Civ 492, [2007] 1 Lloyd's Rep. 115* (on defendant's conduct at time of change of position); *Test Claimants in the FII Group Litigation v Commissioners for Revenue and Customs [2008] EWHC 2893 (Ch)*, [2009] S.T.C. 254 at [320], [337] (wrongdoer bar to the defence of change of position); *Jones v Churcher [2009] EWHC 722 (QB)*, [2009] 2 Lloyd's Rep. 94 (when good faith requires inquiry to be made before disposing of the mistaken payment); *Haugesund Kommune v Depfa ACS Bank [2010] EWCA Civ 579, [2012] 2 W.L.R. 199* (recipient of payment made under void contract of loan took risk that money would have to be repaid); *Jeremy D Stone Consultants Ltd v National Westminster Bank Plc [2013] EWHC 208 (Ch)* (on whether defence barred by bank's alleged failure to monitor its relationship with customer, contrary to the Money Laundering Regulations 2007 reg.8(1), and its alleged failure to report criminal activity, contrary to the Proceeds of Crime Act 2002 s.330); *Bellis (a firm) v Challinor [2015] EWCA Civ 59* at [115]–[120] (in circumstances failure to make diligent enquiry before disposing of mistaken payment did not constitute commercially unacceptable conduct); *T & L Sugars Ltd v Tate & Lyle Industries Ltd [2015]*

*EWHC 2696 (Comm)* at [137] (on anticipatory reliance); *Dexia Credop SpA v Comune di Prato [2016] EWHC 2824 (Comm)* at [75] (on need for “but for” causal connection between the receipt and any change of position)—but see also *[2017] EWCA Civ 428*, where the Court of Appeal reversed an earlier, related judgment on a key conflict of law issue in this case, and also held (at [213]) that there was no basis for restitutionary claims by either party; *Skandinaviska Enskilda Banken AB v Conway [2019] UKPC 36* at [94]–[117] (no change of position defence to unjust enrichment claim following voidable preference); *School Facility Management Ltd v Governing Body of Christ the King College [2020] EWHC 1118 (Comm)* at [475]–[478] (no rule against anticipatory change of position in respect of money paid under an ultra vires contract), and on appeal at *[2022] EWCA Civ 1053* at [78]–[85] (facts of case meant CA did not have to express a firm conclusion on the relationship between the counter-restitution principle and the change of position defence, see Vol.I, para.32-216); *Atkinson v Varma [2021] EWHC 2027 (Ch)* at [74]–[78] (steps required to be taken by recipient in order to reverse the disenrichment for the purposes of the change of position defence); *Tecnimont Arabia Ltd v National Westminster Bank Plc [2022] EWHC 1172 (Comm)* at [162]–[186] (obiter, applying *Niru Battery [2003] EWCA Civ 1446* at [149], [162] and [171], when deciding whether defendant is entitled to rely on change of position as a defence to a claim in unjust enrichment, the “essential question” is whether it would be inequitable or unconscionable, and thus unjust, to allow the recipient of money paid under a mistake of fact to deny restitution to the payer). In *BMP Global Distribution Inc v Bank of Nova Scotia [2009] 1 S.C.R. 504*, [62]–[65], the Supreme Court of Canada held that (1) the general of change of position defence applies to mistaken payments made on forged cheques; and (2) neither the collecting bank nor the payee changed their position merely by allowing the proceeds of a cheque to be credited to the payee’s account. For detailed coverage, see Bant, *The Change of Position Defence* (2009); Grantham in Bant, Barker and Degeling (eds), *Research Handbook on Unjust Enrichment and Restitution* (2020), Ch.21. See generally, Vol.I, paras 32-199 et seq.

461 For further discussion of the relationship between the payment over defence and the change of position defence, see *E Bant*, “*Payment over and change of position: lessons from agency law*” *[2007] L.M.C.L.Q. 225*. The separate nature of the two defences was stressed in *Jones v Churcher [2009] EWHC 722 (QB)*, *[2009] 2 Lloyd’s Rep. 94* at [77]–[78], and also in *Jeremy D Stone Consultants Ltd v National Westminster Bank Plc [2013] EWHC 208 (Ch)* at [244], with both cases citing Millet LJ in *Portman Building Society v Hamlyn Taylor Neck (a firm) [1998] 4 All E.R. 202* at 207.

462 *[1979] 3 All E.R. 1025*.

463 *[1979] 3 All E.R. 1025* at 1032.

464 For analysis of rules of “following and tracing”, see Vol.I, paras 32-181–32-187. As regards the issue of tracing funds paid into an overdrawn account, see *Style Financial Services Ltd v Bank of Scotland [1986] 5 Bank. L.R. 15*; *Bishopsgate Investment Management Ltd v Homan [1995] Ch. 211, CA*; *Box v Barclays Bank Plc [1998] Lloyd’s Rep. Bank 185* at 203; *Shalson v Russo [2003] EWHC 1637 (Ch)*, *[2005] Ch. 281* at [140]–[141]; *Cooper v PRG Powerhouse Ltd [2008] EWHC 498 (Ch)* at [28]–[33]; *Re BA Peters Plc [2008] EWCA Civ 1604* at

[13]–[24]; *Serious Fraud Office v Lexi Holdings Plc [2008] EWCA Crim 1443* at [51]. See also *Smith [1995] C.L.J. 290*; *Conaglen (2011) 127 L.Q.R. 432*. The arguments of Smith and Conaglen were reviewed by the Judicial Board of the Privy Council in *Brazil v Durant International Corp [2015] UKPC 35*, which (at [40]) rejected the argument that there can never be “backward tracing”, or that the court can never trace the value of an asset whose proceeds are paid into an overdrawn account. In *Serious Fraud Office v Hotel Portfolio II UK Ltd [2021] EWHC 1273 (Comm)*, Foxton J reviewed the authorities and concluded (at [45]) that the “present state of English law is that backward tracing of assets acquired prior to the misuse of trust assets is not permitted, save in certain narrow (but, for all that, soft-edged and overlapping) exceptions where a strict insistence on chronological sequence would fail to reflect the substance of the position”.

465 [1996] A.C. 669 at 714–715 (a case where money was paid under a void contract). See also the criticisms of Lord Millett, writing extra-judicially, in “Restitution and Constructive Trusts”, in W. Cornish et al (eds) Restitution—Past, Present and Future (1998), p.212.

466 Aikens J refused to follow it in *Bank of America v Arnell [1999] Lloyd's Rep. Bank* 399 at 406.

④467 This seems to require actual knowledge on the part of the recipient (*Papamichael v National Westminster Bank Plc [2003] 1 Lloyd's Rep. 341, 372*), but it has also been suggested that an objective test of unconscionability ought to be adopted (*Fitzalan-Howard (Norfolk) v Hibbert [2009] EWHC 2855 (QB), [2010] P.N.L.R. 11* at [49]). See also *Commerzbank AG v IMB Morgan Plc [2004] EWHC 2771 (Ch)*, [36]; *Bank of Ireland v Pexxnet Ltd [2010] EWHC 1872 (Comm)*, [55]; *Ali v Dinc [2020] EWHC 3055 (Ch)* at [225], affd. [2022] EWCA Civ 34 (appeal on different issue).

468 s.61.

469 *Harmer v Steele (1849) 4 Exch. 1*. cf. *Foster, Hight & Co v Ward (1883) 1 Cab. & E. 168*.

470 *Jenkins v Jenkins [1928] 2 K.B. 501*.

471 For a detailed analysis see Chalmers and Guest on Bills of Exchange and Cheques, 18th edn (2017), para.8-058.

472 s.62(1).

473 [1896] 2 Ch. 157. cf. *D Gokal & Co (HK) Ltd v Rippleworth Ltd [1998] 11 C.L. 370*.

474 (1924) 40 T.L.R. 803.

475 s.62(2).

476 s.63(1).

477 s.63(2).

478 *Ingham v Primrose (1859) 7 C.B.(N.S.) 82*. See also *Ralli v Dennistoun (1851) 6 Exch. 483; Bank of Scotland v Dominion Bank [1891] A.C. 592*.

479 s.63(3). See *Warwick v Rogers (1843) 5 M. & G. 340*, approved in *Prince v Oriental Bank Corp (1878) 3 App. Cas. 325*.

480 s.64(1) has been explained as an application of the rule in *Pigot's case (1614) 11 Co. Rep. 26b: Habibsons Bank Ltd v Standard Chartered Bank (Hong Kong) Ltd [2010] EWCA Civ 1335, [2011] Q.B. 943* at [28].

481 *Woollatt v Stanley (1928) 138 L.T. 620*. See generally *Hudson [1975] J.B.L. 108*.

- 482 *Scholfield v Londenborough* [1896] A.C. 514.
- 483 *Imperial Bank of Canada v Bank of Hamilton* [1903] A.C. 49. See also above, paras 36-126 et seq.
- 484 *Heller Factors Pty Ltd v Toy Corp Pty Ltd* [1984] 1 N.S.W.L.R. 121 Aust.
- 485 See, e.g. *Smith v Lloyds TSB Group Plc* [2000] 2 All E.R. (Comm) 693, where the Court of Appeal held that altering the payee's name on a cheque was a "material" alteration.
- 486 *Hong Kong and Shanghai Banking Corp v Lo Lee Shi* [1928] A.C. 181.
- 487 *Foster v Driscoll* [1929] 1 K.B. 470, 494.
- 488 *Koch v Dicks* [1933] 1 K.B. 307. See also *Raiffeisen Zentralbank Österreich AG v Crossseas Shipping Ltd* [2000] 1 W.L.R. 1135 at [19], CA.

## **(viii) - Acceptance and Payment for Honour**

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 36 - Bills of Exchange and Banking

Section 1. - Negotiable Instruments

(b) - Bills of Exchange<sup>32</sup>

(viii) - Acceptance and Payment for Honour

### **Acceptance for honour**

- 36-142 Where the drawee of a bill dishonours it by non-acceptance, a person who is not a party to the bill may, before the bill is overdue, and provided the holder consents to his doing so, accept the bill supra protest for the honour of any party liable thereon.<sup>489</sup> The acceptor for honour undertakes to pay the bill himself if it is dishonoured by non-payment by the drawee, provided the bill is duly presented to the drawee and protested. He incurs liability towards the holder and all parties to the bill subsequent to the one for whose honour he has accepted it.<sup>490</sup> Where a bill has been accepted for honour supra protest, it must be protested for its non-payment by the drawee before it is presented for payment to the acceptor for honour.<sup>491</sup> Where a bill is dishonoured by the acceptor for honour, it must be protested for non-payment.<sup>492</sup>

### **Payment for honour supra protest**

- 36-143 Where a bill has been protested for non-payment, any person may intervene and pay it supra protest for the honour of any party liable thereon.<sup>493</sup> In order that it may operate as payment for honour and not as a mere voluntary payment, the payment must be attested by a notarial act in a specified form.<sup>494</sup> Where a bill has been paid for honour, all the parties subsequent to the party for whose honour it is paid are discharged; the payer for honour is subrogated to and succeeds to both the rights and duties of the holder as regards the party for whose honour he pays, and all parties liable to

that party.<sup>495</sup> If the holder of the bill refuses to receive payment for honour supra protest, he loses his right of recourse against all the parties who would have been discharged by such payment.<sup>496</sup> If the holder receives such payment as well as payment of notarial expenses which he incurred due to the dishonour of the bill, he is obliged to deliver the bill and the protest to the payer for honour.<sup>497</sup>

## Referee in case of need

- 36-144 According to s.15 of the Act, the drawer or any indorser may insert in the bill the name of a person to whom the holder may resort if the bill is dishonoured by non-acceptance or non-payment. Such a person is known as a “referee in case of need”. The holder has the option to resort to the referee in case of need. A bill which contains a reference in case of need must, in the case of its dishonour by the drawee, be protested for non-payment before it is presented for payment to the referee in case of need.<sup>498</sup>

## Footnotes

32 For detailed works on the subject, see Chalmers and Guest on Bills of Exchange and Cheques, 18th edn (2017); for the special aspects respecting the use of bills of exchange in international trade, see Benjamin’s Sale of Goods, 11th edn (2021), Ch.22.

489 s.65.

490 s.66.

491 s.67(1); even a bill payable after sight must be presented to the drawee after its acceptance for honour: *Williams v Germaine (1827) 7 B. & C. 468*. As regards the time and place for such presentment, see s.67(2). As regards excuses for delay, see s.67(3).

492 s.67(4). As to the computation of the maturity of such bills, see s.65(5).

493 s.68(1), as regards the position if more than one person offers to pay a bill supra protest, see s.68(2).

494 s.68(3), (4).

495 s.68(5). He cannot, however, negotiate the bill: *Ex p. Swan (1868) L.R. 6 Eq. 344*.

496 s.68(7).

497 s.68(6).

498 s.67(1).

## **(ix) - Lost Instruments**

**Chitty on Contracts 34th Ed.**

**Consolidated Mainwork Incorporating First Supplement**

**Volume II - Specific Contracts**

**Chapter 36 - Bills of Exchange and Banking**

**Section 1. - Negotiable Instruments**

**(b) - Bills of Exchange<sup>32</sup>**

**(ix) - Lost Instruments**

### **Holder's right to duplicate of lost bill**

- 36-145 According to s.[69](#), where a bill has been lost before it is overdue, the last holder is entitled to request another bill of the same tenor from the drawer, but must give him an indemnity against claims by any persons, arising in case the lost bill is found again. If the drawer refuses to give such duplicate bill, he may be compelled to do so. No power is given by this section to obtain an indorsement or acceptance over again.

### **Action on lost bill**

- 36-146 According to s.[70](#), in any action or proceeding on a bill, the court may order that the loss of the instrument shall not be set up, provided an indemnity be given against the claims of any other person. If the claimant wishes to secure an order for costs, he should offer the indemnity before bringing an action on the lost instrument. [499](#)

### **Footnotes**

- 32 For detailed works on the subject, see Chalmers and Guest on Bills of Exchange and Cheques, 18th edn (2017); for the special aspects respecting the use of bills of exchange in international trade, see Benjamin's Sale of Goods, 11th edn (2021), Ch.22.
- 499 *King v Zimmerman (1871) L.R. 6 C.P. 466, 469*. Note that the section has been repealed as regards Northern Ireland: *Judicature (Northern Ireland) Act 1978 s.122* and *Sch.7 Pt I*.

## **(x) - Bills in a Set**

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**(b) - Bills of Exchange<sup>32</sup>**

**(x) - Bills in a Set**

### **Rules as to sets**

- 36-147 Where a bill is drawn in a set, each part of which is numbered<sup>500</sup> and contains a reference to the other parts, all these parts constitute one bill. Where the holder of a set indorses two or more parts to different persons, he is liable on every such part, and every indorser subsequent to him is liable on the part he has himself indorsed, as if the different parts were separate bills. Where two or more parts of a set are negotiated to different holders in due course, the holder whose title first accrues is, as between such holders, deemed the true owner of the bill; but this does not, in itself, affect the rights of a person who in due course accepts or pays the part first presented to him. The acceptance may be written on any part, and it must be written on one part only. If the drawee accepts more than one part, and such accepted parts get into the hands of different holders in due course, he is liable on every such part as if it were a separate bill. When the acceptor of a bill drawn in a set pays it without requiring the part bearing his acceptance to be delivered up to him, and that part is, at maturity, outstanding in the hands of a holder in due course, he is liable to this holder. Subject to the preceding rules, where any one part of a bill drawn in a set is discharged, the whole bill is discharged.<sup>501</sup>

### **Footnotes**

- 32 For detailed works on the subject, see Chalmers and Guest on Bills of Exchange and Cheques, 18th edn (2017); for the special aspects respecting the use of bills of exchange in international trade, see Benjamin's Sale of Goods, 11th edn (2021), Ch.22.
- 500 The parts of the set are usually expressed to be the "First", "Second", etc. "of Exchange". Such a bill is rarely used except for overseas trade, when it may be convenient to send the various parts separately to ensure the early delivery of, at any rate, one part.
- 501 s.71.

## **(i) - General Provisions**

**Chitty on Contracts 34th Ed.**

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**Volume II - Specific Contracts**

**Chapter 36 - Bills of Exchange and Banking**

**Section 1. - Negotiable Instruments**

**(c) - Cheques**

**(i) - General Provisions**

### **Cheques defined**

- 36-148 According to s.73 of the Act, a cheque is a bill of exchange drawn on a banker, payable on demand.<sup>502</sup> It should be noted that the Act does not limit the definition to bills drawn on the bank *by a customer*. While it is customary to draw cheques on forms contained in a cheque book supplied by a bank, a cheque may be drawn on any paper. In *Roberts & Co v Marsh*<sup>503</sup> a person drew a cheque on a sheet of writing paper, wrote on it the words “to be retained” and promised the payee to substitute a cheque written on a form. It was held that, as the words “to be retained” were directed to the payee, this instrument was a valid cheque.<sup>504</sup>

### **Provisions on bills payable on demand apply**

- 36-149 According to s.73, except as otherwise provided in the part of the Bills of Exchange Act 1882 relating to cheques (ss.73–81A), the provisions of the Act applicable to bills of exchange payable on demand apply to cheques.<sup>505</sup>

### **Certifying or marking cheques**

- 36-150

A cheque is not intended to be (and in practice never is) accepted.<sup>506</sup> In some Commonwealth countries bankers do, however, “mark” or “certify” cheques drawn on them by writing on the cheques the word “good” or “approved”. At one time it was thought that such a certification constituted an acceptance,<sup>507</sup> but this view has been rejected in more recent cases, and it is at present clear that a certification does not, in itself, give the holder a right to sue the certifying banker.<sup>508</sup> However, a certification can have some effect if it is written by the drawee bank on a post-dated cheque. In such a case a banker may be estopped from pleading that the customer’s account did not have a credit balance, sufficient to meet the cheque, at the date of the certification.<sup>509</sup> But it is to be doubted whether such an estoppel would assist the holder’s case, because an estoppel cannot, in itself, constitute a cause of action. Moreover, the certification of a post-dated cheque does not entitle the banker to “earmark” any amount standing to the credit of the customer’s account for the purpose of meeting this cheque, and the banker will be obliged to honour any cheque presented between the date of the certification of the post-dated cheque and the date of its presentation. Thus, even if there is a sufficient balance for meeting the post-dated cheque at the date of certification, there may not be sufficient funds at the date of presentation. The certification cannot, therefore, be regarded as constituting a promise of the drawee bank that the cheque will be paid when presented. This is particularly so as the customer can effectively countermand, i.e. “stop”, the payment of a certified cheque.<sup>510</sup>

## Presentment for payment

- 36-151 While presentment of a cheque for payment is required—except where excused by s.46—failure so to do does not necessarily discharge the drawer. [Section 74\(1\) of the Act](#) provides that where a cheque is not presented for payment within a reasonable time<sup>511</sup> of its issue and the drawer had the right, at the time at which the cheque should have been presented, to have it paid by the banker, he is discharged to the extent of his actual loss, i.e. to the extent to which the drawer is the creditor of the banker to a larger amount than he would have been had the cheque been paid. The effect of this provision is that the drawer is discharged only if the banker becomes insolvent, and to the extent of his actual loss. [Section 74\(3\)](#) provides that when the drawer is so discharged, the holder becomes the banker’s creditor in lieu of the drawer.

## Cheque truncation

- 36-152 Under the traditional (and now discontinued) paper-based banking procedure, as spelt out in the Clearing House Rules, cheques had to be presented for payment through the clearing house to the branch on which they were drawn.<sup>512</sup> This resulted in a cumbersome and prolonged clearing cycle for cheques. For many years the cheque clearing cycle took three working days after receipt

of the cheque by the payee's bank.<sup>513</sup> In order to speed up the clearing process, the **Bills of Exchange Act 1882** was amended in 1996 to allow for cheque truncation, i.e. the presentation of a cheque by means of an electronic message which sets out the serial number of the cheque, the code which identifies the drawee bank, the number of the account on which the cheque is drawn and its amount.<sup>514</sup> Under a fully truncated system only this essential information about the cheque is sent electronically from the collecting bank to the drawee bank and not the cheque itself, which remains with the collecting bank. But a fully truncated cheque clearing system was never developed in the UK. The declining use of cheques, and the high costs associated with the development of a fully truncated system, meant that UK banks adopted a system of partial truncation with code line information being transferred electronically through an Inter Bank Data Exchange system, but with the cheque still being physically presented through the clearing system to the drawee bank's clearing centre.<sup>515</sup> In fact those provisions introduced in 1996 to allow for cheque truncation (ss.74B and 74C of the Bills of Exchange Act 1882) were repealed by **s.13 of the Small Business, Enterprise and Employment Act 2015**, which introduces fresh amendments to the **1882 Act** that allow for cheques to be cleared through presentation of an electronic image of the cheque (known as "cheque imaging") in place of presentation of the cheque itself.<sup>516</sup> However, one amendment introduced in 1996 remains in force. According to **s.74A of the Bills of Exchange Act 1882**,<sup>517</sup> a bank may by a notice published in the London, Edinburgh and Belfast Gazettes specify an address at which cheques drawn on it may be presented for payment. A cheque presented at such an address, for instance at the bank's own data processing centre, is, then, deemed to have been presented at the "proper address". **Section 74A** is not limited to presentation through the cheque truncation process set out in **s.74B**, and it remains relevant for cheques that fall outside the new cheque imaging clearing process.

## Cheque imaging

- 36-153 In March 2014 the government consulted with a view to introducing legislation to allow for "cheque imaging", in order to speed up the clearing process, reducing it from six to two days,<sup>518</sup> by sending a digital image of a cheque for clearing rather than the piece of paper itself.<sup>519</sup> For example, cheque imaging enables a customer to take a photograph of their cheque on their smartphone and pay it in to his bank electronically via the bank's mobile banking app. In June 2014, following the consultation exercise, the government announced its intention to legislate to facilitate cheque imaging.<sup>520</sup> The **Small Business, Enterprise and Employment Act 2015** was enacted on 26 March 2015, and **s.13 of that Act** provides the legal framework for the introduction of cheque imaging by inserting a new Pt 4A (ss.89A–F) into the **Bills of Exchange Act 1882**.<sup>521</sup> In December 2019, the traditional paper-based cheque clearing system was discontinued and all sterling cheques drawn on UK bank and building society accounts are now cleared via a new image-based cheque clearing system.<sup>522</sup>

## Summary of Pt 4A

- 36-154** The main effect of new Pt 4A of the Bills of Exchange Act 1882 is to remove the right of the paying bank to demand delivery of the original paper cheque. Section 89A(1) provides that a cheque, or other instrument to which the section applies, may be presented for payment by providing an electronic image of the front and back of the cheque, instead of by presenting the physical cheque, if the person to whom presentment is made accepts the cheque as effective.<sup>523</sup> The electronic image of the cheque is equivalent to the original paper cheque,<sup>524</sup> but only for the purpose of presentation.<sup>525</sup> Cheques still have to be written on paper. The new legislation also extends the benefits of imaging to paper instruments other than cheques that were previously cleared using the same system, e.g. bankers' drafts, postal orders, government payable orders, warrants, travellers' cheques and bank giro credits.
- 526**
- U** The new legislation makes it clear that the banks involved in the clearing process are subject to the same duties in relation to collection and payment of the cheque (or other relevant instrument) as if the physical instrument had been presented. But the legislation also goes further and ensures that there are clear liabilities for banks involved in the clearing process. The government considered that the bank which collects the cheque/cheque image and introduces it into the clearing system (the collecting bank) is best placed to implement measures to make the system secure, detect security risks at the earliest stage and reduce fraud in the system. Therefore, the new legislation gave the Treasury power to make delegated legislation to ensure that the collecting bank,<sup>527</sup> and not the paying bank, should be liable for fraud or error.<sup>528</sup>
- 36-155** Made pursuant to the Treasury's power contained in s.89E(1) of the Bills of Exchange Act 1882, reg.5 of the Electronic Presentment of Instruments (Evidence of Payment and Compensation for Loss) Regulations 2018<sup>529</sup> ensures that if a customer of the bank which pays the cheque or the bank that pays the cheque ("the claimant") incurs a loss<sup>530</sup> in connection with the electronic presentment, or purported electronic presentment, of a cheque (and that loss did not result from gross negligence or fraudulent activity on their part), and they have not already received compensation, they can obtain compensation from the bank which presented the cheque. The regulation sets out conditions to be met in order for compensation to be payable, including that the claimant has made a claim in accordance with reg.6, which sets out the procedure for such a claim. Importantly, a right to compensation can only arise where one of the following two criteria is met: (a) the electronic presentment or purported electronic presentment of the instrument was of a type described in s.89E(2)(c), (d) or (e) of the Bills of Exchange Act 1882<sup>531</sup>; (b) the cheque was collected for or paid to a person other than its true owner.<sup>532</sup> The claimant's right to compensation

may also be affected by two additional factors. First, the claimant is not entitled to compensation if they are protected by [s.80 of the Bills of Exchange Act 1882](#) (protection to banker and drawer where cheque is crossed).<sup>533</sup> Secondly, the amount of compensation to be paid will be reduced where any act or omission of the claimant contributed to the loss.<sup>534</sup>

## Revocation of payment

- 36-156 According to [s.75](#), the duty and authority of a banker to pay a cheque drawn on him by a customer are determined by countermand of payment and by notice of the customer's death.<sup>535</sup> Notice of the customer's bankruptcy<sup>536</sup> or that he has, due to a mental disorder, become incapable of managing his affairs<sup>537</sup> appear, likewise, to determine the banker's authority to pay.

## Post-dated cheques<sup>538</sup>

- 36-157 A practice has developed of writing on a cheque a date later than that of the actual day of drawing. The purpose in drawing such a "post-dated cheque" is to prevent the payee or a holder from presenting it before the day written on it. It has been held that, in view of [s.13\(2\) of the Act](#),<sup>539</sup> such a cheque is not invalid.<sup>540</sup> Moreover, a person who obtains such a cheque for value and in good faith becomes a holder in due course when he actually takes the cheque, and not only as from the date on which it purports to be made.<sup>541</sup> At the same time, a banker should not honour a cheque while it is post-dated.<sup>542</sup> If he does, and the cheque is countermanded by the customer before the purported date of issue, the banker is not entitled to debit the customer's account.<sup>543</sup> It has been suggested that a post-dated cheque is a bill of exchange payable at a future date.<sup>544</sup>

## Use of cheque cards

- 36-158 Cheque cards used to be issued by banks in the UK for use with their customers' cheques. Through the card the bank undertook to the payee of the cheque that payment would be made (up to the limit indicated on the card itself) regardless of the state of the customer's account, provided that certain condition were met. Cheque cards are no longer in use in the UK.<sup>545</sup>

## Footnotes

- 502 As to which bills are payable on demand, see s.10 of the Act, discussed in para.36-013, above.
- 503 [1915] 1 K.B. 42. cf. *Burnett v Westminster Bank Ltd* [1966] 1 Q.B. 742.
- 504 As regards “cheques” drawn to “cash or order”, see above, para.36-021.
- 505 Note that a new Pt 4A (presentment of cheques and other instruments by electronic means) was introduced into the Bills of Exchange Act 1882 by the Small Business, Enterprise and Employment Act 2015 s.13: see below, paras 36-153—36-154.
- 506 *Bellamy v Marjoribanks* (1852) 7 Exch. 389, 404; *Bank of Baroda Ltd v Punjab National Bank Ltd* [1944] A.C. 176, 188.
- 507 *Robson v Bennett* (1810) 2 Taunt. 388, 396.
- 508 *Gaden v Newfoundland Savings Bank* [1899] A.C. 281; *Bank of Baroda Ltd v Punjab National Bank Ltd*, above; *Southland Savings Bank v Anderson* [1974] 1 N.Z.L.R. 118. But note that where a cheque is marked by the drawee bank at the request of another bank for clearing purposes, that other bank is by mercantile usage entitled to payment: *Robson and Waugh v Bennett* (1810) 2 Taunt. 388; *Goodwin v Robarts* (1875) L.R. 10 Ex. 337, 351 (affirmed (1876) 1 App. Cas. 476). In *BMP Global Distribution Bank Ltd v Bank of Nova Scotia* [2009] 1 S.C.R. 504, [87]–[88], the Supreme Court of Canada held that certification by a bank does not prevent it from recovering the proceeds of a cheque paid by mistake.
- 509 *Bank of Baroda Ltd v Punjab National Bank Ltd* [1944] A.C. 176 at 191. It is to be doubted whether a certification could give rise to an action by the holder against the certifying banker for a negligent misrepresentation under the rule in *Hedley Byrne & Co v Heller & Partners* [1964] A.C. 465. The reason for this is that by certifying the cheque the banker does *not* warrant that it will be paid.
- 510 *Keyes v Royal Bank of Canada* [1947] 3 D.L.R. 161; *Southland Savings Bank v Anderson*, above, at 121; cf. *Gibson v Minet* (1824) 2 Bing. 7.
- 511 As to what constitutes “reasonable time”, see s.74(2), which is similar to the relevant part of s.45(2); see also *King v Porter* [1925] N.I. 107. For cheques presented by electronic means, s.89A(5) preserves the requirement that presentation must be within a reasonable time.
- 512 *Barclays Bank v Bank of England* [1985] 1 All E.R. 385.
- 513 The process was accelerated in November 2007 under the “T+2-4-6” cheque-clearing timetable. However, a new image-based clearing system for sterling cheques was introduced in October 2017 and this has now completely replaced the traditional paper-based clearing system. The speed of the cheque clearing process has been increased under the new image-based cheque clearing system with cleared funds available to the payee of the cheque at the latest by midnight of the working day following deposit (Cheque & Credit Clearing Company, Cheque Imaging Explained, 30 October 2017, pp.2–3). See further, para.36-153.
- 514 Bills of Exchange Act 1882 ss.74B–C, inserted by the Deregulation (Bills of Exchange) Order 1996 (SI 1996/2993). See Chalmers and Guest on Bills of Exchange and Cheques, 18th

- edn (2017), paras 13-021—13-030; and, on cheque truncation generally, see also *Vroegop [1990] L.M.C.L.Q. 244*.
- 515 In December 2009, the Payments Council announced that the cheque clearing system was to close in 2018, but reversed that decision in July 2012 following public pressure. For critique of reversal of Payment Council's decision to abolish cheque clearing, see *S. Booyens [2018] J.B.L. 283*.
- 516 See **Pt 4A of the Bills of Exchange Act 1882** (as inserted by **s.13**). **Section 13** came into force on 26 March 2015 for the purposes of enabling the making of regulations under **Pt 4A of the 1882 Act**, and on 31 July 2016 for all other purposes: **Small Business, Enterprise and Employment Act 2015 s.164(4)**.
- 517 Inserted by the **Deregulation (Bills of Exchange) Order 1996 (SI 1996/2993)**.
- 518 Cleared funds will be available at the latest by midnight of the working day following deposit (Cheque & Credit Clearing Company, Cheque Imaging Explained, 30 October 2017, p.2): compare para.**36-152**. Some banks and building societies even allow their customers to access their funds earlier than this.
- 519 HM Treasury Consultation, Speeding up cheque payments: legislating for cheque imaging (6 March 2014).
- 520 HM Treasury, Speeding up cheque payments: legislating for cheque imaging (25 June 2014).
- 521 **s.13** came into force on 26 March 2015 for the purposes of enabling the making of regulations under **Pt 4A of the Bills of Exchange Act 1882**, and on 31 July 2016 for all other purposes: **Small Business, Enterprise and Employment Act 2015 s.164(4)**.
- 522 Cheque & Credit Clearing Company, Cheque Imaging (<http://www.chequeandcredit.co.uk> [Accessed 1 September 2021]).
- 523 subss.(2)–(3) enable the Treasury to make regulations to restrict the circumstances in which presentment by image is permissible. Furthermore, **s.89C** provides that the new method of presentation is not available where the bank imposes terms on a customer which require the customer to provide an image of the instrument for paying in, and prevent the customer from providing the instrument itself to the bank.
- 524 **Electronic Presentment of Instruments (Evidence of Payments and Compensation for Loss) Regulations 2018 (SI 2018/832) reg.3**, made by the Treasury under **s.89D of the Bills of Exchange Act 1882**, requires a banker who has paid an instrument following presentation under **s.89A of the 1882 Act** to provide a copy of the instrument and certain prescribed accompanying information to the creator of the instrument (in the case of a cheque, this means the drawer) on request. **reg.4** provides for the copy and information provided to be evidence of receipt by the payee named in the instrument of the sum payable by the instrument (there being similar provision for paper cheques in **s.3 of the Cheques Act 1957**).
- 525 **s.89A(4)** removes existing requirements that apply to the presentment of a cheque or similar instrument that would be inconsistent with presentment in an electronic system, such as the exhibition, presentment and delivery of the paper instrument itself, and a particular place and time of payment. But note that **s.89A(5)** saves any requirement as to the latest time for presentment (see above, para.**36-151**).

**⑤26**

- s.89B. The key requirements, set out in s.89B(1)(b), are that (i) the instrument is one which enables a person to obtain payment from a banker, (ii) it is an instrument that must be presented for payment, and (iii) it could not otherwise be presented electronically. Banknotes are expressly excluded from the new regime (s.89B(2)). The Law Commission recommends that s.89A does not apply “to any bill or note that is an electronic trade document for the purposes of the Electronic Trade Documents Act 2022” (Electronic trade documents: Report and Bill (2022) Law Com. No.405, paras 9.102–9.106).
- 527 s.89F(5) extends the definition of “collecting bank” beyond that found in s.4 of the Cheques Act 1957 (see para.36-376) for the purposes of Pt 4A, and includes where the bank has credited the customer’s account with some value other than money. See Chalmers and Guest on Bills of Exchange and Cheques, 18th edn (2017), para.15-078.
- 528 s.89E.
- 529 SI 2018/832, made on 10 July 2018 and coming into force on the 21st day after that date (reg.1).
- 530 Meaning loss arising directly from the debiting of funds from the claimant’s account and not further consequential loss (reg.5(4)).
- 531 s.89E(2)(c) covers “purported presentment for payment by any means involving provision of an electronic image of an instrument that may not be presented for payment in that way”; (d) covers “provision, in purported presentment for payment, of (i) an electronic image that purports to be, but is not, an image of a physical instrument (including an image that has been altered electronically), or (ii) an electronic image of an instrument which has no legal effect”; (e) covers “provision, in presentment or purported presentment for payment of an electronic image which has been stolen”.
- 532 reg.5(1)(e), (2).
- 533 reg.7. For Bills of Exchange Act 1882 s.80, see below, para.36-357.
- 534 reg.8.
- 535 As regards countermand, see further below, para.36-332.
- 536 Insolvency Act 1986 s.284.
- 537 *Imperial Loan Co Ltd v Stone [1892] 1 Q.B. 599*. But the position may be different where an order has been made under the Mental Capacity Act 2005 (replacing the Mental Health Act 1983 Pt VII): see Chalmers and Guest on Bills of Exchange, 18th edn (2017), para.13-047.
- 538 See Chalmers and Guest on Bills of Exchange and Cheques, 18th edn (2017), para.2-098.
- 539 Discussed in para.36-017, above.
- 540 *Hitchcock v Edwards (1889) 60 L.T. 636; Royal Bank of Scotland v Tottenham [1894] 2 Q.B. 715*. See also *Hodgson & Lee Pty Ltd v Mardonius Pty Ltd (1986) 78 A.L.R. 573, 84 F.L.R. 323*. (In Australia, s.16(3) of the Cheques Act 1986 (Cth) now provides that “[f]or the purpose of determining whether a post-dated instrument is a cheque, the fact that the instrument is post-dated shall be disregarded.”) A cheque is not invalid by reason of the fact that it is not dated (Bills of Exchange Act 1882 s.3(4)(a)); *Aspinall's Club Ltd v Al-Zayat [2007] EWCA Civ 1001*.
- 541 *Hitchcock v Edwards*, above.
- 542 *Brien v Dwyer (1979) 53 A.L.J.R. 123*, in which it was held that the furnishing of a post-dated cheque did not comply with a contractual term permitting payment by cheque.

- 543 *Morley v Culverwell* (1840) 7 M. & W. 174, 178; *Pollock v Bank of New Zealand* (1901) 20 N.Z.L.R. 174; *Keyes v Royal Bank of Canada* [1947] 3 D.L.R. 161. Contrast *Magill v Bank of North Queensland* (1895) 6 Q.L.J. 262.
- 544 *Brien v Dwyer* (1979) 53 A.L.J.R. 123, per Aickin J at 134; contrast *Hodgson & Lee Pty Ltd v Mardonius* (1986) 78 A.L.R. 573, 84 F.L.R. 323; *Shapiro v Greenstein*, 10 D.L.R. (3rd) 746 (1970).
- 545 The UK Domestic Cheque Card Scheme was closed on 30 June 2011. For discussion of cheque cards and, in particular, the law relating to the use of stolen cheque cards, see the 31st edition of this work, paras 36-157—36-159.

## (ii) - Crossed Cheques

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(c) - Cheques

(ii) - Crossed Cheques

### What constitutes a “crossing”

36-159 According to s.76(1) of the Act, a cheque is “crossed generally” if it bears across its face two transverse parallel lines to which may be added the words “and company” or “not negotiable” or both. According to s.76(2) a cheque is “crossed specially” to a designated banker, if it bears across its face the name of that banker either with or without the addition of the words “not negotiable”. In practice a special crossing is, too, written between two transverse parallel lines. The provisions of the Act concerning crossed cheques are, by s.95, applied also to dividend warrants. By s.5 of the Cheques Act 1957 they are further extended to:

“(a)any document issued by a customer of any banker which, though not a bill of exchange, is intended to enable a person to obtain payment from that banker of the sum mentioned in the document<sup>546</sup>;

(b)any document issued by a public officer which is intended to enable a person to obtain payment from the Paymaster General or the Queen’s and Lord Treasurer’s Remembrancer of the sum mentioned in the document

(c)any draft drawn by a banker on himself and payable on demand.”

### Who is entitled to cross a cheque

36-160

According to s.77 of the Act, a cheque may be crossed generally or specially by the drawer and holder. The holder<sup>547</sup> is entitled to cross a cheque even if it has been uncrossed, may change a general crossing into a special one by adding the name of a banker, and is always entitled to add the words “not negotiable”. Where a cheque is crossed specially, the banker to whom it is crossed may again cross it specially to another banker for collection. Where an uncrossed cheque, or a cheque crossed generally, is sent to a banker for collection, he may cross it specially to himself.

## Effect of crossing

- 36-161 A crossing is a material part of the cheque and, except where authorised by the Act, it is not lawful for any person to obliterate a crossing or to add to it.<sup>548</sup> Any crossing affects the duties of the drawee bank. In the case of an uncrossed cheque the holder can obtain payment in two ways: first, he can send the cheque to his own bankers and request them to collect it on his behalf, i.e. present it on his behalf for payment to the drawee bank. Secondly, he may himself present the cheque for payment at the counter of the drawee bank. When a cheque bears either a general or a special crossing, this second mode of realisation is not available to the holder. If the cheque bears a general crossing, it must be presented for payment through a bank; if it bears a special crossing to a designated bank, it must be presented for payment through that bank.<sup>549</sup> If the drawee bank pays a generally crossed cheque over the counter, or to a person who is not a banker, it is liable to compensate the true owner of the cheque for any loss the latter may sustain owing to the cheque having been so paid.<sup>550</sup> The drawee bank incurs similar liability to the true owner if it pays a specially crossed cheque otherwise than to the banker to whom it is crossed or his agent for collection. It is, however, provided that when a cheque is presented for payment and does not, at that time, appear to be crossed or to have had a crossing which has been altered or obliterated, the drawee bank does not incur any liability to the true owner, provided it paid the cheque in good faith and without negligence.<sup>551</sup>

## Protects true owner

- 36-162 Thus, one of the main effects of a crossing is to protect the rights of the true owner.<sup>552</sup> The phrase “true owner”, which is not defined in the Act, has been held to include the holder in due course of a cheque.<sup>553</sup> But the true owner may be a person other than the holder. By way of illustration, take the case of a cheque payable to order, which is discounted by a financial institution at the request of a thief who has forged the payee’s indorsement. As the indorsement is ineffective,<sup>554</sup> the true owner is the payee and not the financial institution. Another effect of a crossing is to protect the drawer. A banker, who pays a cheque in a manner prohibited by a crossing executed on it, exceeds the authority conferred on him by the cheque and is not entitled to debit the customer’s (drawer’s)

account.<sup>555</sup> If a banker pays a cheque according to the tenor of the crossing he obtains a certain protection against the customer and the true owner of the cheque.<sup>556</sup>

## **Effect of the addition of the words “not negotiable” to a crossing**

- 36-163 According to s.81 of the Act, where the words “not negotiable” are added to a crossed cheque, a person taking it does not obtain a better title than that of the transferor, and cannot give a better title to a further transferee. Thus, while a cheque crossed “not negotiable” remains transferable, each transferee takes it subject to the defects in the title of all previous parties so that no person can become a holder in due course of the instrument. In *Great Western Railway Co v London and County Banking Corp* Lord Lindley said<sup>557</sup>: “Everyone who takes a cheque marked ‘not negotiable’ takes it at his own risk, and his title to the money got by its means is as defective as his title to the cheque itself”.

## **Cheques crossed “account payee only”**

- 36-164 It is a well-established practice to add the words “account payee only” to a general crossing. Until 1992 the phrase “account payee only” was not given a statutory definition. Although, generally, customers added these words to a crossing in the belief that they rendered the cheque non-transferable, a long list of cases established that the phrase did not have this effect. It was held that the words in question constituted a warning to the collecting bank that the cheque should not be collected for a person other than the nominated payee<sup>558</sup> but that the transferability of the cheque was not, in itself, affected.<sup>559</sup> In essence, the courts took the view that, on a strict reading, the phrase “account payee only” did not comprise words prohibiting transfer or evidencing an intention that the instrument be non-transferable within the meaning of s.8(1) of the Bills of Exchange Act 1882.

## **Recommendations for reform**

- 36-165 A similar approach was advocated by the Review Committee on Banking Services Law (the “Jack Committee”),<sup>560</sup> which recommend that cheques should, indeed, remain transferable even if they bore a crossing accompanied by the phrase in question. But this recommendation was rejected in the White Paper presented to Parliament by the Chancellor of the Exchequer in March 1990.<sup>561</sup> Seeking to give effect to what was considered the natural meaning and common understanding of the words in question, the White Paper recommended that the addition to a crossed cheque of

the words “account payee only” (or of certain similar words) should render the instrument non-transferable.

## The 1992 Act

- 36-166 The [Cheques Act 1992](#), which amends certain provisions of the [Bills of Exchange Act 1882](#) and of the [Cheques Act 1957](#), gives effect to the recommendation made in the White Paper. The new [s.81A](#) of the [Bills of Exchange Act 1882](#), inserted by the [1992 Act](#), reads:

“(1)Where a cheque is crossed and bears across its face the words ‘account payee’ or ‘a/c payee,’ either with or without the word ‘only,’ the cheque shall not be transferable, but shall only be valid as between the parties.

(2)A banker is not to be treated for the purposes of [s.80](#) above as having been negligent by reason only of his failure to concern himself with any purported indorsement of a cheque which under subs.(1) above or otherwise is not transferable.”

## Effect of s.81A(1)

- 36-167 Subsection (1), effectively, applies the provisions of [s.8\(1\)](#) to cheques bearing a crossing accompanied by the words “a/c payee only”. Such a cheque now has the same effect as one in which the words “not transferable” appear on the face of the cheque or a cheque on which the word “only” is added after the payee’s name.<sup>562</sup> Under [s.8\(1\)](#) and the new [s.81A](#), the title to an instrument bearing any of these formulae cannot be passed by its negotiation. Consequently, the original payee, to whom the instrument has been issued, remains its owner notwithstanding his attempt to transfer the instrument. The transferee, thus, does not obtain a title to the cheque and cannot bring an action to enforce it in his own name.<sup>563</sup>

## Effect of s.81A(2)

- 36-168 Subsection (2) gives effect to another recommendation made in the White Paper. It sets out to ensure that the drawee or paying bank, that pays a crossed cheque bearing the words “a/c payee only”, retains the defence available under [s.80 of the Bills of Exchange Act 1882](#) as augmented by [s.1 of the Cheques Act 1957](#).<sup>564</sup> A consequential amendment to [s.80](#) itself—effected by [s.2 of the 1992 Act](#)—has the object of putting the matter beyond doubt.

## Negligence issue

- 36-169 Section 81A(2) provides that a banker is not to be treated for the purposes of s.80 as having been negligent *by reason only* of his failure to concern himself with any purported indorsement of a cheque which under s.81A(1) or otherwise is not transferable. This means that the paying bank can normally ignore any purported indorsement on the cheque, as it is the responsibility of the collecting bank to ensure that a non-transferable cheque is collected only for the account of the named payee. However, there may be other, additional circumstances, for example where the paying bank is reliably informed that the cheque has been stolen from the payee,<sup>565</sup> or where it is clear that the cheque has been collected on behalf of a party other than the payee,<sup>566</sup> in which it might be negligent for a bank to pay a non-transferable cheque bearing a purported indorsement without first satisfying itself that it was in fact being paid to the person entitled to receive it.<sup>567</sup>

## “A/c payee” on uncrossed cheques

- 36-170 A question which is not settled by the Act concerns the effect of the words “a/c payee only” on an uncrossed cheque. The answer is, accordingly, provided by the authorities, decided prior to 1992, which treat the formula as falling outside the ambit of s.8(1) of the 1882 Act. On their basis, the addition of the words in question would leave the uncrossed cheque transferable. The problem, though, is academic. In practice, the words in question are either printed on the cheque as part of the crossing or are appended by means of a rubber stamp which includes the two transverse lines of the crossing. The only situation in which the problem is likely to arise is where the drawer opens a crossing but fails to cancel the words “a/c payee only”. As already indicated, the cheque would, in all probability, remain transferable.

## Protection of collecting banker

- 36-171 The provisions giving a protection to a collecting banker were originally set out in s.82 of the Act. This section has been repealed but its provisions have been re-enacted and extended in s.4 of the Cheques Act 1957 which is applicable to all cheques, whether crossed or uncrossed, and to certain analogous instruments. The issues are discussed in the section dealing with the position of the collecting banker.<sup>568</sup>

## Footnotes

- 546 This includes a cheque payable to “cash or order”: *Orbit Mining and Trading Co v Westminster Bank [1963] 1 Q.B. 794*.
- 547 For a definition of holder, see s.2 of the Act. “Holder” includes an agent for collection: *Akrokerri Mines v Economic Bank [1904] 2 K.B. 465, 472; Sutters v Briggs [1922] 1 A.C. 1; Baker v Barclays Bank Ltd [1955] 1 W.L.R. 822*.
- 548 s.78.
- 549 According to s.79(1), if a cheque is crossed specially to more than one banker, the drawee bank must refuse payment. But see s.77(5).
- 550 s.79(2). See also *Law Society of Northern Ireland v Governor and Company of the Bank of Ireland [2013] N.I.Q.B. 130* at [73]–[74], [80].
- 551 s.79(2).
- 552 As to whether the true owner had a right at common law to sue the paying banker in conversion following the wrongful payment of the cheque, see *Smith v Union Bank (1875) L.R. 10 Q.B. 291, 295–296; affirmed (1875) 1 Q.B.D. 31*.
- 553 *Smith v Union Bank*, above. In most instances, the true owner is either the issuer or the payee of the cheque: *Marquess of Bute v Barclays Bank [1955] 1 Q.B. 202* (applied in *Australian Guarantee Corp v State Bank of Victoria [1989] V.R. 617, Vic Aus SC*). But note that the issuer of a cheque loses his title, and ceases to be the true owner of the instrument, when he delivers it to a fraudster: *Citibank NA v Brown Shipley & Co [1991] 1 Lloyd's Rep. 576* (Waller J); see also *Abbey National Plc v JSF Finance & Currency Exchange Co Ltd [2006] EWCA Civ 328*.
- 554 See above, para.36-086.
- 555 *Bobbett v Pinkett (1876) 1 Ex. D. 368, 372–373*.
- 556 s.80 of the Act discussed in para.36-357, below.
- 557 [1901] A.C. 414, 424. See also *Universal Guarantee Pty Ltd v National Bank of Australasia [1965] 1 Lloyd's Rep. 525, 531*. cf. *Miller Associates (Australia) Pty Ltd v Bennington Pty Ltd (1975) 7 A.L.R. 144*.
- 558 *Akrokerri (Atlantic) Mines Ltd v Economic Bank [1904] 2 K.B. 465, 472; House Property Co of London Ltd v London County and Westminster Bank (1915) 84 L.J. K.B. 1846; Universal Guarantee Pty Ltd v National Bank of Australasia Ltd*, above; *New Zealand Law Society v ANZ Banking Group Ltd [1985] 1 N.Z.L.R. 280, 287; Algemene Bank Nederland NV v Happy Valley Restaurant Pte Ltd [1991] 1 S.L.R. 708, 713*. As to no negligence being involved if a suitable explanation was given, see *Souhrada v Bank of NSW [1976] 2 Lloyd's Rep. 444*, especially at 452.
- 559 *National Bank v Silke [1891] 1 Q.B. 435; Importers Co Ltd v Westminster Bank Ltd [1927] 2 K.B. 297; Universal Guarantee Pty Ltd v National Bank of Australasia [1965] 2 All E.R. 98*; see also *Standard Bank of South Africa Ltd v Sham Magazine Centre [1977] 1 S.A.L.R. 484 App Div.*

- 560 Cmnd.622 paras 7.18–7.20, submitted in February 1989 and adopting the approach of s.39(2) of the Australian Cheques and Payment Orders Act 1986, which became the Cheques Act 1986 s.39(2) following the enactment of the Cheques and Payment Orders Amendment Act 1998 (Cth).
- 561 Cmnd.1026 Annex 5 para.5.6.
- 562 See above, para.[36-026](#).
- 563 As to the effect of a crossing accompanied by the words “A/C payee only” where a cheque is payable to bearer, see Chalmers and Guest on Bills of Exchange and Cheques, 18th edn (2017), para.14-039.
- 564 And note that, under [s.3 of the 1992 Act](#), cheques bearing a crossing accompanied by the words “a/c payee only” (or the recognised similar formulae) are specifically equated with other types of cheque in respect of the defence conferred on the collecting bank (see *Honourable Society of the Middle Temple v Lloyd's Bank Plc [1999] 1 All E.R. (Comm) 193*). Note further that the provisions respecting crossings, made under the [1882 Act](#), apply to such cheques in the same manner as to negotiable cheques: [Cheques Act 1957 s.5](#), read together with [s.4 of that Act](#) (as amended by [s.3 of the 1992 Act](#)).
- 565 This assumes the drawer has not, or has not yet, countermanded payment.
- 566 *Linklaters v HSBC Bank Plc [2003] EWHC 1113 (Comm), [2003] 2 Lloyd's Rep. 545* at [65]–[74].
- 567 Chalmers and Guest on Bills of Exchange and Cheques, 18th edn (2017), para.14-028.
- 568 See below, paras [36-376](#) et seq.

## **(iii) - Travellers' Cheques**

**Chitty on Contracts 34th Ed.**

**Consolidated Mainwork Incorporating First Supplement**

**Volume II - Specific Contracts**

**Chapter 36 - Bills of Exchange and Banking**

**Section 1. - Negotiable Instruments**

**(c) - Cheques**

**(iii) - Travellers' Cheques** <sup>569</sup>

### **Description**

- 36-172 Travellers' cheques are widely used by tourists and businessmen all over the world. Most travellers' cheques bear two blank spaces meant for the signature of the traveller who purchases them from the issuing bank or from its agents for sale. The first signature, known as "the signature", is written on the instrument by the traveller, at the time he purchases the instrument, in the presence of a clerk of the issuing bank. The second signature, known as "the countersignature", is affixed by the traveller when he cashes or negotiates the instrument. A traveller's cheque is treated as containing a promise of the issuing bank to pay the amount specified in the instrument to the traveller or a transferee, provided the signature and countersignature correspond.
- 36-173 While travellers' cheques appear in different forms the following three patterns are the most common ones: first, the instrument may assume the form of an order by the directors of the issuing bank, to that bank, to pay a certain amount to the order of the payee (whose name is left blank) provided the signature and countersignature correspond. Secondly, the instrument may assume the form of an order given by the traveller in the absence of stipulation to the contrary who acts as drawer, to the bank, to pay the amount to his own order, provided the instrument is duly countersigned by himself. The instrument bears the signature of the directors of the issuing bank, which, presumably, constitutes an acceptance. Thirdly, some instruments assume the form of a promise by the issuing bank to pay a certain amount of money to the payee (whose name is left blank) provided the signature and countersignature correspond.

## Legal nature

- 36-174 It will be noted that travellers' cheques drafted in the first two patterns mentioned above resemble bills of exchange while those following the third pattern resemble promissory notes. However, the order in the first two patterns as well as the promise in the third one are conditional, i.e. dependent on the correspondence between the signature and the countersignature. Thus, the instruments do not fall within the respective definitions of bills of exchange ([s.3\(1\) of the Act](#)) and promissory notes ([s.83](#)).<sup>570</sup> Treating the request for a countersignature as a demand for an indorsement does not render the instrument unconditional. While an indorsement is necessary for the *negotiation* of a bill or a note payable to order,<sup>571</sup> it is not a prerequisite of *payment*. In the case of travellers' cheques, however, a countersignature is needed before the drawee or maker may pay the instrument, even if it is presented by the original payee. A travellers' cheque cannot, therefore, be regarded as an unconditional order or promise to pay and does not constitute a bill or note.<sup>572</sup> But travellers' cheques are regarded as negotiable instruments by the mercantile community as well as by tourists all over the world. It is arguable that they ought to be treated as a novel species of negotiable instruments established as such by a universal mercantile usage.<sup>573</sup> It is well established that, if such a usage is proved, it will be recognised and acted upon by the courts.<sup>574</sup>

## Application of 1882 Act

- 36-175 It stands to reason that the general principles of the law of negotiable instruments (most of which are now codified in the [Bills of Exchange Act 1882](#)) apply, with the necessary modifications, to travellers' cheques. This view derives support from recent cases.<sup>575</sup> That travellers' cheques do not have greater currency than negotiable instruments and are not to be treated as the equivalent of banknotes has been decided by a South African authority.<sup>576</sup> To date, the detailed analysis of travellers' cheques remains the province of American authorities which, thus, merit discussion. There are only three English cases in point.

## The position of the traveller

- 36-176 Usually the relationship of "traveller", i.e. the person to whom the instrument is issued, and issuing banker does not give rise to problems. The issuing banker is obliged to pay the amount of the traveller's cheque to the traveller when it is presented and properly countersigned. Difficulties may, however, arise when the traveller loses the cheques. If the loss of the instruments occurs while they do not bear a countersignature, the traveller—in the absence of stipulation to the

contrary—is entitled to obtain their face value from the issuing banker, provided he agrees to sign an indemnity.<sup>577</sup> Such an indemnity would protect the banker if it turned out that, despite the travellers' statement, the cheques had been countersigned before they were lost. In such cases the banker would have to honour them when presented by a holder in due course,<sup>578</sup> and the indemnity would enable him to recover the amount so paid from the traveller. The indemnity does not, however, enable the banker to recover from the traveller an amount paid to a holder who was not entitled to payment.<sup>579</sup>

## **Loss of uncountersigned cheque**

- 36-177 In the absence of an express term to the contrary, the traveller's right to claim the face value of lost uncountersigned travellers' cheques does not depend on his notifying the banker promptly of their loss. In *Sullivan v Knauth*<sup>580</sup> the plaintiff lost uncountersigned travellers' cheques issued by the defendants and, having forgotten the defendants' name and address, did not notify them of the loss for several weeks. In the meantime the travellers' cheques, bearing forged countersignatures, were paid by the defendants to a third party. The defendants refused to reimburse the plaintiff and relied on a clause, printed on the folder which contained the travellers' cheques, by which prompt report of a loss was made a prerequisite to the defendants' duty to refund the amount of the cheques. It was held that the defendants' payment against forged countersignatures did not discharge them from their liability to reimburse the plaintiff.<sup>581</sup> An English court, though, could be persuaded to follow this decision only if it concluded that the clauses printed on the folder were not made terms of the contract entered into between the parties.<sup>582</sup> As long as an express clause incorporated in the contract concluded between the issuer and the traveller at the time of the purchase of the instruments was reasonable and fair it would be hard to assail.<sup>583</sup>

## **Effect of clauses**

- 36-178 The English courts will uphold express terms of a standard term contract respecting the purchase of travellers' cheques provided the terms are clear. In *Braithwaite v Thomas Cook Travellers' Cheques Ltd*,<sup>584</sup> the application signed by the traveller when he purchased the travellers' cheque rendered his right to obtain a refund subject to his having properly safeguarded each cheque against loss or theft. The traveller, who was allowed to leave the bank without signing the substantial bundle of cheques acquired by him, signed some of them whilst in the airport, others whilst in a coffee house and the remaining ones whilst travelling on the underground. Thereafter he spent an evening socialising, without making any arrangements to safeguard the instruments. It would appear that the paper bag in which he kept them after executing his signature was stolen when he fell asleep whilst travelling again on the underground. Dismissing his action for a refund,

Schiemann J held that the traveller had failed to safeguard the cheques properly and found he had, thus, acted carelessly. That such a finding would not, however, be made lightly is demonstrated by the slightly earlier decision in *Fellus v National Westminster Bank Plc*,<sup>585</sup> in which Stuart-Smith J held that a traveller was not negligent in the handling of his travellers' cheques simply because he left them in the pocket of a blazer which he had taken off for a few moments in a department store whilst trying on a new jacket. His Lordship further held that, in cases of this type, the onus of proof rested on the issuer, who would, accordingly, have to establish the traveller's negligence.

## Ambiguous terms

- 36-179 That the courts strive to give clauses of the type under consideration a reasonable construction can be also gleaned from *El Awadi v Bank of Credit and Commerce International SA*.<sup>586</sup> In this case, the standard terms executed by the traveller provided that a refund was to be subject to the bank's "approval". Hutchinson J concluded that this clause did not have the effect of conferring on the issuer an absolute discretion respecting refunds. A refusal would have to be based on a breach by the traveller of one of the contractual obligations undertaken by him. His Lordship refused to regard the clause under consideration as imposing on the issuer a right to refuse to make a refund on the basis of the traveller's carelessness in the handling of the cheques. As the cheques involved had been lost or stolen before they had been countersigned, he held the issuer liable to reimburse the traveller.<sup>587</sup> It is significant that, like Stuart-Smith J in *Fellus*' case, Hutchinson J referred to brochures published by financial institutions seeking to promote the sale of travellers' cheques, in which emphasis was placed on the safety provided by these instruments and on the provisions for refunds in cases of loss. An important additional argument in support of the decision in *El Awadi*'s case is that, as the cheques involved had not been countersigned at the time of their loss, the issuer was not under an obligation to pay them on presentment. Why, then, should the traveller be refused a refund?

## Loss after appending countersignature

- 36-180 If travellers' cheques are lost after they have been countersigned, the traveller is not entitled to claim payment from the bank, even if the loss is promptly reported. In *Emerson v American Express Co*<sup>588</sup> it was held that the countersignature renders a traveller's cheque payable to bearer. As a result, the issuing banker becomes liable to honour the instrument when presented by a holder in due course.

## The rights of a holder

- 36-181 A holder who obtains a properly countersigned cheque from the traveller or from a transferee is entitled to payment. Where a holder obtains a traveller's cheque from a person who does not have a good title, his rights depend, first, on the genuineness of the countersignature and, secondly, on his holding the cheque in due course. To be a holder in due course of a traveller's cheque the holder must be able to show that he took it in good faith, for valuable consideration and while it was complete and regular on its face.<sup>589</sup> A traveller's cheque is considered as being complete on its face even while some spaces, which are in practice left blank until the cheque is paid, are not filled up. Thus, if the space meant for the name of the payee is usually left blank in a traveller's cheque, then a person can be a holder in due course even if he takes it with such a blank space.<sup>590</sup> However, if the traveller's cheque does not bear a countersignature, or bears a forged one, a holder cannot hold it in due course and cannot enforce payment.<sup>591</sup>

## Footnotes

- 569 *Hawkland* (1966) 15 *Buffalo L. Rev.* 501; *Ellinger* (1969) 19 *Univ. of Toronto L.J.* 132; *Stassen* (1978) 95 *S.A.L.J.* 180; *Frohlich* (1980) 54 *A.L.J.* 388.
- 570 As to the meaning of "conditional", see above, para.36-010 (regarding bills of exchange) and below, para.36-182 (regarding promissory notes).
- 571 See s.31(3) which applies, mutatis mutandis, to notes: s.89(1).
- 572 Contrast *Stassen* (1978) 95 *S.A.L.J.* 180 at 182–183, who argues that the countersignature is only a means of identification. This point, which is to be doubted, does not overcome the fact that—on its face—the order to pay is conditional. Contrast also Uniform Commercial Code s.3-106(c); E. McKendrick (ed.), *Goode on Commercial Law*, 6th edn (2020), para.21.11.
- 573 So held in *Ashford v Thomas Cook & Son (Bankers) Ltd* (1970) 471 *P. 2d* 531, 532. See also *S. v Katsikaris* [1980] 3 *S.A.L.R.* 580, 592.
- 574 *Goodwin v Robarts* (1875) *L.R.* 10 *Ex.* 337 (*affirmed* (1876) 1 *App. Cas.* 476); *London Joint Stock Bank v Simmons* [1892] *A.C.* 201; *Venables v Baring Bros* [1892] 3 *Ch.* 527; *Bechuanaland Exploration Co v London Trading Bank* [1898] 2 *Q.B.* 658; *Edelstein v Schuler & Co* [1902] 2 *K.B.* 144.
- 575 *Fellus v National Westminster Bank Plc* (1983) 133 *New L.J.* 766; *Braithwaite v Thomas Cook Travellers Cheques Ltd* [1989] *Q.B.* 553; *El Awadi v Bank of Credit and Commerce International SA* [1990] *Q.B.* 606.
- 576 *S v Katsikaris* [1980] 3 *S.A.L.R.* 580 at 592–593.
- 577 This is usually provided for in the form signed by the traveller when making application for the travellers' cheques.
- 578 See below, para.36-181.

- 579 *Sullivan v Knauth* (1914) 146 N.Y.S. 583; affirmed (1915) 115 N.E. 460.
- 580 Above. But see now Uniform Commercial Code, ss.3-106(c), 3-305(a)(2).
- 581 The decision of the Court of Appeal in *Burnett v Westminster Bank Ltd* [1966] 1 Q.B. 742, indicates that a notice printed on a folder of a cheque book does not necessarily form a term of the contract of banker and customer.
- 582 For an illustration, see below, para.[36-332](#).
- 583 For contracts made before 1 October 2015, the applicability of the [Unfair Contract Terms Act 1977](#) and the [Unfair Terms in Consumer Contracts Regulations 1999 \(SI 1999/2083\)](#), will need to be considered in relation to any provision in the contract between issuer and the traveller. For such contracts made on or after 1 October 2015, [Pt 2 of the Consumer Rights Act 2015](#) amends the [Unfair Terms in Consumer Contracts Act 1977](#) so that it no longer applies to “consumer contracts” or “consumer notices” as defined by the new Act, and revokes and replaces the [Unfair Terms in Consumer Contracts Regulations 1999](#). For detailed analysis of the impact of the [2015 Act](#) on the [1977 Act](#) and [1999 Regulations](#), see below, [Ch.40](#). See also Brexit paragraphs in Vol.I, [Ch.1](#), especially para.[1-023](#).
- 584 [1989] Q.B. 553. See also *Thomas Cook Ltd v Kumari* [2002] NSWCA 141.
- 585 (1983) 133 New L.J. 766.
- 586 [1990] Q.B. 606.
- 587 At 253–256, obiter, Hutchison J said that if there had been no express term requiring the issuer to refund the value of the lost or stolen cheques such a term ought to be implied.
- 588 (1952) 90 A. 2d 236.
- 589 [s.29 of the Act](#) which provides the general definition of a holder in due course.
- 590 *Emerson v American Express Co*, above; cf. *Gray v American Express Co*, 239 S.E. 2d 621 (1977), in which, however, *Emerson's* case was not cited and where the holder observed the transferor's execution of both a signature and a countersignature. cf. Chalmers and Guest on Bills of Exchange and Cheques, 18th edn (2017), para.13-012: “it is doubtful whether [[*Emerson v American Express Co*] would be followed in this country”.
- 591 *Samberg v American Express Co* (1904) 99 N.W. 879; *Sullivan v Knauth* (1914) 146 N.Y.S. 583. But see now Uniform Commercial Code ss.3-106 (c), 3-305(a)(2).

## (d) - Promissory Notes

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Chapter 36 - Bills of Exchange and Banking

Section 1. - Negotiable Instruments

(d) - Promissory Notes

### Definition

36-182 A promissory note is an unconditional promise in writing made by one person to another, signed by the maker, engaging to pay on demand or at a fixed or determinable future time a sum certain in money, to, or to the order of, a specified person or to bearer. An instrument in the form of a note payable to the maker's order is not a promissory note unless and until it is indorsed by the maker. A note is not invalid by reason only that it contains also a pledge of collateral security with authority to sell or dispose thereof. But if a note is made to run concurrently with a charge in respect of which it is issued, the promise to pay may thereby be rendered conditional.<sup>592</sup> A note which is, or on the face of it, purports to be, both made and payable within the British Islands is an inland note. Any other note is a foreign note.<sup>593</sup>

36-183 In *Kirkwood v Carroll*<sup>594</sup> it was held that a joint and several note for the payment of £225 by instalments, the whole to become due on default in payment of any one instalment, and providing that no time given to either party should prejudice the rights of the holder to proceed against any other party, was a valid promissory note. In *Mason v Lack*<sup>595</sup> an instrument in the form of a bill, signed by a person as drawer and not addressed to anyone, but accepted by another person, was held to be a promissory note and not a bill. In *Haseldine v Winstanley*,<sup>596</sup> a similar instrument, which had been completed by the holder, with the drawer's consent, by adding the name of the acceptor as addressee, was held to be good as a bill if the alteration was justifiable, or good as a note if it was not. An IOU containing a promise to pay is—provided the promise is in the terms specified in s.83—a promissory note.<sup>597</sup>

## Application of provisions regarding bills of exchange to promissory notes

- 36-184 According to s.89(1) of the Act, the provisions relating to bills of exchange apply, with the necessary modifications, to promissory notes.<sup>598</sup> According to s.89(2), in applying these provisions, the maker of the note is deemed to correspond with the acceptor of a bill, and the first indorser with the drawer of an accepted bill payable to his own order. Section 89(3) provides that the following provisions relating to bills of exchange do not apply to promissory notes:
- (a)those relating to presentment for acceptance (ss.39–44);
  - (b)those relating to acceptance (ss.17–19);
  - (c)those relating to acceptance supra protest (ss.65–67); and
  - (d)those relating to bills in a set (s.71).

By s.89(4) protest is not required where a foreign note is dishonoured.<sup>599</sup> Further provisions, varying the law relating to promissory notes from that relating to bills of exchange, are set out in ss.84–88 of the Act, and will be discussed presently.

## Delivery

- 36-185 According to s.84 a promissory note is inchoate and incomplete until its delivery to the payee or bearer.<sup>600</sup> It should be noted that, as regards bills of exchange, s.21 enacts that a party may revoke his contract on the bill until he delivers it, but the section does not provide that the bill itself is inchoate. The proviso to s.21(1) as well as subss.(2) and (3)<sup>601</sup> apply, mutatis mutandis, to promissory notes.

## Joint and several notes

- 36-186 According to s.85 of the Act, a promissory note may be made by two or more makers, and they may be liable thereon jointly and severally, according to its tenor. Where a note reads “I promise to pay” and is signed by two or more persons, it is deemed to be their joint and several note. When two or more persons are jointly liable, a judgment against one of them, even though unsatisfied, is a bar to proceedings against the other or others, but not if the liability is several as well as joint.<sup>602</sup> The fact that one of two joint makers of a note is not liable does not release the other. Thus, in *Wauthier v Wilson*<sup>603</sup> a father and his son, a minor, made a joint and several note in respect of

a loan given to the son. It was held that the minor was not liable, but that the father was liable as principal debtor.

## Note payable on demand

- 36-187 According to s.86, where a note payable on demand has been indorsed, it must be presented within a reasonable time. If it is not so presented the indorser is discharged. What amounts to reasonable time depends on the nature of the instrument, the usage of trade and the facts of the particular case. However, the section provides that, where a note payable on demand is negotiated, it is not deemed to be overdue—so as to prevent a holder from being a holder in due course—by reason that it appears that a reasonable time for presenting it for payment has elapsed since its issue.

## Note given to secure payment of debt

- 36-188 Where a promissory note payable on demand is given to secure payment of a debt, the discharge of the debt does not, in itself, discharge the note. In *Glasscock v Balls*<sup>604</sup> the payee of a note payable on demand, who had as further security obtained a mortgage from the maker, realised the mortgage, and thus obtained the amount of a debt. He retained the note, and negotiated it to the plaintiff, who took it in good faith and for value. It was held that the note had not been paid, and that the plaintiff could recover from the maker.

## Presentment for payment<sup>605</sup>

- 36-189 Any promissory note must be presented for payment in order to render an indorser liable on it.<sup>606</sup> If the note is made payable at a particular place, it must be presented there. If the place of payment is indicated by way of memorandum only, the note may be presented at that place, but due presentment to the maker elsewhere suffices to render the indorser liable.<sup>607</sup> The maker's liability is subject to due presentment for payment only if the bill is made payable at a particular place.<sup>608</sup> A note is considered so payable only if the relevant words are imperative and constitute a part of the promise.<sup>609</sup> Thus, where a place of payment was indicated at the foot of the note, the maker was liable although the note was not presented for payment.<sup>610</sup>

## Limitation of action

- 36-190 The period of limitation under the [Limitation Act 1980](#) runs in favour of the maker of a note payable on demand from the date of the note or its issue, and not from the date of demand.<sup>611</sup>

## Liability of maker

- 36-191 The maker of the note is the principal debtor and his position is similar to that of an acceptor of a bill of exchange.<sup>612</sup> [Section 88\(1\) of the Act](#) provides that the maker engages that he will pay the note according to its tenor. By [s.88\(2\)](#) the maker is precluded from denying to a holder in due course the existence of the payee and his capacity to indorse.<sup>613</sup>

## New forms of negotiable instruments

- 36-192 New forms of negotiable instruments have been making their appearance in recent years. Usually, they assume a form similar to that of a promissory note but, due to special terms incorporated in their text, fall outside the ambit of the definition of [s.83](#). Thus, the instruments used in many note issue facilities (NIFS) provide for maturity of the “note” before the designated date in the event of a default under the underlying agreement. Such an instrument is, of course, not payable at a designated future time and hence does not constitute a promissory note. Another popular instrument is the negotiable certificate of deposit (NCD), which uses a language similar to that of an ordinary deposit receipt,<sup>614</sup> except that it is stated to be negotiable or transferable. However, many NCDs do not include an express promise of the issuer to repay the amount deposited either to the payee’s order or to bearer. Such NCDs, therefore, do not constitute promissory notes.

## Established by mercantile usage

- 36-193 Can the negotiability of such novel instruments be based on some other reasoning? It is true that the decision in *Customs and Excise Commissioners v Guy Butler (Int) Ltd*<sup>615</sup> suggests that NCDs constitute a novel form of negotiable instrument, established by a mercantile usage. The point, though, was not in issue in that case and the relevant passage is a mere observation. Cases concerning the recognition of modern mercantile usages establishing novel forms of negotiable instruments show that it is difficult to persuade courts to proclaim the validity of a new type of

instrument. To be legally recognised, the usage has to be certain, reasonable, “notorious” and of a general standing.<sup>616</sup> Thus, although it is possible, perhaps even likely, that the courts would recognise the negotiability of NCDs if the point were argued and supported by forceful expert evidence, the outcome is not free from doubt.<sup>617</sup>

## Footnotes

592 *Bank of Montreal v Faulkner*, 127 A.P.R. 256 (1987) Can.

593 s.83. For the meaning of the following words, see section quoted: “unconditional”—s.3(1) and see *Crouch v Crédit Foncier of England* (1873) L.R. 8 Q.B. 374; *Williamson v Rider* [1963] 1 Q.B. 89, 97–98, 101 (above, para.36-010); cf. *John Burrows Ltd v Subsurface Surveys Ltd* [1968] S.C.R. 607, 614 (Canada); *Creative Press Ltd v Harman* (1973) I.R. 313 (Ireland); *Emu Brewery Mezzanine Ltd v ASIC* [2006] WASCA 105 (Australia); *Re York Street Mezzanine Pty Ltd* [2007] FCA 922 (Australia); *Club Securities Ltd v Hurley* [2008] 1 N.Z.L.R. 711 (New Zealand); “on demand”—s.10 and “fixed or determinable future time”—s.11 (above, paras 36-013 et seq.); “sum certain”—s.9 (above, para.36-019); “British Islands”—s.4 (below, para.36-199).

594 [1903] 1 K.B. 531.

595 (1929) 45 T.L.R. 363.

596 [1936] 2 K.B. 101.

597 *Brooks v Elkins* (1836) 2 M. & W. 74; *Muir v Muir*, 1912 1 S.L.T. 304.

598 See, e.g. *Banque Cantonale de Genève v Sanomi* [2016] EWHC 3353 (Comm).

599 A fortiori protest will not be required where an inland note is dishonoured: s.51.

600 For when a banknote (a promissory note payable to the bearer on demand) is “issued” for the purpose of VAT legislation and the VAT treatment applicable to the issue of banknotes, see *Clydesdale Bank Plc v Revenue and Customs Commissioners* [2019] UKFTT 419 (TC) at [87]–[92].

601 As to which, see above, para.36-034.

602 *Kendall v Hamilton* (1879) 4 App. Cas. 504.

603 (1912) 28 T.L.R. 239.

604 (1889) 24 Q.B.D. 13.

605 The requirement of presentment of a promissory note for payment is to be found in s.87 of the Bills of Exchange Act 1882, and is summarised in this paragraph. However, s.87 is subject to Pt 4A of the 1882 Act (presentment by electronic means), inserted by s.13 of the Small Business, Enterprise and Employment Act 2015: see above, paras 36-153—36-154.

606 s.87(2).

607 s.87(3).

608 s.87(1); as to what constitutes a “particular place”, see *Eimco Corp v Tutt Bryant Ltd* [1970] 2 N.S.W.R. 249. cf. *Day v Bate* (1979) 41 F.L.R. 222 Aust.

609 *Re British Trade Corp Ltd* [1932] 2 Ch. 1.

- 610 *Masters v Baretto* (1849) 8 C.B. 433.
- 611 *Norton v Ellam* (1837) 2 M. & W. 461.
- 612 s.89(2), discussed in para.36-184, above.
- 613 Compare the estoppels concerning the acceptor of a bill: s.54 of the Act, discussed in para.36-113, above.
- 614 Which, unlike a promissory note, does not spell out a duty to pay.
- 615 [1977] Q.B. 377, 382.
- 616 See above, para.36-005.
- 617 For endorsement of the view that NCDs are negotiable by mercantile usage, see E. McKendrick (ed.), Goode on Commercial Law, 6th edn (2020), para.21.18; S. Paterson and R. Zakrzewski (eds), McKnight, Paterson and Zakrzewski on the Law of International Finance, 2nd edn (2017), para.10.4.3.

## **(e) - Negotiable Instruments in the Conflict of Laws**

**Chitty on Contracts 34th Ed.**

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*Replace footnote 617 with:* See Dicey, Morris and Collins on the Conflict of Laws, 15th edn (2012), para.33R–334 et seq. See also B. Geva and S. Peari, International Negotiable Instruments (2020).

### **Footnotes**

618 See Dicey, Morris and Collins on the Conflict of Laws, 15th edn (2012), para.33R–334 et seq.

## **(i) - General**

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### **(i) - General**

#### **Determining negotiability**

- 36-194 Whether an instrument is negotiable or not is determined in an English court according to English law. Thus, if by a mercantile usage, prevailing in England, an instrument is treated as being negotiable, the courts will be prepared to treat it as such.<sup>619</sup> As the recognition in England of a usage establishing the negotiability of an instrument depends mainly on the prevalence of the usage in this country, it is possible that an instrument may not be considered as negotiable in England although it is so considered in the country of its issue.<sup>620</sup> Negotiable instruments, however, are usually of international standing and in most cases a usage establishing the negotiability of a class of instruments will prevail not only in the place of issue of such an instrument but also at the place of payment. Generally, if an instrument derives its negotiability from a general or universal mercantile usage, it is likely that the usage will be recognised as applying in England.<sup>621</sup>

#### **Sources of law**

- 36-195 There are a number of express provisions in the [Bills of Exchange Act 1882](#) concerning conflict of laws. They constitute a basis, but not an exhaustive<sup>622</sup> regulation, of the rules of private international law applicable to bills of exchange, cheques and promissory notes.<sup>623</sup> These are augmented by decisions applying general principles of the conflict of laws.

- 36-196 Article 1(2)(d) of the Rome I Regulation (EC) 593/2008 provides that “obligations arising under bills of exchange, cheques and promissory notes and other negotiable instruments to the extent that the obligations under such other negotiable instruments arise out of their negotiable character” are excluded from the scope of the Regulation.<sup>624</sup> A similar exclusion is contained in art.1(2)(c) of the Rome II Regulation (EC) 864/2007 on the law applicable to non-contractual obligations.<sup>625</sup>

## International conventions

- 36-197 It is perhaps unfortunate that the United Kingdom has not adopted the two treaties of the Geneva Convention of 1930 relating to the conflict of laws in respect of negotiable instruments.<sup>626</sup>

## Series of contracts

- 36-198 It is essential for an examination of the conflict problems arising in connection with bills of exchange to remember that a bill of exchange does not represent a single contract but a series of different promises which, while closely interconnected because they are embodied in the same instrument, are nevertheless in many respects independent. This explains why the different promises contained in a bill of exchange may be subject to different legal systems.<sup>627</sup>

- 36-199 The sections of the [Bills of Exchange Act 1882](#) dealing with conflict rules run as follows:

### Section 4

“4.—

(1) An inland bill is a bill which is or on the face of it purports to be (a) both drawn and payable within the British Islands or (b) drawn within the British Islands upon some person resident therein. Any other bill is a foreign bill.<sup>628</sup>

For the purposes of this Act “British Islands” mean any part of the United Kingdom of Great Britain and Ireland,<sup>629</sup> the Islands of Man, Guernsey, Jersey, Alderney, and Sark, and the islands adjacent to any of them being part of the dominions of Her Majesty.

**(2)** Unless the contrary appear on the face of the bill the holder may treat it as an inland bill."

## Section 72

"72.—

Where a bill drawn in one country is negotiated, accepted or payable in another, the rights, duties, and liabilities of the parties thereto are determined as follows:

**(1)** The validity of a bill as regards requisites in form is determined by the law of the place of issue, and the validity as regards requisites in form of the supervening contracts, such as acceptance, or indorsement, or acceptance *supra protest*, is determined by the law of the place where such contract was made.

Provided that—

**(a)** Where a bill is issued out of the United Kingdom, it is not invalid by reason only that it is not stamped in accordance with the law of the place of issue.

**(b)** Where a bill, issued out of the United Kingdom, conforms, as regards requisites in form, to the law of the United Kingdom, it may, for the purpose of enforcing payment thereof, be treated as valid as between all persons who negotiate, hold, or become parties to it in the United Kingdom.

**(2)** Subject to the provisions of this Act, the interpretation of the drawing, indorsement, acceptance, or acceptance *suprà protest* of a bill, is determined by the law of the place where such contract is made.

Provided that where an inland bill is indorsed in a foreign country the indorsement shall as regards the payer be interpreted according to the law of the United Kingdom.

**(3)** The duties of the holder with respect to presentment for acceptance or payment and the necessity for or sufficiency of a protest or notice of dishonour, or otherwise, are determined by the law of the place where the act is done or the bill is dishonoured.

(4) ...<sup>630</sup>

(5) Where a bill is drawn in one country and is payable in another, the due date thereof is determined according to the law of the place where it is payable.”

## Summary

- 36-200 It follows from s.4 that a foreign bill is one which is either (a) drawn by a person who is not resident in the British Isles; or (b) drawn by a person resident in the British Isles on a person abroad and payable abroad. It should be noted that, if a bill is drawn and payable in the British Isles, it is not a foreign bill, even if the payee resides abroad. Moreover, an inland bill does not become a foreign bill because of any subsequent contract embodied in it, as for instance by indorsements effected in foreign countries. The most important difference between an inland and a foreign bill is that a foreign bill must be protested if dishonoured, while a protest is not, usually, required in the case of an inland bill.<sup>631</sup>
- 36-201 Section 72 applies where an instrument “drawn in one country is negotiated, accepted, or payable in another”. Section 72 has no application where all matters connected with the instrument take place in one country.<sup>632</sup> As regards the reference in s.72 to “the place of issue” or “the place where the contract is made” it should be recollect that:

“... every contract on a bill, whether it be the drawer’s, the acceptor’s or an indorser’s, is incomplete and revocable until delivery of the instrument.”<sup>633</sup>

Thus, the bill must be considered as issued, and each contract as concluded, at the place in which delivery takes place, and not at the place at which the promisor signs the document.<sup>634</sup>

## Footnotes

- 618 See Dicey, Morris and Collins on the Conflict of Laws, 15th edn (2012), para.33R–334 et seq.
- 619 *Goodwin v Robarts (1875) L.R. 10 Ex. 337 (affirmed (1876) 1 App. Cas. 476); Edelstein v Schuler & Co [1902] 2 K.B. 144*. See also *Bechuanaland Exploration Co v London Trading Bank [1898] 2 Q.B. 658*.

- 620 *Picker v London and County Banking Co* (1887) 18 Q.B.D. 515.
- 621 See above, especially *Easton v London Joint Stock Bank* (1886) 34 Ch. D. 95, 113 (reversed on a different point sub nom. *Sheffield v London Joint Stock Bank* (1888) 13 App. Cas. 333).
- 622 *Re Gillespie* (1886) 18 Q.B.D. 286, 293; *Embiricos v Anglo-Austrian Bank* [1905] 1 K.B. 677, 685; *Koechlin et Cie v Kestenbaum Bros* [1927] 1 K.B. 889, 895; *Zebrarise Ltd v De Nieffe* [2005] 1 Lloyd's Rep. 154 at [36].
- 623 While the provisions refer to bills of exchange they apply, mutatis mutandis, to cheques (s.73) and to promissory notes (s.89); and see *Embiricos v Anglo-Austrian Bank*, above.
- 624 An identical provision was previously set out in art.1(2)(c) of the 1980 Rome Convention on the Law applicable to Contractual Obligations (applied in the UK under the *Contracts (Applicable Law) Act 1990*), which was replaced, from 17 December 2009 by the Rome I Regulation. After the end of the implementation period (31 December 2020), the Rome I Regulation became part of retained EU law subject to minor amendment (Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment, etc.) (EU Exit) Regulations 2019/834 reg.10). On the effects of Brexit generally, see Vol.I, paras 1-016 et seq. For analysis of the Rome I Regulation, see Vol.I, paras 33-019 et seq.
- 625 After the end of the implementation period (31 December 2020), the Rome II Regulation became part of retained EU law subject to minor amendment (Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment, etc.) (EU Exit) Regulations 2019/834 reg.11). On the effects of Brexit generally, see Vol.I, paras 1-016 et seq.
- 626 The Convention for the Settlement of Certain Conflicts of Laws in Connection with Bills of Exchange and Promissory Notes, signed on 7 June 1930, League of Nations Treaty Series, Vol.CXLII, p.319, No.3314 (hereinafter: Geneva Convention on Bills) and the Convention for the Settlement of Certain Conflicts of Laws in Connection with Cheques, signed on 19 March 1931, as before, p.409, No.3317 (hereinafter: Geneva Convention on Cheques).
- 627 Dicey, Morris and Collins on the Conflict of Laws, 15th edn (2012), paras 3-335 et seq.; see also *Lebel v Tucker* (1867) L.R. 3 Q.B. 77, 83; Geneva Convention on Bills arts 2, 3, 4; Geneva Convention on Cheques arts 2, 4, 5.
- 628 As regards the corresponding provisions regarding promissory notes, see s.83(4) referred to in para.36-186, above. And see *Canadian Life Assurance Co v Canadian Bank of Imperial Commerce*, 98 D.L.R. (3d) 670 (1979).
- 629 The Republic of Ireland is not included: see Irish Free State (Consequential Adaptation of Enactments) Order 1923 (SR & O 1923/405) r.2.
- 630 s.72(4) has been repealed by s.4 of the Administration of Justice Act 1977.
- 631 s.51. Promissory notes need not be protested: s.89(4).
- 632 *Karafarin Bank v Dara* (No.2) [2009] EWHC 3265 (Comm), [2010] 1 Lloyd's Rep. 236 at [10], Blair J.
- 633 s.21. See *Aspinall's Club Ltd v Al-Zayat* [2007] EWHC 362 (Comm) at [16], reversed on other grounds [2007] EWCA Civ 1001. As regards promissory notes, see s.84, discussed in para.36-185, above. See *Zebrarise Ltd v De Nieffe* [2005] 1 Lloyd's Rep. 154 at [36].
- 634 *Chapman v Cottrell* (1865) 3 Hurl. & C. 865.

## **(ii) - Form**

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**(ii) - Form**

**Generally**

36-202 **Section 72(1)** enacts as a general rule that every separate contract contained in a bill of exchange has to satisfy the formal requirements of the law of the place where the contract has been concluded. Compliance with the proper law of the contract, which in the case of simple contracts may be alternative to compliance of form with the *lex loci contractus*,<sup>635</sup> is thus excluded. The following issues have been regarded as questions of form, viz whether a bill of exchange contains an unconditional or conditional order,<sup>636</sup> or whether an undisclosed agent can execute an indorsement binding on his principal.<sup>637</sup> The Act provides two exceptions to the rule that the validity of form depends on the law of the place at which the contract is made, and these will be discussed presently.

**Foreign stamp law**

36-203 **Section 72(1)(a)** lays down that a bill of exchange is not invalidated merely because it fails to comply with the stamp law in the place of issue. An English court will, thus, treat a bill as valid although a court in the place of issue may be obliged to treat it as void or unenforceable.

## Foreign bills

- 36-204 Another exception to the rule that the lex loci contractus prevails as regards the form of a bill of exchange, is to be found in s.72(1)(b) of the Act. It provides that if a bill, issued outside the United Kingdom, conforms, as regards requisites of form, to the law of the United Kingdom, it is to be treated as valid as between all the persons who have become parties to it in the United Kingdom. However, even as between these parties it is to be treated as being valid only for the purpose of enforcing payment.<sup>638</sup>

## Footnotes

- 618 See Dicey, Morris and Collins on the Conflict of Laws, 15th edn (2012), para.33R–334 et seq.
- 635 See Vol.I, paras 33-019 et seq. (Under art.3 of the Geneva Convention on Bills, the form must, subject to certain exceptions, comply with the requirements of the place in which each contract has been signed; the same principle applies under the Geneva Convention on Cheques art.4.)
- 636 *Guaranty Trust Co of New York v Hannay & Co* [1918] 1 K.B. 43. The decision was reversed by the Court of Appeal on a different point: [1918] 2 K.B. 623.
- 637 *Koechlin et Cie v Kestenbaum Bros* [1927] 1 K.B. 889, per Banks LJ at 896–897, Sargent LJ, dubitante, at 899.
- 638 The following cases were decided before the Act, but appear to be good law: *Bradlaugh v De Rin* (1870) L.R. 5 C.P. 473; *Re Marseilles Extension Railway and Land Co* (1885) 30 Ch. D. 598, 603.

## (iii) - Essential Validity

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(iii) - Essential Validity

### Essential validity

36-205 Section 72(2) of the Act provides that the “interpretation” of a contract contained in a bill is to be governed by the law of the country in which the contract is made. In this context, the term “interpretation” has to be construed liberally. The draftsman of the Act suggested that this term “clearly includes the obligations of the parties as deduced from such interpretation”. <sup>639</sup> This view has been confirmed by judicial authority. In *Alcock v Smith*, <sup>640</sup> Romer J observed that “interpretation” in this subsection includes “the legal effect” of the contract. This subsection deals, therefore, with what is usually called the essential, as opposed to the formal, validity of the contract. The construction and interpretation of the document, the quality and import of the obligations arising from the agreement of the parties, the legality of the promises embodied in the document—these and similar questions all fall under the subsection. The Act admits, however, of an exception, which will be examined later, <sup>641</sup> to the rule applying the lex loci contractus to questions of essential validity.

36-206 The Act, thus, replaces the proper law doctrine by a rigid application of the lex loci contractus. The exclusion of the lex loci solutionis leads to a remarkable result. A bill drawn in England, on a drawee in New York but payable in Montreal, would—as regards matters of the essential validity of the bill, arising in a dispute concerning the drawee’s contract—be governed by the law prevailing in New York and not Montreal. The proper law doctrine, on the other hand, might well lead to the application of the lex loci solutionis, i.e. the law of Montreal. <sup>642</sup> However, in most cases a bill would be payable at the place of acceptance. <sup>643</sup>

## Embiricos

- 36-207 The operation of the principle laid down in subs.(2) of s.72 is illustrated by *Embiricos v Anglo-Austrian Bank*.<sup>644</sup> In this case, the validity of an indorsement was in issue. A Roumanian bank drew, in Roumania, a cheque on a London bank payable to the plaintiffs' order. The plaintiffs indorsed the cheque in Roumania to a London firm and posted it to them. A clerk of the plaintiffs stole the cheque, forged the indorsement of the London firm and negotiated the cheque to bankers in Vienna, who in good faith paid its value to the fraudulent clerk. The Vienna bank then indorsed the cheque to the defendants in London and the latter presented it to the drawees who honoured the cheque. By this action the plaintiffs claimed back the money from the defendants, alleging conversion of the cheque. The defence was that, according to Austrian law, the defendants had acquired a good title from their Austrian transferor, and that, according to Austrian law, a bona fide indorsee may acquire a title even under a forged indorsement. The plaintiffs replied that the title of the defendants had to be ascertained according to English law, which does not recognise a good title through a forged indorsement. The Court of Appeal held that the validity of the indorsement was governed by Austrian law and decided, therefore, in favour of the defendants. Vaughan Williams and Romer LJJ based their decision on the ground that Austrian law was the law governing the transfers of the cheque. Stirling LJ and Walton J who had decided the case in the King's Bench Division, attached more weight to the additional ground that the case was covered by s.72(2) of the Bills of Exchange Act 1882.<sup>645</sup>

## Transfer

- 36-208 The reference in s.72(2) to the case of indorsements indicates that the lex loci contractus applies also to the negotiation of a bill. In *Koechlin et Cie v Kestenbaum Bros*<sup>646</sup> a bill of exchange was drawn in France by one E.V. on the defendants. The payee was one M.V. who was the father of the drawer and likewise resided in France. The bill was accepted by the defendants and was made payable at a bank in London. Subsequently, the bill was indorsed by the drawer E.V. in his own name to the plaintiffs, but it never showed an indorsement of the payee M.V. The defendants refused to pay the bill. The plaintiffs maintained that they were holders in due course and sued the defendants as acceptors. The defence was that the indorsement was irregular on its face because it did not emanate from the payee (as required by s.31(3) of the Act), and that, according to English law, no oral evidence was admissible to show that E.V. acted as agent for the payee. The plaintiffs replied that, as the validity of the indorsement was governed by French law, E.V.'s indorsement was good. The Court of Appeal held that the case was covered by s.72 of the Act and that the validity of the indorsement was to be determined according to French law. The court, therefore, gave judgment against the defendants. Sargent LJ was inclined to consider the issue as a question

of form governed by s.72(1), but explained that if it were not covered by that subsection, it was covered by subs.(2):

“... in view of the very wide effect of the decision in *Embiricos v Anglo-Austrian Bank*.<sup>647</sup> ... If the indorsement in fact made is, according to the law of the place where it is made, sufficient to give a title to the indorsee, it appears to me that by the express terms of the Act the indorsee is entitled to sue. The effect is not to increase the liabilities of the acceptor, but merely to enlarge the methods by which the right to enforce those liabilities can be transferred from the person originally entitled to them to some subsequent indorsee.”<sup>648</sup>

## Exception to the application of the lex loci contractus

- 36-209 It is now necessary to consider the exception admitted by the Act to the rule that the essential validity of a contract contained in a bill of exchange is determined by the law of the place where the contract is made. The proviso to subs.(2) enacts that, in the case of an inland bill indorsed in a foreign country, the indorsement is to be interpreted, as regards the payer, according to the law of the United Kingdom. It codifies the law as it stood before the Act.<sup>649</sup> Thus, where an inland bill was indorsed in France in a manner void according to French but valid according to English law, it was held that the obligation of the acceptor towards the indorsee was not affected thereby.<sup>650</sup> As a result, the purchaser of an inland bill is in a more favourable position than the purchaser of a foreign bill whose rights may be defeated by some infirmity imposed by foreign law. Conversely, the liability of the acceptor may be greater in the case of a foreign bill than in the case of an inland bill. The situation which existed prior to the Act and which the Act purported to adopt was described by Sargent LJ as follows:

“The result was that any one dealing with a foreign bill of exchange was in a less certain position than a person dealing with an inland bill, because in the case of an indorsement abroad on a foreign bill he might find substituted for the person to whom he was originally liable as acceptor not merely a person to whom the transfer would have been good if made in England, but a person to whom the transfer by indorsement would be good if made according to the law of the country in which it was made.”<sup>651</sup>

## Footnotes

618 See Dicey, Morris and Collins on the Conflict of Laws, 15th edn (2012), para.33R–334 et seq.

- 639 Chalmers, Bills of Exchange, 9th edn, p.282 (and see currently 18th edn, 2017, para.12-015), cited with approval in *Nova (Jersey) Knit Ltd v Kammgarn Spinnerei GmbH [1979] 1 W.L.R. 713, 718*.
- 640 [1892] 1 Ch. 238, 256. See also *Embiricos v Anglo-Austrian Bank [1905] 1 K.B. 677*. As regards illegality, see *Moulis v Owen [1907] 1 K.B. 746*; *Belize Bank Ltd v Association of Concerned Belizeans [2011] UKPC 35* at [45]. See also Dicey, Morris and Collins on the Conflict of Laws, 15th edn (2012), paras 33-350 et seq.
- 641 See below, para.36-209.
- 642 For a criticism of the provision, see Dicey, Morris and Collins on the Conflict of Laws, 15th edn (2012), para.33-350.
- 643 Under art.4 of the Geneva Convention on Bills, the law of the place at which the bill is payable determines the effect of the acceptance; the effect of other signatures is determined by the law of the place at which they are affixed. See also the Geneva Convention on Cheques art.5, applying the lex loci contractus.
- 644 [1905] 1 K.B. 677.
- 645 As regards the construction of an *aval* (viz guarantee), see *G & H Montage GmbH v Irvani [1988] 1 W.L.R. 1285 (affirmed [1990] 1 W.L.R. 667)*.
- 646 [1927] 1 K.B. 889. See also *Alcock v Smith [1892] 1 Ch. 238*.
- 647 [1905] 1 K.B. 677.
- 648 [1927] 1 K.B. at 899. The lex loci contractus applies likewise under the Geneva Convention on Bills art.4, and under the Geneva Convention on Cheques art.5; the latter however applies some special rules in art.7.
- 649 *De la Chaumette v Bank of England (1831) 2 B. & Ad. 385*; *Lebel v Tucker (1867) L.R. 3 Q.B. 77*.
- 650 *Lebel v Tucker*, above.
- 651 *Koechlin et Cie v Kestenbaum Bros [1927] 1 K.B. 889, 898*.

## **(iv) - Performance**

**Chitty on Contracts 34th Ed.**

**Consolidated Mainwork Incorporating First Supplement**

**Volume II - Specific Contracts**

**Chapter 36 - Bills of Exchange and Banking**

**Section 1. - Negotiable Instruments**

**(e) - Negotiable Instruments in the Conflict of Laws** <sup>618</sup>

**(iv) - Performance**

### **Duties of holder**

- 36-210 The rules relating to the performance of obligations arising from the bill are to be found in subss. (3) and (5) of s.<sup>618</sup> 72. The first of these enacts that the duties of the holder, as well as the sufficiency of the performance of his duties (e.g. presentment for acceptance and payment) are to be governed by the law of the place where the act is done or the bill is dishonoured.<sup>652</sup> These two places will usually coincide. It should be noted that the holder's performance of his duty to present the bill for payment, and his duty of sending a notice of dishonour and protesting the bill, are not usually prerequisites for charging the acceptor.<sup>653</sup> However, where any prerequisites exist before the holder may sue the acceptor, it is reasonable to assume that they should be governed by the law of the place of the acceptor.<sup>654</sup>

### **Effect of failure to perform**

- 36-211 Greater difficulties arise as regards the effect which the failure of the holder to perform any of his duties has—once the bill is dishonoured—on his rights against the drawer and indorsers, and the rights of each indorser against antecedent parties. The problem in particular is whether a notice of dishonour, which is necessary to preserve the rights of a holder or indorser against antecedent parties, is sufficient and valid. Here two interpretations of subs.(3) are possible, viz that the mode and sufficiency of the notice of dishonour are governed by the law of the place where the acceptor

has to pay the bill,<sup>655</sup> or that these incidents depend on the contract between indorser and indorsee, and consequently are governed by the law of the place where this contract is to be discharged.<sup>656</sup> Both interpretations are reconcilable with the words of the subsection, though the former view does not strain the words of the enactment as much as the latter.

## Suggested construction

- 36-212 It is suggested that the true meaning of this subsection is that the mode and sufficiency of the notice of dishonour are, as between indorsers, governed by the same law that determines ancillary rules relating to payment by the acceptor, i.e. by the law of the place where the bill was made payable and dishonoured. Three reasons can be advanced in favour of this view: first, the indorser, when negotiating the bill, is fully aware where the bill has to be paid.

“The indorser of a bill accepted payable in France, promises to pay in the event of dishonour in France, and notice thereof. By his contract he must be taken to know the law of France relating to the dishonour of bills; and notice of dishonour is a portion of that law.”<sup>657</sup>

Secondly, on principle, it is preferable that questions extending to protest and notice of dishonour should, as far as the indorsers of a bill are concerned, be regulated by a single law rather than by several legal systems. Thirdly, it should be noted that the indorser’s undertaking is, in the first place, that the bill will be honoured by the drawee, and only in the second place, that upon its dishonour, he will pay it himself.<sup>658</sup> The indorser’s main promise is, thus, that the bill will be paid in the acceptor’s place, where the holder has, under his contract with the indorser, to seek payment. The construction of s.72(3), which is supported in this book, gives effect to the intention of the parties.

- 36-213 The result is that all ancillary rules with respect to presentment for acceptance or payment, or with respect to protest or notice of dishonour, are, in principle, governed by a single law, i.e. the law prevailing at the place of the payment of the bill, no matter whether the dispute concerns the original promise of the acceptor or a subsequent contract between indorser and indorsee.

## Amount payable

- 36-214 Until 1977 the position was governed by s.72(4) of the Act, based on the traditional common law rule under which a foreign debt was to be converted into sterling on the basis of the rate prevailing

at the time at which payment was due. The introduction of the new rule, sanctioning the conversion of a foreign debt on the basis of the rate prevailing at the time at which payment is enforced by the court, has led to the repeal of s.72(4). Under the new doctrine, the holder is entitled to bring an action to enforce payment of the bill in the foreign currency in which it is expressed.<sup>659</sup>

## Date of payment

36-215 Section 72(5) provides that where a bill is drawn in one country and payable in another, the date of payment is determined by the law of the place at which the bill is payable. Thus, in *Re Francke and Rasch*<sup>660</sup> an English bank purchased before the First World War bills payable in Germany and Austria. The war legislation of these countries postponed the maturity of the bills indefinitely. The English bank brought an action against the acceptor in the English courts but failed because the postponement of the dates of maturity by the German and Austrian decrees was effective against the holder.

## Footnotes

- 618 See Dicey, Morris and Collins on the Conflict of Laws, 15th edn (2012), para.33R–334 et seq.
- 652 For a criticism of this section, see Dicey, Morris and Collins on the Conflict of Laws, 15th edn (2012), paras 33-367—33-372. See also the Geneva Convention on Bills art.8; Geneva Convention on Cheques art.8.
- 653 See above, para.36-114.
- 654 cf. Foote, Private International Law, 5th edn, pp.460–461, who thinks that it is “at least reasonable to presume that these incidents of non-payment will be governed by the same law that applies to all incidents of payment”. As regards the question of the necessity for presentment, see *Banku Polskiego v KJ Mulder & Co* [1941] 2 K.B. 266 (affirmed [1942] 1 K.B. 497); *Cornelius v Banque Franco-Serbe* [1941] 2 All E.R. 728, 732 (the case is also reported in [1942] 1 K.B. 29, where the relevant passage does not occur).
- 655 *Rothschild v Currie* (1841) 1 Q.B. 43; *Hirschfeld v Smith* (1866) L.R. 1 C.P. 340.
- 656 *Horne v Rouquette* (1878) 3 Q.B.D. 514.
- 657 *Hirschfeld v Smith*, above, at 352. See also *Cornelius v Banque Franco-Serbe* [1941] 2 All E.R. 728, 732 (the relevant passage does not appear in the report of the case in [1942] 1 K.B. 29).
- 658 See s.55(2)(a) of the Act.
- 659 See above, para.36-118.
- 660 [1918] 1 Ch. 470. See also *Rouquette v Overmann* (1875) L.R. 10 Q.B. 525. In *Banku Polskiego v KJ Mulder & Co* [1941] 2 K.B. 266 (affirmed [1942] 1 K.B. 497), the bills were

payable in London and not in Amsterdam, the acceptor being a firm in London and having accepted the bills generally.

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## **Section 2. - Aspects of Banking Law**

**Chitty on Contracts 34th Ed.**

**Consolidated Mainwork Incorporating First Supplement**

**Volume II - Specific Contracts**

**Chapter 36 - Bills of Exchange and Banking**

**Section 2. - Aspects of Banking Law**

### **Introduction**

- 36-216 The treatment of banking law in this section of the chapter is concerned with the relationship of banker and customer. In order to place that relationship in its proper context, it is necessary to begin with an outline of the way banking activities are controlled in the United Kingdom.

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## **(i) - Overview**

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**Consolidated Mainwork Incorporating First Supplement**

**Volume II - Specific Contracts**

**Chapter 36 - Bills of Exchange and Banking**

**Section 2. - Aspects of Banking Law**

**(a) - Bank Regulation**

**(i) - Overview**

### **Financial Services and Markets Act 2000**

- 36-217 Section 19 of the Financial Services and Markets Act 2000 (“the FSMA 2000”) provides that no person may carry on, or purport to carry on, a regulated activity in the United Kingdom unless authorised or exempt. Deposit-taking is included in the list of regulated activities contained in Sch.2 to the Act.<sup>661</sup> Until mid-1998, the authorisation and supervision of deposit-taking institutions was a function of the Bank of England. However, a series of high-profile financial scandals in the 1990s raised doubts over whether the Bank of England was an effective supervisor and led the government to introduce legislation transferring the Bank of England’s banking supervision function to a new super-regulatory body called the Financial Services Authority (FSA). The transfer was effected by the Bank of England Act 1998, which came into force on 1 June 1998. From 1 December 2001, the FSA assumed full regulatory powers in relation to banking, insurance and investment business under the FSMA 2000.<sup>662</sup>

### **Financial Services Act 2012**

- 36-218 The banking crisis of 2007–2008 led to widespread criticism of the role and performance of the FSA. This resulted in the Government proposing reform of the regulatory system. The Financial Services Act 2012 received Royal Assent on 19 December 2012. The new Act substantially amends the FSMA 2000 and introduces key structural changes to the structure of financial regulation in the UK. The FSA was dismantled and replaced by two new regulatory bodies. First, responsibility

for significant prudential regulation was transferred from the FSA to a new Prudential Regulation Authority (PRA), originally established as a subsidiary of the Bank of England but, since March 2017, made part of the Bank of England as a result of the [Bank of England and Financial Services Act 2016](#). The PRA's regulatory remit extends to deposit-taking, insurance business and dealing in investments as principal.<sup>663</sup> Secondly, the Financial Conduct Authority (FCA) was tasked with the regulation of the conduct of business of all financial firms, including retail conduct and market conduct. The FCA is also responsible for the prudential regulation of firms that are not regulated by the PRA and, since April 2014, for the regulation of consumer credit business.<sup>664</sup> Finally, the [2012 Act](#) gave the Bank of England, acting through a new Financial Policy Committee, macro-prudential responsibility for oversight of the financial system.

## The Prudential Regulation Authority (PRA) and the Financial Conduct Authority (FCA)

- 36-219 Since 1 April 2013, the PRA has been responsible for the prudential regulation of those firms considered by the Government to be systemically important, such as banks, insurers and significant investment firms.<sup>665</sup> These firms may be described as “dual-regulated” firms (or PRA-authorised firms) because they are also regulated by the FCA for conduct of business purposes. The FCA is responsible for the conduct of business regulation of all firms, including dual-regulated firms. The PRA and the FCA are under a statutory duty to co-ordinate their approach to the regulation of dual-regulated firms. The FCA is also responsible for the prudential regulation of firms not regulated by the PRA. The FCA has also taken over the majority of the FSA's market regulatory functions, including the FSA's role as the UK Listing Authority. The PRA has its own Rulebook<sup>666</sup> and the FCA its own Handbook.<sup>667</sup>

## Banking Conduct of Business Sourcebook (BCOBS)

- 36-220 BCOBS is the FCA Handbook module relating to retail banking conduct of business. BCOBS's introduction in November 2009 coincided with that of the new [Payment Services Regulations 2009](#) (“PSRs 2009”),<sup>668</sup> which implemented the EU's Payment Services Directive in the UK.<sup>669</sup> The PSRs 2009 have since been revoked and replaced by the [Payment Services Regulations 2017](#),<sup>670</sup> which implement in part the EU's Revised Payment Services Directive in the UK.<sup>671</sup> The PSRs apply to most retail bank accounts. BCOBS and the PSRs together form what has been described as the Banking and Payment Services Conduct Regime.<sup>672</sup> As originally envisaged, the FSA was central to the supervision and enforcement of this new regime, but that function shifted to the FCA

on 1 April 2013.<sup>673</sup> Outside the new regime, there are also self-regulatory Standards of Lending Practice for both personal customers and small business customers.<sup>674</sup>

- 36-221 BCOBS generally applies to firms (including UK-authorised banks and building societies) with respect to the regulated activity of accepting deposits from banking customers (consumers, micro-enterprises and charities which have an income of less than £1 million)<sup>675</sup> carried on from an establishment in the UK and activities connected with that activity (e.g. cheques and foreign exchange).<sup>676</sup> In addition, Ch.2 of BCOBS applies to a firm (other than a credit union), an electronic money institution, a payment institution and a registered account information service provider with respect to the provision of payment services or issuance or redemption of electronic money carried on from an establishment maintained by it or its agent in the UK and activities connected with those activities.<sup>677</sup> However, there are various limitations on the application of BCOBS in these circumstances.<sup>678</sup> Except as provided for in BCOBS 1.1.4R, BCOBS does not apply to payment services where [Pts 6 and 7 of the Payment Services Regulations 2017](#) apply. BCOBS 1.1.4R(1) provides that Chs 2, 2A, 5 and 6 of BCOBS (except BCOBS 5.1.10AR–5.1.19R) and BCOBS 4.3 and 4.4 apply to payment services where [Pts 6 and 7 of the Payment Services Regulations 2017](#) apply.<sup>679</sup> BCOBS also controls terms that seek to exclude or limit liability. A firm or a provider must not seek to exclude or restrict, or rely on any exclusion or restriction of, any duty or liability it may have to a banking customer, a payment service user or an electronic money customer unless it is reasonable for it to do so and the duty or liability arises other than under the regulatory system.<sup>680</sup> The general law, including the [Unfair Terms in Consumer Contracts Regulations 1999](#)<sup>681</sup> (for contracts entered into before 1 October 2015) and the [Consumer Rights Act 2015](#), also limits the scope for a firm to exclude or restrict any duty or liability to a consumer.<sup>682</sup>

- 36-222 BCOBS provides rules and guidance on the following areas of activity: communications with banking customers and financial promotions<sup>683</sup>; optional additional products<sup>684</sup>; distance communications<sup>685</sup>; information to be communicated to banking customers<sup>686</sup>; post-sale requirements<sup>687</sup>; cancellation<sup>688</sup>; information about current account services<sup>689</sup>; and tools for personal current account services.<sup>690</sup> Under the [Financial Services and Markets Act 2000 s.138D\(2\)](#), a “private person” who has suffered loss as the result of a breach of the BCOBS rules has a right of action, as if it were an actionable breach of statutory duty.<sup>691</sup>

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## The Standards of Lending Practice

- 36-223 A voluntary Standards of Lending Practice for Personal Customers came into operation on 1 October 2016. It replaced the self-regulatory Lending Code, which had been introduced in November 2009. A revised version of the Standards of Lending Practice for Personal Customers was published by the Lending Standards Board in April 2021 and came into operation on 1 July 2021 (“the 2021 Standards”). The 2021 Standards apply to personal customers and set out standards of good practice in relation to credit card, charge card, overdraft and unsecured loan products.
- 36-224 A voluntary Standards of Lending Practice for Business Customers came into operation on 1 July 2017. It replaced the micro-enterprise provisions of the Lending Code. A revised version of the Standards of Lending Practice for Business Customers was published by the Lending Standards Board in July 2019 and came into operation on 1 November 2019. This version of the Standards of Lending Practice for Business Customers was further revised in August 2020 so as to apply to products offered under the government’s Bounce Bank Loan Scheme and the Coronavirus Business Interruption Loans Scheme (“the 2020 Standards”). The 2020 Standards apply to lending to business customers with a consolidated turnover of up to £25 million (prior to the 2019 revision, the threshold was set at £6.5). In terms of application of the 2020 Standards a distinction is made between (a) businesses with an annual turnover of no more than £6.5 million and which do not have a complex ownership structure (the 2020 Standards apply in their entirety), and (b) businesses with a turnover greater than £6.5 million (for some business customers the relevant section of the 2020 Standards may apply in its entirety, whilst for others only particular elements may be applicable, although firms must adhere in full to the section on governance and oversight). The 2020 Standards apply to products offered for business lending purposes: overdraft, loan, credit card, commercial mortgage and charge card products. The 2020 Standards do not apply to trade loans or invoice financing. A separate set of Standards apply to asset finance products.

## Payment Services Regulations 2017

- 36-225 The [Payment Services Regulations 2017 \(“PSRs 2017”\)](#)<sup>692</sup> implement (in part) the EU’s Revised Payment Services Directive in the UK.<sup>693</sup> The PSRs 2017 revoke and replace the [PSRs 2009](#).<sup>694</sup> The PSRs 2017 were amended in order to ensure legal continuity on the United Kingdom’s exit from the European Union.<sup>695</sup> Payment services include the execution of payment transactions, card issuing, merchant acquiring, money remittance, certain services based on mobile phones or other electronic devices, and the operation of “payment accounts”. [Regulation 2\(1\) of the PSRs](#)

**2017** defines a “payment account” as “an account held in the name of one or more payment service users which is used for the execution of payment transactions”, and a “payment transaction” as:

“... an act, initiated by the payer or payee, or on behalf of the payer, of placing, transferring or withdrawing funds, irrespective of any underlying obligations between the payer and the payee.”

Thus, payment accounts include current accounts and easy access savings accounts. The **PSRs 2017** focus only on electronic means of payment: they do not apply to cash-only transactions directly between payer and payee<sup>696</sup> or payments based on paper instruments, such as cheques, bankers’ drafts, paper-based vouchers and paper postal orders, despite the fact that these instruments may now be cleared by electronic means.<sup>697</sup>

- 36-226 In the context of retail banking, the **PSRs 2017** impose conduct of business requirements on payment services that are within scope.<sup>698</sup> The **PSRs 2017** are of wider scope than the **PSRs 2009**. Parts 5 (informational requirements) and 6 (rights and obligations) of the **PSRs 2009**, with some exceptions, only applied if the service was provided from an establishment maintained by a payment service provider or its agent in the UK, the payment service providers of both the payer and the payee were within the EEA, and the transaction was in euros, sterling or another non-euro Member State currency.<sup>699</sup> This changed with the **PSRs 2017**, which have themselves recently been subject to Brexit-related amendments.<sup>700</sup> So long as the payment services are provided from an establishment maintained by a service provider or its agent in the UK,<sup>701</sup> Pts 6 (informational requirements) and 7 (rights and obligations) of the **PSRs 2017** extend, with some exceptions, to: (i) services relating to transactions in sterling where the payment service providers of both the payer and the payee are located within the UK<sup>702</sup>; (ia) services relating to transactions in euros executed under a payment scheme which operates across a “qualifying area” (which means the area of the UK and the EEA States) where the payment service providers of both the payer and the payee are located within the qualifying area<sup>703</sup>; (ii) services relating to transactions in a currency other than sterling or euro where the payment service providers of both the payer and the payee are located in the UK<sup>704</sup>; and (iii) services relating to transactions where the payment service provider of either the payer or the payee, but not both, is in the UK (and the case does not fall within (ia) above).<sup>705</sup> In the case of (ii) and (iii), Pts 6 and 7 apply only in respect of those parts of the transaction which are carried out in the UK,<sup>706</sup> and when they apply they do so in a more restricted manner than in the case of (i) or (ia).<sup>707</sup>
- 36-227 The conduct of business regulations mostly relate to providing information to payment services users, both before and after the execution of particular transactions.<sup>708</sup> There are separate provisions for single payment service contracts<sup>709</sup> and framework contracts.<sup>710</sup> There are

also common provisions including a prohibition on charging for certain information.<sup>711</sup> Other information requirements extend to account information service providers, information on ATM withdrawals and provision of information leaflets.<sup>712</sup> The Regulations also set out the legal rights and obligations as between payment service providers and users. They provide for matters including consent to payment transactions,<sup>713</sup> unauthorised or incorrectly executed payment transactions, liability for unauthorised payment transactions,<sup>714</sup> refunds, execution of payment transactions, execution time and liability of payment service providers.<sup>715</sup> The 2017 version of the Regulations extend, for the first time, to the activities of “payment initiation services” and “account information services”,<sup>716</sup> although in a much more limited way than with other payment services providers.<sup>717</sup> This extension has encouraged the development of Open Banking whereby bank customers can open up their banking data and accounts to trusted third parties allowing for increased innovation, greater competition and customer choice, as well as increased financial inclusion.<sup>718</sup>

- 36-228 As with [reg.120\(1\) of the PSRs 2009](#), [reg.148\(1\) of the PSRs 2017](#) makes any breach of the requirements of Pts 6 or 7 actionable by a “private person” who suffers loss as a result of the contravention, subject to defences and other incidents applying to actions for breach of statutory duty.<sup>719</sup> However, and new to the [PSRs 2017](#), it is provided, in [reg.148\(4\)](#), that where there is a contravention of a requirement under [regs 76\(5\)\(b\), 77\(6\), 93\(4\)](#) or [95](#) for a payment service provider to compensate another service provider, the payment service provider to which compensation is required to be paid is to be treated for the purposes of [reg.148](#) as if it were a “private person”.
- 36-229 Payment service providers may contract out of certain obligations with customers who are not consumers, micro-enterprises or small charities for the purposes of the Regulations.<sup>720</sup> For these purposes a “consumer” is a natural person who, in payment service contracts, is acting for purposes other than his trade, business or profession. A “micro-enterprise” is an enterprise which employs fewer than 10 persons and has a turnover or annual balance sheet that does not exceed €2 million, including self-employed persons, family businesses, partnerships and associations regularly engaged in economic activity. A “charity” is one with an annual income of less than £1 million.
- 36-230 There are a number of exemptions to be found in [Pt 2 of Sch.1 to the Regulations](#). These activities do not constitute payment services. The exemptions mainly cover wholesale activities of financial institutions. There are no specific exemptions based on transaction size although low-value payment instruments are subject to fewer requirements.<sup>721</sup> Certain requirements of the [PSRs](#)

(relating to information and rights and obligations) are disapplied where the [Consumer Credit Act 1974](#) already contains similar requirements.<sup>722</sup>

## Footnotes

- 661 FSMA 2000 Sch.2 Pt I para.4 defines “deposit taking” to mean “accepting deposits”. See also the [Financial Services and Markets Act 2000 \(Regulated Activities\) Order 2001 \(SI 2001/544, as amended\) Pt II Ch.II](#). See below, paras [36-231](#) et seq.
- 662 For a summary of the regulatory regime established by the [FSMA 2000](#) in the context of deposit-taking, see E.P. Ellinger, E. Lomnicka and C.V.M. Hare, [Ellinger's Modern Banking Law](#), 5th edn (2011), Ch.2. For detailed review, see E. Lomnicka and J. Powell, [Encyclopedia of Financial Services Law](#) (looseleaf), Pt 2A.
- 663 [Financial Services and Markets Act 2000 \(PRA-Regulated Activities\) Order 2013 \(SI 2013/556\)](#). See also the PRA’s policy statement on the designation of investment firms for prudential regulations (March 2013).
- 664 On 1 April 2014, the FCA assumed responsibility for consumer credit regulation from the Office of Fair Trading.
- 665 See para.[36-218](#), above.
- 666 Available via the Bank of England’s website: <http://www.bankofengland.co.uk> [Accessed 1 September 2021].
- 667 Available via the FCA’s website: <http://www.fca.org.uk> [Accessed 1 September 2021]. See, in particular, the following sections of the FCA Handbook: Principles for Businesses (PRIN); Banking Conduct of Business Sourcebook (BCOBS) and Consumer Credit Sourcebook (CONC).
- 668 [SI 2009/209](#) (as amended).
- 669 [SI 2009/209](#), as amended, implementing Directive 2007/64 of the European Parliament and of the Council on payment systems in the internal market ([2007] O.J. L319/1).
- 670 [SI 2017/752](#), as amended. See para.[36-225](#) below.
- 671 Revised Payment Services Directive 2015/2366/EU.
- 672 See *G. McMeel [2010] L.M.C.L.Q. 431*. It should also be noted that since 1 April 2014 a bank’s consumer credit-related activities (e.g. overdrafts and credit cards) have been regulated by the FCA according to the conduct of business standards set out in the FCA’s Consumer Credit Sourcebook (CONC).
- 673 See para.[36-218](#) above.
- 674 See paras [36-223—36-224](#) below.
- 675 Including a natural person acting in a capacity as a trustee when acting for purposes outside their trade business or profession (FCA Handbook, Glossary of Definitions). A micro-enterprise is defined in the FCA Handbook glossary as an enterprise which employs fewer than 10 persons and has a turnover or annual balance sheet that does not exceed €2 million, including self-employed persons, family businesses, partnerships and associations regularly engaged in economic activity.

- 676 BCOBS 1.1.1R.
- 677 BCOBS 1.1.1AR.
- 678 BCOBS 1.1.2R–1.1.5R.
- 679 Ch.3 of BCOBS also applies (with modifications) where [Pts 6 and 7 of the Payment Services Regulations 2017](#) apply (BCOBS 1.1.4R(2)).
- 680 BCOBS 1.1.6R.
- 681 [SI 1999/2083](#), as amended.
- 682 BCOBS 1.1.7G.
- 683 BCOBS Ch.2.
- 684 BCOBS Ch.2A.
- 685 BCOBS Ch.3.
- 686 BCOBS Ch.4.
- 687 BCOBS Ch.5.
- 688 BCOBS Ch.6.
- 689 BCOBS Ch.7.
- 690 BCOBS Ch.8.
- 691 See, e.g. *Parmar v Barclays Bank Plc [2018] EWHC 1027 (Ch)* (unsuccessful swap mis-selling claim); *CJ and LK Perks Partnership v NatWest Markets Plc [2022] EWHC 726 (Comm)* at [259] (s.138D and COBS held to be “potentially applicable” to mis-selling claims made by a partnership). The definition of a “private person” is to be found in [FSMA 2000 \(Rights of Action\) Regulations 2001 \(SI 2001/2256\)](#), as amended. The courts have interpreted the definition broadly so that a company carrying on business of any kind, irrespective of whether this related to financial services, is not a “private person” for these purposes. See *Titan Steel Wheels Ltd v Royal Bank of Scotland Plc [2010] EWHC 211 (Comm)*, [2010] 2 Lloyd’s Rep. 92 at [68]–[70]; *Camerata Property Inc v Credit Suisse Securities (Europe) Ltd [2012] EWHC 7 (Comm)*, [2012] 1 C.L.C. 234 at [89]–[98]; *Bailey v Barclays Bank Plc [2014] EWHC 2882 (QB)* at [44]; *Thornbridge Ltd v Barclays Bank Plc [2015] EWHC 3430 (QB)* at [138]–[141] (appeal dismissed, Unreported 9 January 2018); *Sivagnanam v Barclays Bank Plc [2015] EWHC 3985 (Comm)* at [8]–[21]; *Target Rich International Ltd v Forex Capital Markets Ltd [2020] EWHC 1544 (Ch)* at [61]–[82]. A claim by a private person under s.138D(2) of the FSMA 2000 may be assigned: *Connaught Income Fund Series 1 v Capital Financial Management Ltd [2014] EWHC 3619 (Comm)*, [2015] 1 All E.R. (Comm) 751 at [45]–[46]. Exceptions to right of action under s.138D(2) are found in subss.(3) and (5).
- 692 [SI 2017/752](#), as amended. On the effects of Brexit see Vol.I, paras [1-016](#) et seq.; and [Financial Services and Markets Act 2000 \(Amendment\) \(EU Exit\) Regulations 2019 \(SI 2019/632\)](#); [Financial Services \(Electronic Money, Payment Services and Miscellaneous Amendments\) \(EU Exit\) Regulations 2019 \(SI 2019/1212\)](#).
- 693 Revised Payment Services Directive 2015/2366/EU (“PSD2”).
- 694 With certain exceptions as set out in reg.1, which include where the implementation period is linked to the coming into force of the secure communication and authentication requirements

- adopted under art.98 of PSD2, the [PSRs 2017](#) came into force on 13 January 2018 ([PSRs 2017 reg.1\(6\)](#)).
- 695 On the effects of Brexit, see Vol.I, paras 1-016 et seq. See also the [Electronic Money, Payment Services and Payment Systems \(Amendment and Transitional Provisions\) \(EU Exit\) Regulations 2018 \(SI 2018/1201\)](#) and the [Financial Services \(Electronic Money, Payment Services and Miscellaneous Amendments\) \(EU Exit\) Regulations 2019 \(SI 2019/1212\)](#).
- 696 But the placement and withdrawal of cash to and from a payment account is within the scope of the [PSRs 2017](#).
- 697 [PSRs 2017 Sch.1 Pt 2\(g\)](#). See above, para.36-154.
- 698 For detailed discussion of [PSRs 2017](#), see paras 36-412 et seq.
- 699 [PSRs 2009](#) regs 33(1), 51(1), (2): [reg.73](#) (value date and availability of funds) applied whether or not the payment service providers of both the payer and the payee were located within the EEA.
- 700 See above, para.36-225.
- 701 [PSRs 2017](#) regs 40(1)(a), 63(1)(a).
- 702 [PSRs 2017](#) regs 40(1)(b)(i), 63(1)(b)(ii).
- 703 [PSRs 2017](#) regs 40(1)(b)(ia), 63(1)(b)(ia). “Payment service provider” includes any person who is a PSP as defined in art.2(8B) of the Single European Payments Area Regulation (Regulation (EU) 260/2012 “SEPA Regulation”). [PSRs 2017 reg.148A](#), has been inserted by [SI 2018/1201](#) so that if the SEPA Regulation is revoked under [reg.15 of the Credit Transfers and Direct Debits in Euro \(Amendment\) \(EU Exit\) Regulations 2018 \(SI 2018/1199\)](#), the Treasury may by regulations make such amendments to [regs 40, 63, 66](#) and [85](#) of the [PSRs 2017](#) as appear to be appropriate in connection with that revocation.
- 704 [PSRs 2017](#) regs 40(1)(b)(ii), 63(1)(b)(ii).
- 705 [PSRs 2017](#) regs 40(1)(b)(iii), 63(1)(b)(iii).
- 706 [PSRs 2017](#) regs 40(2)(a),(3)(a), 63(2)(a), (3)(a).
- 707 [PSRs 2017](#) regs 40(2)(b), (3)(b), 63(2)(b), (3)(b). Significantly, for a transfer in a currency other than sterling or euro that falls within (ii), [regs 84 to 88](#) (amounts transferred and received and execution times) do not apply ([reg.63\(2\)\(b\)](#)).
- 708 See [BAWAG PSK Bank für Arbeit und Wirtschaft und Österreichische Postsparkasse AG v Verein für Konsumenteninformation \(C-375/15\) EU:C:2017:38, 25 January 2017](#), CJEU for meaning of requirement that payment service provider must “provide” information on a “durable medium” for purposes of arts 36(1) and 41(1) of the Payment Services Directive 2007/64/EC. See also Revised Payment Services Directive 2015/2366/EU arts 44(1) and 54(1).
- 709 [PSRs 2017](#) regs 43–47.
- 710 [PSRs 2017](#) regs 48–54.
- 711 [PSRs 2017](#) regs 55–58.
- 712 [PSRs 2017](#) regs 60–62.
- 713 [PSRs 2017](#) reg.67.
- 714 [PSRs 2017](#) regs 74–77.
- 715 [PSRs 2017](#) regs 79–96.

- 716 PSRs 2017 Sch.1 Pt 1(g), (h).
- 717 PSRs 2017 regs 40(4), 63(4): Pts 6 and 7 do not apply to registered account information service providers, except for, in the case of Pt 6, regs 59 and 60, and, in the case of Pt 7, regs 70, 71(7) to (10), 72(3) and 98 to 100.
- 718 See also the Competition and Markets Authority's Retail Banking Market Investigation Order 2017. On Open Banking generally, see *J Black*, “*Open banking: an emerging technology grows to maturity*” [2019] *P.L.C.* 19; *J Black*, “*In Open Banking’s brave new world could using a third party to initiate payments weaken consumer protection?*” [2019] *J.I.B.F.L.* 25. On the related, broader, topic of Open Finance, see *R. Keating*, “*Opening innovation or opening up to risk? The potential liability framework for Open Finance*” [2021] *J.I.B.F.L.* 31.
- 719 In PSR 2017 reg.148, a “private person” means (a) any individual, except where the individual suffers the loss in question in the course of providing payment services; and (b) any person who is not an individual, except where that person suffers the loss in question in the course of carrying on business of any kind (reg.148(3)). A fiduciary or representative may also, generally, bring the action on behalf of a private person: reg.148(2). In the context of the similarly worded definition of “private person” in the FSMA 2000 (Rights of Action) Regulations 2001, “in the course of carrying on business of any kind” has been interpreted broadly by the courts so that a company carrying on business of any kind, irrespective of whether this related to financial services, falls outside the definition of “private person”: for cases on the definition, see para.36-222 above.
- 720 PSRs 2017 regs 40(7), 63(5).
- 721 PSRs 2017 regs 42, 65.
- 722 PSRs 2017 regs 41, 64.

## (ii) - The Regulation of Deposit-taking

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## Financial Services and Markets Act 2000

- 36-231 The [FSMA 2000](#) carries forward the need for institutions to be authorised in order to carry on banking in the UK in the sense of “accepting deposits”.<sup>723</sup> This is done by imposing a “general prohibition” on anyone carrying on, or purporting to carry on, a regulated activity “in the United Kingdom” unless he is an authorised person or an exempt person ([FSMA 2000 s.19\(1\)](#)). Regulated activities are listed in [Sch.2 to the Act](#) and are defined in detail in the [Financial Services and Markets Act 2000 \(Regulated Activities\) Order 2001 \(the “RAO”\)](#).<sup>724</sup> One such regulated activity is “accepting deposits” by way of business ([RAO art.5](#)).<sup>725</sup> The [FSMA 2000](#) has extraterritorial scope because of the extended meaning of “in the United Kingdom”.<sup>726</sup> This means that an institution based in the United Kingdom will require authorisation even though it is offering deposit-taking services exclusively to customers outside the UK.

### “Accepting deposits”

- 36-232 Article 5(1) of the RAO defines “accepting deposits” in terms of two alternative categories of activity.<sup>727</sup> The first is where “money received by way of deposit is lent to others”. The second is where “any other activity of the person accepting the deposit is financed wholly or to any material extent, out of the capital or of interest on money received on deposit”. A “deposit” is defined in [arts 5\(2\)–\(3\)](#) to mean a sum of money paid on the basis that it will be repaid with or without

interest or premium either on demand or as agreed.<sup>728</sup> However, it does not include an arrangement for the payment of money on terms which are “referable to the provision of property (other than currency) or services or the giving of security”. The wide definition of a “deposit” has led to specific exclusions: e.g. loans by banks and other institutions engaged in the lending business, loans between companies in the same group and transactions between relatives are all excluded from the definition.<sup>729</sup>

- 36-233 A construction of this elaborate definition is to be found in *SCF Finance Co v Masri (No.2)*,<sup>730</sup> decided in respect of a similar definition used in the *Banking Act 1979*. In that case it was argued that a firm of futures brokers, who obtained a deposit to secure its client’s trading in commodities, carried on the business of deposit taking in contravention of s.1 of the 1979 Act. It was held that the payment involved did not constitute a “deposit”. It fell outside the ambit of the relevant definition because its object was to secure a contract respecting a service provided by the brokers to the client.

## Accepting deposits “by way of business”

- 36-234 A person does not accept deposits “by way of business” if he does not hold himself out as accepting deposits on a day-to-day basis, and any deposit which he accepts are accepted only on particular occasions, whether or not involving the issue of any securities.<sup>731</sup> In determining whether deposits are accepted only on particular occasions, “regard is to be had to the frequency of those occasions and to any characteristics distinguishing them from each other”.<sup>732</sup> In *SCF Finance Co v Masri (No.2)*, discussed above, deposits were accepted from clients by a firm of brokers, commingled with the firm’s general funds and, occasionally, lent on to other clients. In most cases the deposits were accepted as margin payments providing the brokers with security for orders placed on behalf of customers. Occasionally, the brokers also invested deposits at the request of specific clients. The Court of Appeal held that in neither case did the brokers act by way of business. It was held that the brokers had not held themselves out as running a deposit taking business and that the payments were received on particular occasions despite the frequency of those occasions.<sup>733</sup> Recent amendment of the *Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) Order 2001* ensures that non-financial services businesses do not accept deposits “by way of business” when borrowing funds via peer-to-peer lending platforms.<sup>734</sup> This ensures that peer-to-peer lending platforms are not facilitating unlawful deposit taking in such circumstances.

## Exempt persons

- 36-235

Although persons accepting deposits in the UK by way of business generally require authorisation, the [FSMA 2000](#) gives power to the Treasury to exempt institutions from this requirement.<sup>735</sup> Such persons are termed “exempt persons” and include the Bank of England, the European Investment Bank, the International Bank for Reconstruction and Development, the International Finance Corp, the International Monetary Fund and certain other development banks.<sup>736</sup>

## Authorised persons

- 36-236 Unless an exempt person, anyone accepting deposits in the UK by way of business must be an “authorised person”. This means that they must be a person who has obtained authorisation from the PRA under Pt 4A of the FSMA 2000.<sup>737</sup>

## Part 4A permission

- 36-237 Since 1 April 2013, the PRA has been the body responsible for the authorisation of “dual-registered” firms.<sup>738</sup> The PRA decides whether or not to grant permission but must obtain the consent of the FCA before granting permission.<sup>739</sup> The FCA is responsible for considering applications for authorisation by any person seeking to carry out regulated activities that do not include any PRA-regulated activities.<sup>740</sup> Where the applicant is a member of a group which includes a “dual-regulated” firm, the FCA must consult with the PRA before granting authorisation.<sup>741</sup> The new regime has made important changes to the threshold conditions for authorisation to carry on regulated activities, including (a) the application of different threshold conditions to dual-regulated and FCA-regulated firms; and (b) giving the PRA and the FCA the power to make “threshold condition codes”.<sup>742</sup> There is a right of appeal to the Upper Tribunal for those aggrieved by the PRA’s or the FCA’s exercise of their powers in relation to Pt 4A permission.<sup>743</sup>

## Powers to obtain information and documents

- 36-238 The [FSMA 2000](#) gives the PRA and the FCA wide powers to require the provision of information from and the production of documents by an authorised person and any person connected with the authorised person.<sup>744</sup> Both regulators also have power to require an authorised person to provide a report by an accountant or other person with relevant professional skills.<sup>745</sup> Both regulators have the right of entry to obtain documents and information on a magistrate’s warrant.<sup>746</sup> [Section 167](#)

of the FSMA 2000 gives the PRA and FCA (or Secretary of State) power to appoint investigators to conduct general investigations into authorised persons and appointed representatives.

## Sanctions for unauthorised acceptance of deposits

36-239

A person who contravenes the “general prohibition” is guilty of a criminal offence.<sup>747</sup> Where a deposit is accepted in breach of the general prohibition, and the depositor is not entitled under the agreement between himself and the deposit-taker to recover without delay the money deposited by him, he may apply to the court for an order directing the deposit-taker to return the money to him.<sup>748</sup> The court “need not make such an order” if it is satisfied that it would not be “just and equitable” on the basis of a reasonable belief by the deposit-taker that he was not in breach of the general prohibition.<sup>749</sup> The FSMA 2000 also gives the appropriate regulator power to apply to court for injunctions and “disgorgement” orders both against the person acting in breach of the general prohibition and anyone else knowingly concerned in the breach.

<sup>750</sup>



## Liability of the PRA/FCA

36-240

The English courts have generally been reluctant to hold a bank regulator liable in damages to a depositor or investor of a failed bank. It has been repeatedly held by the courts that a bank regulator does not owe a duty of care to individual commercial banks,<sup>751</sup> nor to their depositors,<sup>752</sup> when carrying out its regulatory function. As Lord Millett stated in *Three Rivers DC v Bank of England*<sup>753</sup>:

“... [u]nfortunately for the depositors, a regulatory authority cannot be held liable in English law for negligence, however gross, in the exercise of its supervisory functions.”

## Statutory immunity of the PRA/FCA

36-241

In any event, the FSMA 2000 affords the PRA and the FCA, and any person who is, or is acting as, a member, officer or member of staff of those Authorities, statutory immunity from

liability in damages “for anything done or omitted in the discharge, or purported discharge, of the [Authority’s] functions”.<sup>754</sup> The immunity is not absolute: it does not apply to acts or omissions shown to have been in bad faith or in breach of the *Human Rights Act 1998*,<sup>755</sup> nor does it prevent judicial review of the regulator’s decisions. The regulator could be liable to depositors for the tort of misfeasance in public office where the necessary elements of the tort are established.<sup>756</sup> The tort of misfeasance in public office entails bad faith and so falls outside the statutory immunity. But it will not be easy to prove that the PRA or FCA acted or failed to act because of bad faith, as opposed to negligence, and the claim is more likely to be struck out than to succeed.<sup>757</sup> In any event, it may also be difficult to show that the acts or omissions of the regulator were the effective cause of the depositors’ loss.

## Financial Services Compensation Scheme

36-242 For many years now the UK has had an industry funded depositor protection scheme. This has ensured that depositors receive (limited) compensation in the event of a bank failing. Depositor compensation is now provided for as part of the Financial Services Compensation Scheme (the FSCS), which was established under the *FSMA 2000 Pt 15*. Rules governing depositor compensation are made by the PRA.<sup>758</sup> Consumer and all business (not just SME) depositors are protected up to £85,000,<sup>759</sup> with additional protection available for “temporary high balances”.<sup>760</sup>

## Footnotes

- 723 Deposit-taking is defined as “accepting deposits” in the *FSMA 2000 Sch.2 Pt I para.4*. Many banks will also have permission to engage in other regulated activities, e.g. investment business, regulated mortgage business and insurance mediation.
- 724 SI 2001/544, as amended.
- 725 See *Financial Services Authority v Anderson [2010] EWHC 599 (Ch)*.
- 726 *FSMA 2000 s.418*, as amended.
- 727 See *Financial Services Authority v Anderson [2010] EWHC 599 (Ch)*.
- 728 The term “money” used in art.5 includes money in a foreign currency: *Brazzill v Willoughby [2009] EWHC 1633 (Ch)* at [115]–[116].
- 729 RAO arts 6–9AC. See *Re Kaupthing Singer & Friedlander Ltd (in administration) [2010] EWCA Civ 561, [2010] 2 B.C.L.C. 259*. See further, E.P. Ellinger, E. Lomnicka and C.V.M. Hare, Ellinger’s Modern Banking Law, 5th edn (2011), p.37.
- 730 *[1987] Q.B. 1002*.
- 731 Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) Order 2001 (SI 2001/1177), as amended, art.2(1).

- 732 SI 2001/1177 art.2(2). This amplification was added by the Banking Act 1987 s.6(4) and is repeated in the Order. See also *Financial Services Authority v Anderson [2010] EWHC 599 (Ch)*.
- 733 But now see the amplification of what is a “particular occasion” contained in SI 2001/1177 art.2(2), which was considered in *Financial Services Authority v Anderson [2010] EWHC 599 (Ch)* at [53]–[57], and see also *R. v Napoli [2012] EWCA Crim 1129*. Nevertheless, it is strongly arguable that the case would not be decided any differently today (see E.P. Ellinger, E. Lomnicka and C.V.M. Hare, Ellinger’s Modern Banking Law, 5th edn (2011), p.36).
- 734 SI 2001/1177 art.2(3)–(5) inserted by the Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) (Amendment) Order 2018 (SI 2018/394) in force on 22 March 2018.
- 735 s.38.
- 736 Financial Services and Markets Act 2000 (Exemption) Order 2001 (SI 2001/1201), as amended. The Financial Services and Markets Act 2000 (Amendment) (EU Exit) Regulations 2019 (SI 2019/632) Pt 5 reg.177(2) amended SI 2001/1201 by removing the following bodies from the list of exempt persons as from 31 December 2020: “a central bank of an EEA state other than the UK”, the European Central Bank, the European Union and the European Atomic Energy Community.
- 737 Until the end of the Brexit implementation period (31 December 2020), those authorised to accept deposits in the UK also included a person authorised in another EEA Member State and entitled, through the application of the single European passport principle, to establish branches or provide cross-border services in the UK: see Financial Services and Markets Act 2000 s.31(1)(b) and Sch.3 Pt 2; repealed by the EEA Passport Rights (Amendment, etc., and Transitional Provisions) (EU Exit) Regulations 2018 (SI 2018/1149) Pt 2 regs.2(2), 2(5)(a).
- 738 FSMA 2000 s.55A(2)(a). For what is meant by a “dual-regulated” firm, see para.36-219 above.
- 739 FSMA 2000 s.55F(2).
- 740 FSMA 2000 s.55A(2)(b).
- 741 FSMA 2000 s.55E(3).
- 742 FSMA 2000 ss.55B, 137O and Sch.6.
- 743 FSMA 2000 s.55Z3.
- 744 s.165 and, for additional powers of the PRA, ss.165A–165C.
- 745 ss.166–166A.
- 746 s.176.
- 747 s.23(1). But subject to a due diligence defence (s.23(3)). An “authorised” (or “exempt”) person cannot be in breach of the general prohibition. Authorised persons who exceed the limits of their permission to undertake a regulated activity are subject to disciplinary sanction and not the sanctions for breach of the general prohibition (s.20). But an authorised person is guilty of an offence if that person carries on a credit-related regulated activity in the UK, or purports to do so, otherwise than in accordance with permission given to that person under Pt 4A or resulting from any other provision of the FSMA 2000 (s.23(1A)). See also s.20(1) and (1A).
- 748 s.29(2).

- 749 s.29(3), (4).
- ①750 ss.380, 382. See *Financial Services Authority v Anderson* [2010] EWHC 599 (Ch). For the meaning of “knowingly concerned”, see *Financial Conduct Authority v Ferreira* [2022] EWCA Civ 397, and also *Lomnicka* (2000) 21 Company Lawyer 210. The court has jurisdiction under the Senior Courts Act 1981 s.37 to make an order freezing the bank accounts of third parties over which the person who has contravened the authorisation requirements of the 2000 Act has control. See *Financial Services Authority v Fitt* [2004] EWHC 1669 (Ch).
- 751 *Minories Finance Ltd v Arthur Young (a firm)* [1989] 2 All E.R. 105.
- 752 *Yuen Kun Yeu v A-G of Hong Kong* [1988] A.C. 175, PC; *Davies v Radcliffe* [1990] 1 W.L.R. 821, PC.
- 753 [2001] *Lloyd's Rep. Bank.* 125 at 169. See also *SRM Global Master Fund LP v Commissioners of Her Majesty's Treasury* [2009] EWCA Civ 788, [2010] B.C.C. 558 at [80].
- 754 FSMA 2000 Sch.1ZA para.25 (FCA) and Sch.1ZB para.33 (PRA): note also the limited extension of immunity (to vicarious liability) in para.25(1)(c) and para.33(1)(c). Questions have been raised by some commentators as to whether this blanket immunity contravenes art.6 of the European Convention of Human Rights which guarantees the right to a fair and public hearing: see *C. Proctor* [2002] J.I.B.F.L. 15 and 71; *M. Andenas and D. Fairgrieve* (2002) 51 I.C.L.Q. 757.
- 755 FSMA 2000 Sch.1ZA para.25(3) and Sch.1ZB para.33(3).
- 756 *Three Rivers DC v Governor and Company of the Bank of England* [2000] 2 W.L.R. 1220, where the House of Lords also held that individual depositors were not given rights under relevant European legislation.
- 757 See *Hall v Bank of England* [2000] *Lloyd's Rep. Bank.* 186, CA; although in *Three Rivers DC v Bank of England* [2001] *Lloyd's Rep. Bank.* 125, HL, a claim against the Bank of England was, somewhat surprisingly, allowed to proceed to trial. The claim was eventually abandoned at the trial itself: see [2006] EWHC 816 (Comm).
- 758 See the Deposit Guarantee Scheme Regulations 2015 (SI 2015/486), which implemented in part Directive 2014/49/EU of the European Parliament and of the Council of 16 April 2014 on deposit guarantee schemes (recast) repealing Directive 94/19/EC of 30 May 1994 on deposit-guarantee schemes. On the effects of Brexit see Vol.I, paras 1-016 et seq. and Deposit Guarantee Scheme and Miscellaneous Provisions (Amendments) (EU Exit) Regulations 2018 (SI 2018/1285).
- 759 PRA's Depositor Protection Rules, 4.2.
- 760 PRA's Depositor Protection Rules, 4.3.

## **(iii) - Brexit and Banking**

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### **EU single market in banking**

- 36-243 The EC Second Banking Coordination Directive 89/646 introduced the concept of a single banking licence enabling a bank (or “credit institution”) incorporated in a Member State to enjoy mutual recognition throughout the Community by virtue of recognition in its home country. Once the appropriate licence or authorisation is granted by the home supervisor, the bank can establish and offer certain “listed” banking services (including deposit-taking, lending and most ordinary types of banking business) in any Community country without first having to obtain host country authorisation. The main burden of the continued supervision of the bank’s activities is then placed on the home supervisor and not the host state. Through a series of banking directives, the EU has ensured similar standards of control across EU Member States. Until recently, the key directives were Directive 2006/48 relating to the taking up and pursuit of the business of credit institutions and Directive 2006/49 on the capital adequacy of investment firms and credit institutions. The Capital Requirements Directive IV package implements the Basel III global standards on bank capital in the EU through the Capital Requirements Directive 2013/36<sup>761</sup> (CRD) and the Capital Requirements Regulation<sup>762</sup> (CRR). Directive 2006/48 and Directive 2006/49 have been repealed and merged into the CRD and the CRR.

### **Single European passport**

- 36-244

The Second Banking Coordination Directive was given effect in the UK by the [Banking Coordination \(Second Council Directive\) Regulations 1992](#),<sup>763</sup> which made substantial amendments to the [Banking Act 1987](#). The Regulations were repealed by a Treasury order made under [s.426 of the FSMA 2000](#). However, the principle of the single European passport was carried through into the regulatory regime established under the [FSMA 2000](#). Banks authorised to carry on regulated activities in other European Economic Area (“EEA”) Member States were granted automatic authorisation to carry on those activities in the UK through branches or the provision of cross-border services, provided they comply with certain formalities.<sup>764</sup> These banks, referred to as “EEA firms” in the [FSMA 2000](#), were subject to regulation as “authorised persons” by the PRA, but only in a manner that was consistent with EU law which provided for division of responsibility between “home” (i.e. other EEA Member State) and “host” (UK) regulators. UK authorised banks were also entitled to exercise their single European passport rights throughout the EEA.<sup>765</sup> Those rights were lost when the UK ceased to be a member of the European Single Market.<sup>766</sup>

## Brexit issues

- 36-245** The two most significant Brexit-related issues for UK banks have been the “onshoring” into UK legislation and replication of EU regulations that had previously been directly applicable, and the loss of passporting rights.<sup>767</sup>

## Onshoring

- 36-246** The onshoring of EU legislation required the replication of EU law in UK legislation and its amendment in order to make it operationally effective following the end of the Brexit implementation period (31 December 2020). The legislative process by which EU law was retained as part of UK law at the end of the implementation period is described in Ch.1 of Vol.I of Chitty at paras [1-016](#) et seq. A significant amount of onshoring was required for financial services as much of the UK’s pre-Brexit regulatory regime was based upon EU legislation and regulation.<sup>768</sup> It means that UK banks must comply with retained EU regulations governing the regulation of the financial services sector, including the retained EU law version of the Capital Requirements Regulation 575/2013, which sets out a framework for bank’s prudential requirements.<sup>769</sup>

- U** Banks must also comply with retained EU delegated and implementing regulations, including those containing technical standards.<sup>770</sup>

## Loss of passporting rights

- 36-247 The EU–UK Trade and Cooperation Agreement of 24 December 2020 does not provide the UK with access to the European Single Market.<sup>771</sup> This means that at the end of the implementation period (31 December 2020), the UK ceased to be a member of the European Single Market. As a result, regulated firms no longer hold passporting rights to provide regulated financial services either into the EEA from the UK or into the UK from the EEA. This has resulted in a number of UK-regulated financial service providers, including banks, relocating some or all of their operations within the EEA so that they can continue to carry on financial services in the EEA after Brexit. Similarly, EEA firms that previously carried on activities in the UK in reliance upon passport rights, either from a branch or on a services basis, have had to decide whether they need to obtain authorisation in the UK. The UK has established a temporary permissions regime that will allow certain EEA firms to continue to operate in the UK for a time-limited period after the end of the implementation period in order to provide them with sufficient time to apply for full authorisation from the UK regulators should they wish to do so.
- 36-248 Equivalence regimes may be established between the EU and the UK (as a “third country”, i.e. a jurisdiction that is not part of the EEA) in specific sub-sectors of the regulated financial services sector where both the EU and the UK deem the other jurisdiction to operate broadly similar regulatory and supervisory standards, so as to facilitate firms carrying on business in both jurisdictions. Nevertheless, there are disadvantages associated with the use of equivalence regimes for access to EU markets as a substitute for passporting rights.<sup>772</sup> First, certain key EU financial services regimes (e.g. the Capital Requirements Directive and the Payment Services Directive) do not provide for equivalence regimes. Secondly, the EU may revoke a determination of equivalence at any time. Thirdly, equivalence determinations are unilateral and may contain conditions or limitations which differ between jurisdictions. To date, the EU has made two temporary equivalence decisions relating to central counterparties and central securities depositories.<sup>773</sup>
- U** The UK has made broad equivalence declarations in respect of EEA member states, allowing EEA firms access to UK markets to the extent permitted in onshored EU legislation.
- 36-249 The EU-UK Trade and Cooperation Agreement of 24 December 2020 (TCA) does not include provisions relating to equivalence regimes for financial services.<sup>774</sup> The TCA was accompanied by a joint declaration stating that both the EU and the UK aimed to agree a Memorandum of Understanding establishing a framework of regulatory co-operation on financial services by March 2021. An announcement on 26 March 2021 confirmed the conclusion of technical discussions on

the text of the Memorandum of Understanding (MoU).<sup>775</sup> The MoU, once signed,<sup>776</sup> will create the framework for voluntary regulatory co-operation in financial services between the UK and the EU. The MoU will establish the joint UK-EU Financial Regulatory Forum, which will serve as a platform to facilitate dialogue on financial services issues. It is understood that the MoU will not be legally binding. The MoU is entirely separate from any decisions on regulatory equivalence; nevertheless, the EU considers it a prerequisite for any further access rights being granted to the UK in the form of equivalence rulings.<sup>777</sup> Currently, outside those areas already subject to equivalence declarations,<sup>778</sup> the provision of financial services between the EU and the UK is subject to the World Trade Organization's (WTO's) General Agreement on Trade in Services (GATS) trade rules on financial services, which merely provide a framework for determination of access rights to be granted to foreign service suppliers.

## Footnotes

761 Directive 2013/36/EU.

762 Regulation (EU) 575/2013.

763 SI 1992/3218.

764 s.31(1)(b) and Sch.3 Pt 2; repealed as from 31 December 2020 by the [EEA Passport Rights \(Amendment, etc., and Transitional Provisions\) \(EU Exit\) Regulations 2018 \(SI 2018/1149\)](#) Pt 2 regs.2(2), 2(5)(a).

765 Sch.3 Pt 3; repealed as from 31 December 2020 by the [EEA Passport Rights \(Amendment, etc., and Transitional Provisions\) \(EU Exit\) Regulations 2018 \(SI 2018/1149\)](#) Pt 2 regs.2(2), 2(5)(b).

766 i.e. at the end of the implementation period (31 December 2020): see preceding two notes. On the loss of passporting rights, see further below, para.[36-247](#) et seq. On the effects of Brexit generally, see Vol.I, paras [1-016](#) et seq.

767 On the effects of Brexit generally, see Vol.I, paras [1-016](#) et seq.

768 The [Financial Services Act 2021](#), which received Royal Assent on 29 April 2021, sets out a blueprint for the UK's post-Brexit regulatory framework.

769 See the Capital Requirements (Amendment) (EU Exit) Regulations 2018 (SI 2018/1401), the Capital Requirements (Amendment) (EU Exit) Regulations 2019 (SI 2019/1232) and the Capital Requirements Regulation (Amendment) (EU Exit) Regulations 2021 (SI 2021/558). The [Financial Services Act 2021 ss.3-4](#), which received Royal Assent on 29 April 2021, gives HM Treasury power to repeal the elements of the onshored [Capital Requirements Regulation](#) that need to be updated to reflect Basel III standards: following repeal, many of the updates will be implemented through PRA Rules. The [Capital Requirements Regulation \(Amendment\) Regulations 2021 \(SI 2021/1078\)](#) were made in exercise of the powers in the FSA 2021 ss.3 and 45, and the [European Union \(Withdrawal\) Act 2018 Sch.7 para.21](#).

770 The [Financial Regulators' Powers \(Technical Standards, etc.\) \(Amendments, etc.\) \(EU Exit\) Regulations 2018 \(SI 2018/1115\)](#) Pt 2 gives UK regulators the power to amend EU binding

technical standards to remove “deficiencies” that would effect their operation following the end of the implementation period.

- 771 The EU-UK Trade and Cooperation Agreement (TCA) was implemented into UK law by the [European Union \(Future relationship\) Act 2020](#). The European Parliament ratified the TCA on 27 April 2021 and, following adoption by the Council of the EU on 29 April 2021, it entered into force fully on 1 May 2021.
- 772 See William Fry, Brexit and your Business: Financial Services Generally—Top 5 Issues (January 2021) (<http://www.williamfry.com>) [Accessed 1 September 2021].
- ⑤ 773 The European Securities and Markets Association (ESMA) announced on 11 December 2020 that Euroclear UK & Ireland Ltd (EUI), the central securities depository (CSD) established in the UK, would be recognised as a third-country CSD until 30 June 2022. ESMA recognised three UK central counterparties (CCPs) as third-country CCPs under the European Market Infrastructure Regulation, allowing these CCPs to continue to be used for European trades until 30 June 2022 (since extended to 30 June 2025).
- 774 The TCA was implemented into UK law by the [European Union \(Future relationship\) Act 2020](#). The European Parliament ratified the TCA on 27 April 2021 and, following adoption by the Council of the EU on 29 April 2021, it entered into force fully on 1 May 2021.
- 775 HM Treasury, “Technical negotiations concluded on UK-EU Memorandum of Understanding” (26 March 2021) (<https://www.gov.uk> [Accessed 1 September 2021]).
- 776 At the time of writing (April 2021), the MoU has yet to be signed and its text made public.
- 777 See William Fry, News and Insights: Brexit Continued – UK & EU Agree Memorandum of Understanding on Financial Services (<http://www.williamfry.com> [Accessed 1 September 2021]).
- 778 See above, para.36-248.

## **(i) - Definition of a Bank**

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(b) - The Relationship of Banker and Customer

(i) - Definition of a Bank

### **Who is a banker: scope of problem**

- 36-250 The question of whether or not a given financial institution constitutes a bank arises mainly where a statute confers certain privileges or rights or imposes given duties or controls on a “bank”. In the majority of cases the statute in point includes a definition of the word “bank” or “banker”. Basically, there are two types of definition. The first, which is the standard common law definition, defines a “bank” as a concern engaged in “banking business”. The construction of the latter phrase has been left to the courts. This common law definition is still used in the [Bills of Exchange Act 1882](#).<sup>779</sup> The second type of definition, which was utilised in a number of regulatory Acts, provided that a “bank” was a body holding a certificate to this effect issued by a specific authority. Until relatively recently, the term “bank” was usually defined in these statutes as “an institution authorised under the [Banking Act 1987](#)”.<sup>780</sup> However, the [Banking Act 1987](#) has since been repealed and replaced by the [Financial Services and Markets Act 2000](#).<sup>781</sup> Those statutes which defined a “bank” in terms of authorisation under the [1987 Act](#) have been amended to refer to an “authorised person” (granted permission to accept deposits by the Prudential Regulation Authority).<sup>782</sup>

### **Who is a banker: common law definition**

36-251

“Banker” is defined in the [Bills of Exchange Act](#) as “a body of persons, whether incorporated or not, who carry on the business of banking”.<sup>783</sup> As the term “banking business” is not defined, and as it has been held that its meaning may vary from time to time,<sup>784</sup> it is not always easy to say with certainty whether or not an institution is a bank. Basically, following the established case law, the main types of “banking business” are the opening of current accounts operable by cheques<sup>785</sup> and deposit accounts, as well as the collection of cheques for customers.<sup>786</sup> Nevertheless, in recent years the use of cheques has declined and money is frequently transferred into and out of bank accounts using electronic means (e.g. by ATM and debit card transactions, or by mobile, internet and telephone banking). In the light of this modern practice, it is submitted that the common law definition of the terms “bank”, “banking” and “banking business” should not turn on the precise mechanism by which money is paid into and out of bank accounts.<sup>787</sup>

## Reputation

- 36-252 It is uncertain whether an institution may be considered a bank merely because it is so regarded by the business community. This question came before the Court of Appeal in *United Dominions Trust Ltd v Kirkwood*.<sup>788</sup> A finance company brought an action to recover a loan from a dealer. The dealer pleaded that the company was an unregistered moneylender and that the contract was therefore illegal as it contravened the provisions of the [Money-lenders Act 1900](#).<sup>789</sup> The finance company claimed that under [s.6\(d\) of this Act](#) it was exempted from the provisions concerning registration, because it carried on, bona fide, the business of banking. The main issue in the case was, thus, whether the finance company carried on the business of banking, or—in other words—was a banker. It was proved that the finance company was regarded as a banker in the City, enjoyed some privileges given solely to bankers and had a special clearing number. It was further established that in some cases the company furnished loans to clients by crediting the relevant amount to a current account opened in the respective client’s name. The finance company did receive money on deposits, but these were invariably repayable on agreed dates of maturity and not on demand. There was no evidence to suggest that the company collected cheques on behalf of customers. On these facts, Lord Denning MR questioned whether the company carried on the “business of banking”. Nevertheless, he held that the company was a bank on the basis of its established reputation as “banker” in the city. Diplock LJ concurred in holding that the company was a bank, but based his opinion on different grounds, stressing that he considered the question of reputation to be of limited importance. Harman LJ gave a dissenting judgment, as in his opinion the company was not a bank, regardless of its reputation.

## Banking as ancillary business

- 36-253

It is, thus, clear that in *Kirkwood*'s case Diplock and Harman LJJ doubted that reputation was, in itself, a conclusive criterion for establishing that a firm was a bank as defined at common law. Their judgments indicate that the crucial point is whether or not the firm carries on banking business. But it has been accepted that a firm may be a bank although its activities are not confined to the carrying on of banking business. Some early cases suggest that, in such a case, the firm's principal business must be that of banking business.<sup>790</sup> But this requirement was relaxed in *Re Roe's Legal Charge*.<sup>791</sup> As in *Kirkwood*'s case, the problem in *Roe's Legal Charge* arose in respect of the **Money-lenders Act**. It was established that the lending institution opened current accounts for some customers and collected cheques payable to them. The institution also provided certain foreign currency facilities and arranged for the payment of customers' bills by means of money transfer orders. There were, however, four main differences between this institution's business and that of a regular bank. First, its entire banking services were furnished not at premises maintained in its own name but through an agency bank. Secondly, the number of current and deposit accounts opened by it was less than 200 and in the course of 1984 only 58 cheques had been cleared for customers. Thirdly, about three-quarters of its existing deposits were made by shareholders, by subsidiaries and by associated companies. Fourthly, the institution did not solicit deposits from the public by means of advertisements. Holding that the institution was engaged in banking business, Lawton LJ, in the Court of Appeal, said that it was immaterial that the size of the institution's banking business was negligible in comparison with that of a clearing bank. It was also irrelevant that the institution did not carry on all facets of banking business and that its main activities were in another field. The only question was whether the institution's banking business was real in terms of its entire business.

## Use of “bank” in name

- 36-254 There were tight controls on the use of the terms “bank” and “banker” in the **Banking Act 1987**. **Section 67 of the 1987 Act** provided that, subject to certain exceptions, no person was entitled to use any banking name (i.e. indicating that the person was a bank or a banker or as carrying on banking business) unless that person was an authorised institution under the **Banking Act 1987**. **Section 69 of the Act** provided that no person was entitled to describe himself or hold himself out as to indicate that he was a bank or a banker or was carrying on a banking business unless authorised (or exempt) under the **1987 Act**. These provisions have since been repealed by, and are not repeated in, the **Financial Services and Markets Act 2000**. The relevant provision is now **s.24 of the Financial Services and Markets Act 2000**, which makes it a criminal offence for anyone who is neither an authorised person nor an exempt person in relation to the regulated activity in question to describe himself as either authorised or exempt or who behaves or otherwise holds himself out as being authorised or exempt under the **2000 Act**. It is submitted that this provision would catch an institution that called itself a “bank” without proper authorisation as this implies such authorisation.

## Footnotes

- 779 s.2. For a detailed discussion, see E.P. Ellinger, E. Lomnicka and C.V.M. Hare, Ellinger's Modern Banking Law, 5th edn (2011), Ch.3.
- 780 [Banking Act 1987 s.108\(1\)](#) and [Sch.6](#).
- 781 See para.[36-231](#) above.
- 782 For what is an "authorised person", see para.[36-236](#) above. Prior to the end of the Brexit implementation period on 31 December 2020, an "authorised person" also included an "EEA firm" exercising single European passport rights in the UK; see the notes to para.[36-236](#) above. The term "bank" has not been excised entirely from the "UK regulatory lexicon", see *D.A. Sabalot [2016] J.I.B.F.L. 631*.
- 783 s.2.
- 784 *Woods v Martins Bank Ltd [1959] 1 Q.B. 55*; *United Dominions Trust Ltd v Kirkwood [1966] 2 Q.B. 431*.
- 785 *Commissioners of the State Savings Bank of Victoria v Permewan, Wright & Co Ltd (1915) 19 C.L.R. 457, 470–471*; *Bank of Chettinad Ltd v Commissioner of Income Tax, Colombo [1948] A.C. 378, 383*; *United Dominions Trust Ltd v Kirkwood*, above.
- 786 *United Dominions Trust Ltd v Kirkwood*, above, approving the definition of banking business in Paget, Law of Banking, 9th edn, pp.5–7 (currently 15th edn, 2018, para.4.2).
- 787 See further, E.P. Ellinger, E. Lomnicka and C.V.M. Hare, Ellinger's Modern Banking Law, 5th edn (2011), p.85.
- 788 *[1966] 2 Q.B. 431*. See also *Re Birkbeck Permanent Benefit Building Society [1912] 2 Ch. 183*.
- 789 Repealed by the [Consumer Credit Act 1974 s.192\(4\)](#) and Sch.5 Pt I, also repealing [s.123 of the Companies Act 1967](#), which empowered the Board of Trade to declare an institution a bank for the purposes of the [Money-lenders Act](#). Note that, in view of the similarity between the definition of banker in the [Money-lenders Act](#) and in the [Bills of Exchange Act](#), *Kirkwood*'s case remains of topical importance.
- 790 *Re Birkbeck Permanent Benefit Building Society*, above; *Bank of Chettinad Ltd v Commissioner of Income Tax, Colombo [1948] A.C. 378*. Contrast *Stafford v Henry (1850) 12 Ir.Eq.R. 400*.
- 791 *[1982] 2 Lloyd's Rep. 370*. See also *Canadian Pioneer Management Ltd v Labour Relations Board, 107 D.L.R. (3rd) 1 (1980)*; *Koh v Asia Commercial Banking Corp Ltd [1984] 1 W.L.R. 850 JC*.

## **(ii) - Definition of a Customer**

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**(ii) - Definition of a Customer**

### **Who is a customer**

- 36-255 The word “customer” is not defined in any statute, but it appeared in [s.82 of the Bills of Exchange Act 1882](#) (now replaced by [s.4 of the Cheques Act 1957](#)). It has been held, in this context, that a person becomes a customer either when the banker opens an account in his name<sup>792</sup> or when the banker accepts his instruction to open an account and receives a deposit to be credited to it.<sup>793</sup> The fact that a banker habitually performs a casual service for a person, e.g. cashes over the counter cheques obtained by that person from third parties, does not render that person a customer.<sup>794</sup> Duration is, thus, not the essence of the relationship of banker and customer.

### **Intention of parties**

- 36-256 The relationship of banker and customer comes into existence only if both parties have an intention that it be established. Usually this intention is expressly manifested when the account is opened at the customer’s request. There are, however, cases in which the customer’s consent to the opening of the account is given tacitly. Thus, in *Rowlandson v National Westminster Bank Ltd*<sup>795</sup> a business woman made a cheque payable to a bank, at which she was known but with which she did not have an account, and explained that the proceeds were a gift to her grandchildren. The bank opened an account in the grandchildren’s joint names and conferred the right to draw on their guardians. Although the guardians did not expressly approve this arrangement and were not even expressly notified of the opening of the account they did eventually learn of its existence and one of them

drew a cheque on it. It was held that the bank owed a fiduciary duty to the grandchildren and, furthermore, that it had committed a breach of this duty when it permitted one of the guardians to draw on the account for the credit of his own personal account. It would appear to follow that a relationship of banker and customer came into existence between the bank and the grandchildren, presumably as a result of the tacit approval of the opening of the account by the guardians. The case may, however, rest on its exceptional facts.

## Account in nominee's name

36-257

**U** A relationship of banker and customer does not usually come into existence merely because an account in a person's name has been opened by the bank. Thus, where A forges B's signature and opens a bank account in B's name without his authority, no relationship of banker and customer exists between the bank and B, and so no question respecting the breach of a contractual duty owed to B can arise.

796

**U** In effect, the bank's customer is the person who negotiates the making of the contract and not a third party such as a nominee. Thus, in *Thavorn v Bank of Credit and Commerce International SA* 797

**U** the plaintiff, an elderly woman, opened an account with the bank in her nephew's name but stipulated that during her lifetime she was to be the only person authorised to draw on it. Lloyd J held that it was an irresistible inference that the debt created by the opening of the account was due to the plaintiff and not to the nephew. It followed that the bank's customer was the plaintiff, who had arranged for the opening of the account and who intended to retain the control over it, and not the nephew, who was a mere nominee. The position would, undoubtedly, have differed if the drawing rights had been conferred on the nephew or his guardian. In such a situation—as demonstrated by *Rowlandson*'s case—the customer would have been the nephew.

798

**U** In all cases it is important for the bank to know the identity of its customer. If a bank fails to have appropriate identification procedures in place, it risks committing an offence under the legislation designed to combat money laundering.

799



## Footnotes

- 792 *Lacave & Co v Crédit Lyonnais* [1897] 1 Q.B. 148; *Great Western Ry v London and County Banking Co* [1901] A.C. 414; *Ladbroke v Todd* (1914) 30 T.L.R. 433; *Commissioners of Taxation v English, Scottish and Australian Bank* [1920] A.C. 683.
- 793 *Ladbroke v Todd*, above; *Woods v Martins Bank Ltd* [1959] 1 Q.B. 55 (in which, however, the question was discussed not in relation to s.82).
- 794 *Great Western Ry v London and County Banking Co*, above. See also *Commissioners of Taxation v English, Scottish and Australian Bank*, above, at 687. cf. *Matthews v Brown & Co* (1894) 10 T.L.R. 386.
- 795 [1978] 1 W.L.R. 798.
- ①796 *Stoney Stanton Supplies (Coventry) Ltd v Midland Bank Ltd* [1966] 2 Lloyd's Rep. 373.
- ①797 [1985] 1 Lloyd's Rep. 259, especially at 263.
- ①798 But where an account is opened in the name of a company, it is the company and not the sole owner that is the bank's customer (*Diamantides v JP Morgan Chase Bank* [2005] EWHC 263 (Comm), upheld on different grounds [2005] EWCA Civ 1612). Nevertheless, a bank may be on notice that funds credited to an account are held on a *Quistclose* trust by the account holder for a third party that retains a beneficial interest in them (*Quistclose Investments Ltd v Rolls Razor Ltd* [1970] A.C. 567). The leading modern authority on *Quistclose* trusts is *Twinsectra Ltd v Yardley* [2002] 2 A.C. 164 (HL). See also *Prickly Bay Waterside Ltd v British American Insurance Co Ltd* [2022] UKPC 8. For a recent example of a *Quistclose* trust, see *Re Brookman Home Ltd (In Liquidation)* [2021] EWHC 2610 (Ch) (account in name of one company, but money credited to account for and on behalf of a related company).
- ①799 The main EU legislation on anti-money laundering and counter-terrorist financing is the Fourth Anti-Money Laundering Directive 2015/849/EU (AMLD4), as amended by the Fifth Anti-Money Laundering Directive 2018/843/EU (AMLD5), and the Second Wire Transfer Regulation (EU) 2015/847 (WTR2). AMLD4 was transposed into UK law by the *Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulation 2017* (SI 2017/692) (MLRs). Most of AMLD5 was implemented in the UK through amendment of the MLRs by way of statutory instruments (SI 2018/1337 and SI 2019/1511). WTR2 had direct effect in UK law. Brexit has required amendment of the MLRs and the onshoring of WTR2 through a number of statutory instruments: the *Money Laundering and Terrorist Financing (Amendment) (EU Exit) Regulations 2020* (SI 2020/991); the *Financial Services (Miscellaneous Amendments) (EU Exit) Regulations 2020* (SI 2020/628); the *Money Laundering and Transfer of Funds (Information) (Amendment) (EU Exit) Regulations 2019* (SI 2019/253). The UK opted out of the Sixth Anti-Money Laundering Directive (2018/1673/EU), which had to be transposed into the national law of Member States by 3 December 2020 (i.e. during the Brexit implementation period). Amendments will be made to the MLRs through the *Money Laundering and Terrorist Financing (Amendment) (No. 2) Regulations 2022* (SI 2002/860), which come into force

partly 21 days after the day on which the Regulations are made, partly on 1 September 2022, partly on 1 April 2023 and fully on 1 September 2023.

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## **(iii) - Nature of the Banker–Customer Relationship**

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**(iii) - Nature of the Banker–Customer Relationship**

### **Nature of relationship**

- 36-258 As bankers perform different services for their customers the nature of the relationship between the parties may vary from transaction to transaction. Thus, when the banker accepts the custody of documents or goods he acts as bailee<sup>800</sup> and when he agrees to hold moneys on trust he becomes a trustee. The basic relationship of banker and customer, however, is established, as has been shown, by the opening of an account. When a banker opens an account for the customer the relationship established is one of debtor and creditor.<sup>801</sup> When the account is in credit, the customer is the creditor and the banker the debtor. Consequently, funds deposited by the customer become the bank's money;<sup>802</sup> the customer acquires a debt or chose in action claimable from the bank. The position is reversed when the account is overdrawn. While the relationship of debtor and creditor prevails in all types of accounts opened by bankers, there are superadded obligations in some types of accounts, which will be discussed subsequently.

### **Contractual relationship**

- 36-259 The debtor–creditor relationship that exists between a bank and its account-holding customer is based on contract. In modern banking practice, the customer's account contract will inevitably be on the bank's written standard terms of business, which will contain numerous express terms that govern their relationship.<sup>803</sup> The contract may also contain implied terms that are obvious and/

or necessary to give business efficacy to the contract, are capable of clear expression, and do not contradict and are consistent with the express terms.<sup>804</sup>

- 36-260 In an attempt to impose contractual duties of good faith upon their banks, certain customers have unsuccessfully argued that the bank-customer relationship is underpinned by an overarching “relational contract” or “customer contract” into which such a duty could be implied.<sup>805</sup> The argument is unlikely to succeed where, as is usually the case, the bank provides services to its customers through a series of written standard form contracts. An ordinary loan agreement is not a “relational” contract of any kind, and the lender is not placed under an implied duty to act honestly and in good faith.<sup>806</sup>

## Duty of care

- 36-261 In a contract for the supply of a service where the supplier is acting in the course of a business, there is an implied term that the supplier will carry out the service with reasonable care and skill.<sup>807</sup> The duty of care only applies to the specific services that the contract contemplates.<sup>808</sup> Therefore, a bank’s duty of care would relate to the particular banking services provided under the contract in issue.<sup>809</sup> If the customer claims that the bank owes them a duty of care outside the provision of services contemplated in the relevant contract, the customer will have to establish that the bank owes them a duty of care in tort. This is dependent on the customer meeting the three-fold test for the existence of such a duty (reasonably foreseeable loss, a proximate relationship between the parties and that in all the circumstances it was fair, just and reasonable to impose a duty of care),<sup>810</sup> or establishing that the bank had assumed responsibility to the customer.<sup>811</sup> Alternatively, it might be claimed that the relationship between the bank and the customer was (exceptionally) fiduciary in nature, and gave rise to an equitable duty of care on the part of the bank.<sup>812</sup> The bank might seek to rely on express terms of an underlying contract with its customer to prevent any such tortious or equitable duty of care arising, or at least to modify the content of the duty.<sup>813</sup>

## Footnotes

800 See below, paras 36-449—36-451.

801 *Foley v Hill* (1848) 2 H.L. Cas. 28; *Joachimson v Swiss Bank Corp* [1921] 3 K.B. 110; *Rowlandson v National Westminster Bank Ltd* [1978] 1 W.L.R. 798, 803–804; *Financial Services Authority v Anderson* [2010] EWHC 599 (Ch) at [44]; *First City Monument Bank Plc v Zumax Nigeria Ltd* [2019] EWCA Civ 294 at [25], [36], [74]–[75], [80].

- 802 Note that this is the position even if the funds deposited are trust property; the bank, though, would owe the duties of a trustee where it received the money in that capacity: *Space Investment Ltd v Canadian Imperial Bank of Commerce Trust Co (Bahamas) Ltd* [1986] 1 W.L.R. 1072.
- 803 Depending on the type of account, or other services provided, a bank's standard terms and conditions must take account of the Financial Conduct Authority's Banking Conduct of Business Sourcebook and the Payment Services Regulations 2017 (SI 2017/752 (as amended)). See above, paras 36-220—36-222 and 36-225—36-230.
- 804 *Marks & Spencer Plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72, [2016] A.C. 742. See above, para.16-011.
- 805 *Portland Stone Firms Ltd v Barclays Bank Plc* [2018] EWHC 2341 (QB); *Standish v Royal Bank of Scotland Plc* [2018] EWHC 1829 (Ch); *Broomhead v National Westminster Bank Plc* [2018] EWHC 1574 (Ch).
- 806 *Morley v Royal Bank of Scotland Plc* [2020] EWHC 88 (Ch) at [159]–[160], Kerr J, *affd.* [2021] EWCA Civ 338, where the CA held at [71] that even if, which was not necessarily accepted, the secured lender was subject to such a duty, or a duty not to act vexatiously or contrary to its legitimate interests in its negotiations with the borrower following their default (following *Property Alliance Group Ltd v Royal Bank of Scotland Plc* [2018] EWCA Civ 355, [2018] 1 W.L.R. 3529 at [169], where lender exercised a right to require a valuation of secured property at borrower's expense), there was no breach on the facts.
- 807 Supply of Goods and Services Act 1982 s.13 (business-to-business contracts); Consumer Rights Act 2015 s.49 (business-to-consumer contracts). The duty may also arise concurrently in tort (*Henderson v Merrett Syndicates Ltd* [1995] 1 A.C. 145, 206).
- 808 *Euroption Strategic Fund Ltd v Skandinaviska Enskilda Banken AB* [2012] EWHC 584 (Comm), [2013] 1 B.C.L.C. 125 at [111]; *Morley v Royal Bank of Scotland Plc* [2021] EWCA Civ 338 at [5] and [60] (implied duty in loan agreement has no part to play when bank deciding whether to enforce security and/or negotiating with borrower following their default) and [64] (not appropriate to imply a contractual term into a mortgage which, in any event, is not a contract for the supply of services).
- 809 A bank's implied duty to carry out its contractual services with reasonable care and skill should not be confused with its strict duty to honour its customer's mandate (see below, para.36-321). The two duties can sometimes conflict (see below, para.36-265).
- 810 *Caparo Industries v Dickman* [1990] 2 A.C. 605.
- 811 *Customs & Excise Commissioners v Barclays Bank Plc* [2006] UKHL 28, [2007] 1 A.C. 181; *NRAM Ltd (formerly NRAM Plc) v Steel* [2018] UKSC 13, [2018] 1 W.L.R. 1190 at [18]–[24].
- 812 A fiduciary's duty to act with care and skill is not a fiduciary duty. Fiduciary duties are prescriptive in nature: they tell the fiduciary what they must not do—they do not tell them what they ought to do: *A-G v Blake* [1998] Ch. 439, 455 (Lord Woolf MR).
- 813 *Kelly v Cooper* [1993] A.C. 205, 214-215 (PC); *Henderson v Merrett Syndicates Ltd* [1995] 1 A.C. 145, 206 (HL).

## **(iv) - Fiduciary Relationship and Duty of Care**

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Section 2. - Aspects of Banking Law

(b) - The Relationship of Banker and Customer

(iv) - Fiduciary Relationship and Duty of Care

### **The general rule**

<sup>36-262</sup> Usually the relationship of banker and customer is not of a fiduciary nature.<sup>814</sup> Special circumstances, however, may constitute the banker a fiduciary agent, thus imposing on him a duty of full disclosure or a specific duty of care.<sup>815</sup> Three cases illustrate both the type of circumstances that may lead to the creation of a fiduciary relationship between banker and customer and the ambit of the doctrine. In the first case, *Woods v Martins Bank Ltd*,<sup>816</sup> the manager of a branch of the defendant bank was interested in obtaining the custom of the plaintiff, a young man without business experience, who had inherited a small legacy. The branch manager offered to advise the plaintiff on his investments and business affairs and eventually induced him to invest a substantial amount of money in shares of a private company. The manager failed to disclose to the plaintiff that that company was heavily indebted to the bank and that the head office was pressing for the reduction of its overdraft. The company went into liquidation and the shares turned out to be worthless. As a defence to the plaintiff's action in damages, the bank pleaded that the advice had been given to the plaintiff before he became a customer, to whom they might have owed a duty of care. Giving judgment for the plaintiff, Salmon J held that, even if a relationship of banker and customer had not been established at the relevant time, the bank had nevertheless assumed fiduciary obligations towards the plaintiff when it agreed to become his financial adviser.<sup>817</sup>

### **Bundy's case**

<sup>36-263</sup>

In the second case, *Lloyds Bank Ltd v Bundy*,<sup>818</sup> the Court of Appeal held that a bank owed a duty of “fiduciary care” to a customer from whom it had obtained a guarantee—covered by a charge over land—to secure an overdraft granted to another customer. Conceding that such a duty did not usually exist when a customer agreed to guarantee to his bank the obligations of a third party, Sir Eric Sachs emphasised that in the present case the guarantor—who was a customer of long standing—had relied on the bank’s advice. As the bank had failed properly to advise the guarantor or to suggest that he obtain legal advice, the guarantee and charge were voidable on the ground of undue influence. The learned judge described the situations in which a fiduciary relationship could be created as follows:

“... whilst disclaiming any intention of seeking to catalogue the elements of such a special relationship, it is perhaps of a little assistance to note some of those which have in the past frequently been found to exist where the court has been led to decide that this relationship existed as between adults of sound mind. Such cases tend to arise where someone relies on the guidance or advice of another, where the other is aware of that reliance and where the person upon whom reliance is placed obtains, or may obtain, a benefit from the transaction or has some other interest in it being concluded. In addition, there must, of course, be shown to exist a vital element ... referred to as confidentiality.”<sup>819</sup>

## Analysis of rule in Morgan’s case

- <sup>36-264</sup> The principle in question has been clarified in *National Westminster Bank Plc v Morgan*.<sup>820</sup> The bank was asked to approve a refinancing arrangement for a customer whose improvident business ventures had led to his defaulting in payments under an existing mortgage, granted to a building society over the family home, owned jointly by the customer and his wife. As part of the proposed scheme, the object of which was to preclude the forced sale of the property by the building society, the bank demanded a charge over the same property. When the wife, who was also a customer of the bank, made it clear that she was unwilling to execute a charge covering the husband’s business ventures, the branch manager advised her, erroneously but in good faith, that the charge was meant to cover only the amount advanced in respect of the refinancing arrangement aimed at salvaging the house. In reality, the bank’s standard form of a charge was so phrased as to constitute the property a security for the chargors’ total indebtedness to the bank. When the husband passed away, he was not indebted to the bank in respect of his business activities. The couple had, however, been in arrears of payments due under the refinancing arrangement and the bank proposed to sell the property to recover the amount due to it. Reversing the Court of Appeal’s decision to set the mortgage aside, the House of Lords held that the bank had not committed a breach of a duty of care or a fiduciary duty owed to the wife. The relationship between the bank and the couple had remained one of banker and customer and, on the facts, there was no exercise of undue influence

by the branch manager. Lord Scarman highlighted three points. First, the bank had not derived any hidden benefit from the transaction. The sole object of the refinancing scheme was to enable the couple to save their house from being sold by the building society. Secondly, the branch manager's statement was incorrect technically rather than in substance. Whilst the documents effectively secured the bank in respect of the husband's business debts, the bank had no intention of exercising any rights acquired by it under the charge in respect of such debts. Thirdly, the wife understood the general nature of the charge and of the transaction as a whole. In view of these facts, the mere inequality in the parties' bargaining power was immaterial. Emphasising the absence of a conflict of interests between the bank and the couple, his Lordship concluded that the bank had not been under a duty to advise the wife to seek independent legal advice.

## Limitations of general principle defined

- 36-265** It is clear from the cases considered in the foregoing paragraphs that banks are held to be subject to fiduciary duties or special duties of care only in exceptional cases. Basically, such a duty arises where the bank has assumed liability or has held itself out in a manner that justifies its imposition.<sup>821</sup> A duty of care is more readily invoked if the bank has derived some benefit, be it direct or indirect, from the transaction involved or if it placed itself in a situation which led to a conflict of interests between the customer and itself.

<sup>822</sup>

**U** Cases of this sort are, of course, rare. In its ordinary dealings, the bank need not be unduly suspicious and cannot, for instance, be expected to initiate enquiries about the motive behind a payment instruction given to it by the customer's duly authorised agent unless there are some very clear indications that ought to alert the bank about the agent's fraudulent design.<sup>823</sup> Usually, all that is to be expected of a bank is the exercise of reasonable care in the discharge of its duties to customers. In determining whether a bank has acted negligently, regard must be had to all relevant circumstances as well as to standard banking practice. This principle emerges most clearly from an earlier authority, *Schioler v Westminster Bank Ltd*.<sup>824</sup> The plaintiff, a Danish national domiciled in Denmark but resident in the United Kingdom, maintained an account with the Guernsey branch of the defendant bank. Dividends due to the plaintiff from a Malaysian company were usually remitted by it for credit of this account in sterling, an arrangement under which the plaintiff was not liable to taxation in the United Kingdom. On one occasion, however, the dividend was remitted by a voucher expressed in foreign currency. In the absence of facilities in Guernsey for the negotiation of foreign currency drafts, the dividend voucher was forwarded by the Guernsey branch for collection to the bank's head office in England. The plaintiff, thereupon, became subject to payment of United Kingdom income tax, which was duly deducted by the bank. The plaintiff's action in breach of contract was dismissed by Mocatta J, who held that the bank had not acted negligently in failing to ask for specific instructions when the dividend was received in foreign

currency. As the bank had acted in accordance with established banking practice, it was not in breach of a duty of care.

## Everyday transactions

- 36-266 Another case in point is *Redmond v Allied British Banks Plc.*<sup>825</sup> The plaintiff paid to the credit of his account with the defendant bank a number of crossed cheques, bearing crossings accompanied by the words “not negotiable—account payee only”, which bore on their backs the purported indorsements of the payees. These cheques were paid by the drawee bank when presented through the clearing system but as, in reality, the cheques had been circulated by persons who had no title to them, the defendant bank was sued in conversion by the true owners. The defendant bank settled these actions and then debited the plaintiff’s account with the face value of the cheques. The plaintiff claimed that the bank ought to have warned him about the risk involved in the taking up of crossed cheques payable to a third party and bearing the words in question. Dismissing the action, Saville J said that he could see no basis for a duty to advise or to warn a customer that there were risks attendant upon something which the customer proposed to do.<sup>826</sup> There was no need to imply such a duty in order to give business efficacy to the contract and there was no evidence to suggest that the circumstances of the transactions involved were such as to give rise to some duty of care in tort. His Lordship supported his view by a reference to the Privy Council’s decision in *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd.*<sup>827</sup> It derives further support from cases<sup>828</sup> which show that the courts are unwilling to broaden the category of cases in which a duty of care in tort is imposed at law so as to enable a party to recover pure economic loss.<sup>829</sup>

## Effect of contractual documents on duty of care

- 36-267 Where a bank provides specialist banking services to financially sophisticated customers under the terms of contractual documentation drafted by specialist lawyers, the court will be slow to find a duty of care in tort going beyond the rights and obligations carefully set out in those documents.<sup>830</sup>
- U** There are a number of cases which illustrate that contractual terms, such as those which deny that advice has been given and/or relied upon, may prevent the coming into existence of any duty of care to advise.<sup>831</sup>

**U** The prevailing view has been that where these terms define the basis upon which the parties act, they do not constitute exclusion clauses falling within the ambit of the **Unfair Contract Terms Act 1977** or **s.3 of the Misrepresentation Act 1967**,

<sup>832</sup>

**U** although such a term may constitute an unfair term when found in a “consumer contract” within the meaning of the **Consumer Rights Act 2015**.

<sup>833</sup>

**U**

**U** However, in *First Tower Trustees Ltd v CDS (Superstores International) Ltd*,<sup>834</sup> the Court of Appeal held that a non-reliance clause, binding on the representee through the doctrine of contractual estoppel, was caught by **s.3 of the Misrepresentation Act 1967**, and subject to the reasonableness test in the **Unfair Contract Terms Act 1977**, where the clause in substance excluded liability for misrepresentation which would otherwise have arisen. The reasoning of Leggatt LJ appears to be of wide application

<sup>835</sup>

**U**:

“... whenever a contracting party relies on the principle of contractual estoppel to argue that, by reason of a contract term, the other party to the contract is prevented from asserting a fact which is necessary to establish liability for a pre-contractual misrepresentation, the term falls within s.3 of the Misrepresentation Act 1967.”

## Money laundering

**36-268** In *Shah v HSBC Private Bank (UK) Ltd*,<sup>836</sup> Hamblen J considered what, if any, obligations a bank owed to its customer when it froze the customer’s account having made an authorised disclosure under **s.338 of the Proceeds of Crime Act 2002 (POCA)**. He held that the trigger for disclosure to the authorities under **POCA** was the bank’s subjective suspicion that a requested transfer involved funds which were criminal property.<sup>837</sup> The suspicion had to be genuinely held but it did not matter whether or not there were reasonable grounds for the suspicion, nor did it have to be rational.<sup>838</sup> Thus far, the Court of Appeal agreed with Hamblen J.<sup>839</sup> However, their Lordships considered that the judge had been wrong to say that the customer was left to rely only on an assertion of bad faith (which he had not made).<sup>840</sup> There was no reason why the customer could not require the bank to prove its case that it had the relevant suspicion and be entitled to pursue the case to trial so

that the bank could make good its contention in this respect.<sup>841</sup> But their Lordships held that there was no reasonable prospect that a claim based on negligence would succeed.<sup>842</sup> Hamblen J had accepted that a banker's duty of care was not completely excluded by POCA and that, in principle, delay in making a relevant disclosure might be a breach of that duty.<sup>843</sup> However, he had held that there was no evidence of such delay since all the disclosures had been made within two days of receiving the relevant payment instruction. Their Lordships agreed with the judge on this issue.<sup>844</sup>

## Footnotes

- 814 *Governor and Company of the Bank of Scotland v A Ltd [2001] EWCA Civ 52, [2001] Lloyd's Rep. Bank. 73* at [25]; *JP Morgan Chase Bank v Springwell Navigation Corp [2008] EWHC 1186 (Comm)* at [573] (affirmed [2010] EWCA Civ 1221, [2010] 2 C.L.C. 705); *Forsta Ap-Fonden v Bank of New York Mellon SA [2013] EWHC 3127 (Comm)* at [173]; *Barclays Bank Plc v Svizera Holdings BV [2014] EWHC 1020 (Comm)* at [8]; *Bailey v Barclays Bank Plc [2014] EWHC 2882 (QB)* at [87]–[90]; *WW Property Investments Ltd v National Westminster Bank Plc [2016] EWCA Civ 1142* at [57]; *Rehman v Santander UK Plc [2018] EWHC 748 (QB)* at [43]; *First City Monument Bank Plc v Zumax Nigeria Ltd [2019] EWCA Civ 294* at [25], [36], [80]. The fact that the bank holds third party security to cover the customer's indebtedness does not convert the banker-customer relationship into a fiduciary one: *Kotonou v National Westminster Bank Plc [2010] EWHC 1659 (Ch), [2011] 1 All E.R. (Comm) 1164* (held bank as lender owes no duty to borrower to call on third party security before it lapsed). Neither does a lender owe an equitable duty to act in good faith on a debt restructuring of its borrower merely because it holds security by way of mortgage when it does not exercise, or threaten to exercise, its powers under that security: *Standish v Royal Bank of Scotland Plc [2018] EWHC 1829 (Ch)* at [48]–[49]. A mortgagee's equitable duty of good faith is narrow in scope and does not restrict the lender's discretion to call in an uncommitted loan that was repayable on demand, so long as the lender enforces its security for the proper purpose of satisfying the debt: *UBS AG v Rose Capital Ventures Ltd [2018] EWHC 3137 (Ch)* at [34]–[38]. But some activities of a multifunctional bank may give rise to fiduciary duties, e.g. acting as custodian of its customer's securities (*JP Morgan Chase Bank v Springwell Navigation Corp [2008] EWHC 1186 (Comm)* at [573] (affirmed [2010] EWCA Civ 1221, [2010] 2 C.L.C. 705); *Forsta Ap-Fonden v Bank of New York Mellon SA [2013] EWHC 3127 (Comm)* at [173]). Even then, the fact the bank is a fiduciary in some respects does not mean that it is a fiduciary in all respects (*Forsta Ap-Fonden v Bank of New York Mellon SA*, above, at [174]; *Saltri III v MD Mezzanine SA SICAR [2012] EWHC 3025 (Comm), [2013] 1 All E.R. (Comm) 661* at [123]). For detailed coverage, see E.P. Ellinger, E. Lomnicka and C.V.M. Hare, Ellinger's Modern Banking Law, 5th edn (2011), Ch.5, s.4.
- 815 See *Fahad Al Tamimi v Mohamad Khodari [2009] EWCA Civ 1109*, per Wilson LJ at [42]: “The relationship between a lender and a borrower is not in principle a fiduciary relationship. The relationship between a bank manager and a customer may in certain circumstances acquire a fiduciary character”.

- 816 [1959] 1 Q.B. 55. See also *Standard Investments Ltd v Canadian Imperial Bank of Commerce*, 22 D.L.R. (4th) 410 (1985); *Hong Kong Bank of Canada v Phillips* [1998] *Lloyd's Rep. Bank*. 343; *United Pan-Europe Communications NV v Deutsche Bank AG* [2000] 2 B.C.L.C. 461, CA; *Diamantides v JP Morgan Chase Bank* [2005] EWCA Civ 1612. See also *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1999] P.N.L.R. 496 at 509, Evans-Lombe J (independent financial adviser).
- 817 [1959] 1 Q.B. 55 at 72. Note that this case was decided before the principle of *Candler v Crane, Christmas & Co* [1951] 2 K.B. 164 was overruled by the House of Lords in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] A.C. 465, so that liability could not be placed on negligence simpliciter.
- 818 [1975] Q.B. 326.
- 819 [1975] Q.B. 326 at 341. And see *Commonwealth Trading Bank of Australia v Smith* (1991) 102 Aust. L.R. 453; *Scaravelli v Bank of Montreal* (2004) 69 O.R. (3d) 295 at [37].
- 820 [1985] A.C. 686.
- 821 For such an exceptional case, see *Verity and Spindler v Lloyds Bank Plc* [1995] C.L.C. 1557 (bank manager assumed the role of borrowers' financial adviser); cf. *Murphy v HSBC Bank Plc* [2004] EWHC 467 (Ch) (bank assumed no responsibility to borrowers who had own solicitors and accountants to advise them).
- 822 *Barclays Bank Plc v Quincecare Ltd* [1992] 4 All E.R. 363 at 375–376 (the duty arises as an implied term of the banker-customer contract and a concurrent tortious duty). Under the *Quincecare* duty, as it is known, a bank must refrain from executing an order to make a payment where it knows it to be dishonestly given, or shuts its eyes to the obvious fact of the dishonesty, or acts recklessly in failing to make such enquiries as an honest and reasonable man would make, or is “put on enquiry” by having reasonable grounds for believing that the order is an attempt to misappropriate funds (as summarised by Baroness Hale in *Singularis Holdings Ltd (In Liquidation) v Daiwa Capital Markets Europe Ltd* [2020] UKSC 50 at [1]). The duty is not confined to cases where the suspicion which has been raised (or objectively ought to have been raised) is one of attempted misappropriation of the customer’s funds by an agent of the customer: “[i]t is capable of applying with equal force to a case in which the instruction to the bank is given by a customer themselves who is the unwitting victim of APP fraud provided the circumstances are such that the bank is on inquiry that executing the order would result in the customer’s funds being misappropriated” (*Philipp v Barclays Bank UK Plc* [2022] EWCA Civ 318 at [30], and also [78], Birss LJ: for Authorised Push Payment (APP) fraud, see below, para.36-416). In order to trigger the duty, the bank must be on notice that the payment instruction in question may be vitiated by fraud and not any different or wider potential concern (e.g. historic corruption or past financial crime): there must be a “red flag” in respect of the specific payment that the bank is being instructed to make (*Federal Republic of Nigeria v JP Morgan Chase Bank* [2022] EWHC 1447 (Comm) at [158]–[163], Cockerill J). The question of what a bank should do when it is put on inquiry that a payment instruction ought not to be executed will vary according to the particular facts of the case, and may include making inquiries of its customer, but subject to any duty of confidentiality the bank may separately owe to the person giving the payment instruction, or the fact that

money laundering legislation requires a suspicious activity report to be made to the National Crime Agency, when a bank is prohibited from raising the matter with the customer (*JP Morgan Chase Bank NA v Federal Republic of Nigeria [2019] EWCA Civ 1641* at [20]–[22]). In most cases, the bank will be required to do something more than simply deciding not to comply with a payment instruction (*[2019] EWCA Civ 1641* at [21]). The duty may be excluded or modified by the terms of the banking contract (*[2019] EWCA Civ 1641* at [40]; *[2022] EWHC 1447 (Comm)* at [297] et seq.). The *Quincecare* duty extends beyond banks to include payment service providers that hold assets on behalf of their customers and follow payment instructions (*Hamblin v World First Ltd [2020] EWHC 2383 (Comm)*). The remedy for breach of the *Quincecare* duty is an award of damages to compensate for loss suffered: *Stanford International Bank Ltd v HSBC Bank Plc [2021] EWCA Civ 535* at [29]–[39] (held duty owed to customer alone, and not to its customer’s creditors, and no loss to corporate customer when payments made pre-commencement of winding up process went to discharge its genuine creditors). In *Royal Bank of Scotland International Ltd v JP SPC 4 [2022] UKPC 18* at [36]–[44], the Privy Council confirmed that the *Quincecare* duty is owed only to the bank’s customer, and not to any third party beneficiaries of its customer’s accounts. The fact that the *Quincecare* duty is owed only to the bank’s customer, and not to a wider class, was noted by Falk J in *Tulip Trading Ltd v Bitcoin Association for BSV [2022] EWHC 667 (Ch)* at [103] (held Bitcoin software developers owed no fiduciary or tortious duties to assist Bitcoin owner to regain access to its Bitcoin). For a claim for breach of the *Quincecare* duty (and breach of mandate) that was held to be time-barred under the *Limitation Act 1980*, see *Roberts v Royal Bank of Scotland Plc [2020] EWHC 3141 (Ch)*. For a successful claim for breach of mandate, and (surprisingly) breach of the *Quincecare* duty, where the payment instruction was not given by a genuine authorised signatory, but rather by a third party impersonating the authorised signatory, see *Aegis Resources DMCC v Union Bank of India (DIFC) Branch [2020] DIFC CFI 004* (Court of First Instance in the Dubai International Finance Zone).

- 823 As in *Singularis Holdings Ltd (in liquidation) v Daiwa Capital Markets Europe Ltd [2017] EWHC 257 (Ch)*, affirmed on other grounds *[2018] EWCA Civ 84*. There was no appeal on the judge’s finding of the *Quincecare* duty of care (above), or breach of that duty, although Vos C. stressed (at [98]) that “it will be a rare situation for a bank to be put on inquiry; there is a high threshold” and that the instant case was “an unusual one, the circumstances of which are unlikely often to arise”. Dismissing the defendant bank’s appeal (*[2019] UKSC 50*), the Supreme Court held that the fraudulent misappropriation of funds out of a corporate customer’s account by one of its directors, who was the company’s Chairman and sole shareholder, was not to be attributed to the company so as to afford the bank a defence (based on illegality, lack of causation or by an equal and opposite claim against the company in deceit) to the company’s claim for breach of the bank’s *Quincecare* duty of care: the purpose of the duty was to protect the company from the misconduct of its trusted agent, and to attribute the fraud of that person to the company would be to denude the the duty of any value in cases where it was needed most (Baroness Hale at [35]). See further above, Vol.I, para.18-218. Similarly, in *Hamblin v World First Ltd [2020] EWHC 2383 (Comm)* at [31], where the customer was an insolvent shell company with no directors, which was used by

fraudulent individuals to perpetrate a fraud, it was held that to attribute the knowledge of the fraudsters to the company so as to defeat its claim for breach of the *Quincecare* duty would be to denude the duty of much of its practical utility. For an argument that the *Quincecare* duty, based on a negligence standard, is misconceived, and that the correct default standard is one of dishonesty, see P. Watts, “The *Quincecare* duty: misconceived and misdelivered” [2020] J.B.L. 403.

824 [1970] 2 Q.B. 719.

825 [1987] F.L.R. 307.

826 See also *Winnetka Trading Corp v Julius Baer International Ltd* [2011] EWHC 2030 (Ch), [2012] 1 B.C.L.C. 588 at [90]–[97]. Similarly, an English bank acting as agent for collection of a cheque owes no duty of care to a foreign collecting bank, which is deemed to be its customer for these purposes, to advise on the effect of the *Cheques Act 1992* on the meaning and significance of an “a/c payee only” crossing on the cheque: see *Honourable Society of the Middle Temple v Lloyds Bank Plc* [1999] 1 All E.R. (Comm) 193; *Linklaters (a firm) v HSBC Bank Plc* [2003] EWHC 1113 (Comm), [2003] 2 Lloyd’s Rep. 545 (noted by *Ellinger* (2004) 120 L.Q.R. 226).

827 [1986] A.C. 80, discussed below, para.36-355.

828 *D & F Estates Ltd v Church Commissioners of England* [1989] A.C. 177; *Caparo Industries Plc v Dickman* [1990] 2 A.C. 605; *Murphy v Brentwood DC* [1991] 1 A.C. 398; see Vol.I, paras 20-020 et seq.

829 As regards liability owed to third parties, arising in the context of an ordinary banking transaction, see: *TE Potterton Ltd v Northern Bank Ltd* [1993] 1 I.R. 413 (paying bank owes payee of cheque a duty to act carefully and honestly when advising payee of its reasons for dishonour of cheque); *Chapman v Barclays Bank Plc* [1997] Bank. L.R. 315, CA (bank owes no duty of care to third party who had financial interest in the borrower’s affairs); *Wells v First National Commercial Bank* [1998] P.N.L.R. 552, CA (bank instructed to make funds transfer to named beneficiary owes no duty of care to that beneficiary and will not be liable to him if it fails to execute the instruction); *Abou-Rahmah v Abacha* [2005] EWHC 2662 (QB), [2006] 1 All E.R. (Comm) 247; affirmed. [2006] EWCA Civ 1492, [2007] 1 Lloyd’s Rep. 115, but with no appeal on this issue (receiving bank does not owe a duty of care to the payer of funds, who is not its customer and to whom it has undertaken no special responsibility, to pay money received only to the beneficiary identified in the payer’s instructions or, in the case of discrepancies, to clarify the identity of the beneficiary with the payer); *Customs and Excise Commissioners v Barclays Bank Plc* [2006] UKHL 28 [2007] 1 A.C. 181 (bank notified by a third party of freezing injunction granted to the third party against one of the bank’s customers affecting an account held by the customer with the bank, owes no duty to the third party to take reasonable care to comply with the terms of the injunction); *Riyad Bank v Ahli United Bank (UK) Plc* [2006] EWCA Civ 780, [2006] 2 Lloyd’s Rep. 292 (where there is a contractual chain, the normal position is that the chain should not be bypassed by a claim in tort, but a duty of care may exist where discussions and representations are made directly to the party who suffers loss); *So v HSBC Bank Plc* [2009] EWCA Civ 296, [2009] 1 C.L.C. 503 (bank owes duty of care to third party when representing that it had accepted and intended to carry out its customer’s instructions); *Chudley v Clydesdale Bank*

*Plc (t/a Yorkshire Bank) [2017] EWHC 2177 (Comm)* at [248]–[250] (no sufficient proximity between bank and third party to establish duty of care on which to base claim that bank negligent in putting a “dangerous document” into circulation), but on appeal *[2019] EWCA Civ 344* held that third party could rely on *Contracts (Rights of Third Parties) Act 1999* to assert own contractual rights against bank. Somewhat exceptionally, a bank arranging a capital market transaction was recently held liable for breach of a duty of care owed to third party bondholders: see *Golden Belt 1 Sukuk Co v BNP Paribas [2017] EWHC 3182 (Comm)* (bank arranging Sukuk—Islamic bond—issue owed tortious duty of care to bondholders to ensure promissory note that supported issuer’s liability was properly executed).

- ⑧30 *IFE Fund SA v Goldman Sachs International [2006] EWHC 2887 (Comm), [2007] 1 Lloyd's Rep. 264* at [63], per Toulson J; affirmed *[2007] EWCA Civ 811, [2007] 2 Lloyd's Rep. 449* (syndicated loan); applied in *Maple Leaf Macro Volatility Master Fund v Rouvroy [2009] EWHC 257 (Comm), [2009] 1 Lloyd's Rep. 475* at [369]. See also *Barclays Bank Plc v Svizera Holdings BV [2014] EWHC 1020 (Comm)* at [68]–[70] (applying the opinion of Lord Hodge in *Grant Estates Ltd v Royal Bank of Scotland Plc [2012] CSOH 133* at [73] as to when a tortious duty of care to advise would arise in the case of a bank or other financial institution). But contrast *Sumitomo Bank Ltd v Banque Bruxelles Lambert SA [1997] 1 Lloyd's Rep. 487*, where Langley J held that provisions as to the arranging bank’s duties, rights and exonerations under the syndicated loan agreement did not prevent, and were not inconsistent with, a general duty of care being owed to syndicate members. See also *Golden Belt 1 Sukuk Co v BNP Paribas [2017] EWHC 3182 (Comm)*, where standard disclaimers in Offering Circular did not prevent bank arranging Sukuk—Islamic bond—issue being held in breach of tortious duty of care to bondholders to ensure promissory note that supported issuer’s liability was properly executed. The contractual documents may also regulate the existence and extent of a fiduciary relationship, especially where the parties are both substantial financial institutions dealing on an arm’s length basis (*Forsta Ap-Fonden v Bank of New York Mellon SA [2013] EWHC 3127 (Comm)* at [177]–[178]; *Saltri III v MD Mezzanine SA SICAR [2012] EWHC 3025 (Comm)* at [123(f)]; *CFH Clearing Ltd v Merrill Lynch International [2019] EWHC 963 (Comm)* at [78]–[83], where also held that bank engaged in arm’s length foreign exchange transactions was under no duty to take reasonable care to ensure the transactions were correctly priced to reflect market practice).

- ⑧31 *Springwell Navigation Corp v JP Morgan Chase Bank [2008] EWHC 1186 (Comm), affirmed [2010] EWCA Civ 1221, [2010] 2 C.L.C. 705; IFE Fund SA v Goldman Sachs International [2007] EWCA Civ 811, [2007] 2 Lloyd's Rep. 449; Peekay Intermark v Australia & New Zealand Banking Group [2006] EWCA Civ 386, [2006] 2 Lloyd's Rep. 511; Valse Holdings v Merrill Lynch International Bank [2004] EWHC 2471 (Comm); Bankers Trust International Plc v PT Dharmala Sakti Sejahtera [1996] C.L.C. 518; Credit Suisse International v Stichting Vestia Groep [2014] EWHC 3103 (Comm)* at [113]–[114]. See also *Titan Steel Wheels Ltd v Royal Bank of Scotland Plc [2010] EWHC 211 (Comm), [2010] 2 Lloyd's Rep. 92* (held contract terms gave rise to contractual estoppel or, alternatively, negated the existence of a duty of care); *Raiffeisen Zentralbank Österreich AG v Royal*

*Bank of Scotland Plc* [2010] EWHC 1392 (Comm), [2011] 1 Lloyd's Rep. 123 (held no representation/no responsibility provisions in Information Memorandum gave rise to contractual estoppel). The decision of the Court of Appeal in *Springwell Navigation Corp v JP Morgan Chase Bank* [2010] EWCA Civ 1221, [2010] 2 C.L.C. 705, is important because it upholds the doctrine of contractual estoppel, applying the approach taken by the Court of Appeal (possibly obiter) in *Peekay Intermark Ltd v ANZ Banking Group*, above. Followed in *Cassa di Risparmio della Repubblica di San Marino SpA v Barclays Bank Ltd* [2011] EWHC 484 (Comm), [2011] 1 C.L.C. 701 at [492]–[508]; *Standard Chartered Bank v Ceylon Petroleum Corp* [2011] EWHC 1785 (Comm) at [526]–[534], affirmed on different ground [2012] EWCA Civ 1049; *Barclays Bank Plc v Svizera Holdings BV* [2014] EWHC 1020 (Comm) at [58]–[63], [71]; *Crestsign Ltd v National Westminster Bank Plc* [2014] EWHC 3043 (Ch) at [119]; *Credit Suisse International v Stichting Vestia Groep* [2014] EWHC 3103 (Comm) at [307]–[310]; *Thornbridge Ltd v Barclays Bank Plc* [2015] EWHC 3430 (QB) at [111]; *Marz Ltd v Bank of Scotland Plc* [2017] EWHC 3618 (Ch) at [240]–[275]; *Wallis Trading Inc v Air Tanzania Co Ltd* [2020] EWHC 339 (Comm) at [79]–[81]; *BNP Paribas SA v Trattamento Rifiuti Metropolitani SpA* [2020] EWHC 2436 (Comm) at [175]–[184]. The principle of contractual estoppel is now “firmly established” at Court of Appeal level (*First Tower Trustees Ltd v CDS (Superstores International) Ltd* [2018] EWCA Civ 1396 at [47]–[48], [91]–[95]), although “[t]he doctrine is one which has been established on a very narrow basis and has yet to receive endorsement from the Supreme Court” (*Deutsche Bank AG v Comune di Busto Arsizio* [2021] EWHC 2706 (Comm) at [407], Cockerill J). But note that contract terms may not assist a bank when relied upon in a different context from the one in which they were intended to apply (*Camerata Property Inc v Credit Suisse Securities (Europe) Ltd* [2011] EWHC 479 (Comm), [2011] 2 B.C.L.C. 54 at [184]: for related proceedings, see [2012] EWHC 7 (Comm) and [2013] EWHC 29 (Comm)) or where the terms are limited in their scope (*UBS AG (London Branch) v Kommunale Wasserwerke Leipzig GmbH* [2014] EWHC 3615 (Comm) at [773]–[784]), and that a “disclaimer” cannot create a contractual estoppel when it is not part of the contract (*Taberna Europe CDO II Plc v Selskabet AF1.September 2008 (In Bankruptcy)* [2015] EWHC 871 (Comm) at [120]; reversed on appeal [2016] EWCA Civ 1262, where Court of Appeal held at [19]–[20] that a non-contractual “duty-negating” clause fell outside s.3 of the Misrepresentation Act 1967 because it was found in the very document that was said to contain the misrepresentation). See also *Sofer v Swissindependent Trustees SA* [2019] EWHC 2071 (Ch) at [139]–[140], rev'd [2020] EWCA Civ 699. For criticism of recent trend towards “documentary fundamentalism”, see G. McMeel [2011] L.M.C.L.Q. 185. In the *Springwell case* [2008] EWHC 1186 (Comm) at [431]ff, Gloster J held that an investment bank owed no general advisory duty to a sophisticated investor who was aware of the risks he was running. Her decision on this point was not challenged on appeal; however, the Court of Appeal (above, at [123]) accepted Gloster J's tentative conclusion (above, at [108]) that there might be a “low level duty of care” on the part of a salesman not to make any negligent misstatements and to use reasonable care not to recommend a highly risky investment without pointing out that it was such. However, the courts have tended to reject claims based on the existence of an advisory duty of care in the context of selling financial

investments, e.g. *CJ and LK Partnership v NatWest Markets Plc* [2022] EWHC 726 (Comm); *Fine Care Homes Ltd v National Westminster Bank Plc* [2020] EWHC 3233 (Ch); *Property Alliance Group Ltd v Royal Bank of Scotland Plc* [2018] EWCA Civ 355; *London Executive Aviation Ltd v Royal Bank of Scotland Plc* [2018] EWHC 74 (Ch); *Marz Ltd v Bank of Scotland Plc* [2017] EWHC 3618 (Ch); *Finch v Lloyds TSB Bank Plc* [2016] EWHC 1236 (QB) at [52]–[58]; *Thornbridge Ltd v Barclays Bank Plc* [2015] EWHC 3430 (QB) at [96]; cf. *Rubenstein v HSBC Bank Plc* [2011] EWHC 2304 (QB), [2011] 2 C.L.C. 459 at [70], where there was a one-to-one enquiry about a specific investment transaction: reversed in part (on causation) [2012] EWCA Civ 1184, [2013] 1 All E.R. (Comm) 915. See also *Knights v Townsend Harrison Ltd* [2021] EWHC 2563 (QB) at [252] (when rejecting claim that accountants owed duty of care to clients when introducing them to third party investment schemes, HHJ Cawson QC sitting as a judge of the High Court, was not persuaded that an appropriate or good analogy was to be drawn with banker-customer relationship, as more likely that relationship of trust and confidence exists as between accountant and client than between banker and customer, where it was likely to be rare). For brief discussion of statutory regulatory regime governing the sale of financial products by banks, see para.36-445 below.

- ⑧32 *IFE Fund SA v Goldman Sachs International* [2006] EWHC 2887 (Comm), [2007] 1 Lloyd's Rep. 264 at [70]–[71], per Toulson J, affirmed [2007] EWCA Civ 811, [2007] 2 Lloyd's Rep. 449 at [28]; *Springwell Navigation Corp v JP Morgan Chase Bank* [2008] EWHC 1186 (Comm) at [602], affirmed [2010] EWCA Civ 1221, [2010] 2 C.L.C. 705; *Titan Steel Wheels Ltd v Royal Bank of Scotland Plc* [2010] EWHC 211 (Comm), [2010] 2 Lloyd's Rep. 92 at [98]; *Raiffeisen Zentralbank Österreich AG v Royal Bank of Scotland Plc* [2010] EWHC 1392 (Comm), [2011] 1 Lloyd's Rep. 123 at [316]–[317]; *Marz Ltd v Bank of Scotland Plc* [2017] EWHC 3618 (Ch) at [240]–[275]; First Tower Trustees Ltd v CDS (Superstores International) Ltd [2018] EWCA Civ 1396 at [43]–[44], [96]; *Fine Care Homes Ltd v National Westminster Bank Plc* [2020] EWHC 3233 (Ch) at [119]–[121]; *CJ and LK Partnership v NatWest Markets Plc* [2022] EWHC 726 (Comm) at [296]. For a non-exhaustive list of factors that may be taken into account when determining whether a “basis clause” or an “exclusion clause” for the purposes of the *Unfair Contract Terms Act 1977* or s.3 of the *Misrepresentation Act 1967*, see *Carney v NM Rothschild & Sons Ltd* [2018] EWHC 958 (Comm) at [94] (at [97]–[100] the court also considered the effect of “basis clauses” in the context of the “unfair relationship” provisions in ss.140A and 140B of the *Consumer Credit Act 1974*). It should be noted that different, more stringent, rules apply in the case of fraud: see Vol.I, para.17-067.

- ⑧33 **Consumer Rights Act 2015 (CRA 2015) Pt 2.** Note also CRA 2015 s.50(1), which effectively makes anything that is said or written to a consumer about the bank, or the service provided by the bank, a term of any contract to supply the service as between bank and consumer if relied upon by the consumer: s.50(2) allows the bank to qualify any pre-contractual representations, but only if it does so on the “same occasion” or if it represents a “change to [what was said or written] that has been expressly agreed between the consumer and the trader”. See further, para.40-576 below.

- 834 [2018] EWCA Civ 1396 at [39]–[67], [89]. The particular non-reliance clause in issue was held to be unreasonable under the statutory test because it rendered a landlord's replies to its tenant's pre-contract enquiries worthless, but Lewison LJ accepted, at [67], that such a clause may well be reasonable “in cases involving the sale of complex financial products to sophisticated investors”.
- 835 At [111]. Leggatt LJ's reasoning is wide enough to catch a “no representation” clause. However, a “non-reliance” clause or a “no representation” clause may avoid being classified as an exclusion clause, and, therefore, subject to statutory control, where it plays an evidential role and leads the court to conclude at “the factual investigation” stage of the process that there was no representation in fact made or relied upon (Leggatt LJ at [107]). A true basis clause, which defines a party's primary rights and obligations, must be distinguished from an exclusion clause, and will not be subject to the test of reasonableness in the *Unfair Contract Terms Act 1977* or s.3 of the *Misrepresentation Act 1967* (Lewison LJ at [43]–[44]; Leggatt LJ at [96]; applied in *Fine Care Homes Ltd v National Westminster Bank Plc* [2020] EWHC 3233 (Ch) at [119]–[121], where clauses stating that bank provided general dealing services “on an execution-only basis”, and did not provide “advice on the merits of a particular transaction”, were held to be basis clauses, which were not subject to the statutory requirement of reasonableness; and see also *CJ and LK Partnership v NatWest Markets Plc* [2022] EWHC 726 (Comm) at [293]–[296] and [401]).
- 836 [2009] EWHC 79 (QB), [2009] 1 Lloyd's Rep. 328.
- 837 At [45], applying *K Ltd v National Westminster Bank Plc* [2006] EWCA Civ 1039, [2007] 1 W.L.R. 311, where the Court of Appeal adopted the definition of suspicion given in *R. v Da Silva* [2007] 1 W.L.R. 303, stating that the bank only has to consider that there is a more than fanciful possibility that the relevant facts exist.
- 838 At [45] and [47].
- 839 [2010] EWCA Civ 31, [2011] 1 All E.R. (Comm) 67 at [21]. Re-iterated by Supperstone J when delivering judgment at the trial of the action: *Shah v HSBC Private Bank (UK) Ltd* [2012] EWHC 1283 (QB) at [67]–[69].
- 840 At [22].
- 841 Hence the Court of Appeal reversed Hamblen J's decision to give summary judgment to the bank on the customer's claim for damages for alleged loss suffered as a result of the bank's breach of duty in failing to carry out his payment instructions. Delivering judgment at the trial of the action (see [2012] EWHC 1283 (QB)), Supperstone J dismissed the customer's claim, holding that (1) there was an implied term in the banking contract that permitted the bank, because it suspected money laundering, to delay the execution of the customer's payment instructions until it received consent under POCA (at [45], [236]); (2) there was no duty on the bank to provide the customer with information in relation to the delay and that, in any event, there was an implied term in the banking contract that permitted the bank to refuse to provide that information where doing so might contravene its duties under POCA (at [169], [171]–[172], [238]). For related proceedings, see [2011] EWCA Civ 1154 (on disclosure of the names of employees who had reported their suspicions); [2011] EWCA Civ 1669 (on amendment to allege bad faith on the part of bank employees). See also *Lonsdale v National*

*Westminster Bank Plc [2018] EWHC 1843 (QB)* at [54]–[66], where the judge refused to strike out and/or summarily dismiss the claimant customer's claim that the defendant bank acted in breach of contract by freezing his accounts. The judge stressed (at [64]) that whether or not the bank had a genuine suspicion was a primary fact, which the customer had put in issue, that required to be proved by evidence that would be tested at trial. The judge also refused to strike out and/or summarily dismiss the customer's claims against the bank (a) for breach of his rights under the *Data Protection Act 1998* to see personal data held by the bank, and (b) for defamation (stating, at [131]–[134], that absolute privilege for defamatory words should not be extended to cover reports to the National Crime Agency (NCA), but that a bank which reports suspicious activity to the NCA would have the benefit of qualified privilege).

842 At [35]–[36].

843 *[2009] EWHC 79 (QB), [2009] 1 Lloyd's Rep. 328* at [58].

844 *[2010] EWCA Civ 31, [2011] 1 All E.R. (Comm) 67* at [35].

## (v) - Banks and Undue Influence

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Section 2. - Aspects of Banking Law

(b) - The Relationship of Banker and Customer

(v) - Banks and Undue Influence

### Undue influence and suretyship transactions

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Banks most commonly come up against the doctrine of undue influence when they seek to enforce third party security.<sup>845</sup> In rare cases the bank may be accused of having exercised undue influence itself,<sup>846</sup> but it is more usual for a person who has given security to the bank to cover the indebtedness of the bank's customer to allege that they did so as a result of the undue influence, misrepresentation or other wrongdoing of that customer. The typical case is where the wife charges her interest in the matrimonial home to secure the borrowing of her husband. She may have done this as a result of his undue influence or misrepresentation. The wife may later seek to raise the husband's wrongdoing against the bank when it attempts to enforce the security against her. In *Barclays Bank Plc v O'Brien*,<sup>847</sup> the first of two seminal decisions of the House of Lords in this area, it was held that the wife's prospects of having the security set aside by the court turn on whether her husband acted as the bank's agent,

<sup>848</sup>

**U** or whether the bank had actual or constructive notice of his undue influence or other wrongdoing.<sup>849</sup>

36-270

**U**

The burden is on the wife (or other surety) adequately to plead and prove that the bank had notice of the undue influence or wrongdoing.<sup>850</sup> In *Royal Bank of Scotland Plc v Etridge (No.2)*,<sup>851</sup> the second seminal case in this area, the House of Lords held that, where a wife offers to stand surety for her husband's debts, it is enough for her to show that the bank was aware of the husband/wife relationship. In other cases, the surety must establish that the bank knew that there was a non-commercial relationship between the surety and the debtor and that the transaction was on its face to the disadvantage of the surety. The burden of proof then shifts to the bank to show that it took all reasonable steps to bring home to the wife (or other surety) the risks involved in entering into the transaction.<sup>852</sup> The bank's failure to take all reasonable steps does not automatically mean that the security will be set aside. The wife (or other surety) must also establish either that the transaction was procured by undue influence (or other wrongdoing), or that the basic facts of the "evidential presumption" that it was so procured by undue influence exist and that presumption has not otherwise been rebutted.

<sup>853</sup>



## O'Brien's case

<sup>36-271</sup> In *Barclays Bank Plc v O'Brien*,<sup>854</sup> the husband, who was an accountant, persuaded his wife to execute a charge over the matrimonial home to back a guarantee given by him to secure the debts due to the bank from a company in which he had an interest. The relevant mortgage documents were executed by the wife at the bank's premises. She was not given the chance to read them and, in addition, the clerk who proffered the documents for her signature failed to draw her attention to a side-letter, in which the wife purported to acknowledge that she understood the nature of the transaction and that the bank had recommended that she take independent legal advice. The clerk further failed to carry out the branch manager's instruction to explain to her the nature of the transaction. Reversing the trial judge's decision, the Court of Appeal set the charge aside.<sup>855</sup> After a review of both the 19th-century decisions and the modern cases in point, Scott LJ concluded that many of the relevant authorities treated a certain class of surety, encompassing married women and other persons such as aged relatives, as a "protected class". Scott LJ concluded that—as a matter of policy—the existence of such a class of protected debtor should be recognised, although its existence was not postulated in all the authorities in point.

<sup>36-272</sup> The House of Lords affirmed the Court of Appeal's decision, but on a different reasoning. To start with, Lord Browne-Wilkinson emphasised that it was essential that a law designed to protect the vulnerable, such as wives and cohabitantes, should not render the matrimonial home unacceptable as security to financial institutions. His Lordship then reviewed the authorities respecting undue influence and concluded that, although there was no presumption of undue influence as between husband and wife, it was open to the wife to prove that, in her particular case, she did leave

decisions on financial affairs to her husband. By doing so she established that “she reposed confidence and trust in her husband in relation to financial affairs and therefore undue influence [was] to be presumed”.<sup>856</sup>

## Actual or constructive notice

- 36-273 His Lordship then considered the situations in which the undue influence exercised by the husband over the wife would induce a Court of Equity to set aside a charge or mortgage granted by the wife to a third party such as a bank. Naturally, such a charge would be set aside if the wrongdoing husband was acting as the bank’s agent in obtaining the security from the wife. In such a case the bank would be fixed with the wrongdoing of its agent. His Lordship added:

“Apart from this, if the creditor bank has notice, actual or constructive, of undue influence exercised by the husband (and consequently of the wife’s equity to set aside the transaction) the creditor will take subject to that equity and the wife can set aside the transaction against the creditor … as well as against the husband.”<sup>857</sup>

Lord Browne-Wilkinson concluded that, if the doctrine of notice was properly applied, there was no need to postulate a special equitable doctrine applicable to charges executed by a class of debtor comprising wives and other persons such as cohabitantes and aged parents. The key to the problem was to identify the circumstance in which the bank or other creditor was to be taken to have had notice of the wife’s (or other chargor’s) equity to set aside the transaction. His Lordship emphasised that, generally, a person would have constructive notice of such an equity where he was in command of facts which put him on inquiry as to the possible existence of the defect. Applying this general principle, his Lordship said:

“… a creditor is put on inquiry when a wife offers to stand surety for her husband’s debts by the combination of two factors: (a) the transaction is on its face not to the financial advantage of the wife; and (b) there is a substantial risk in transactions of that kind that, in procuring the wife to act as surety, the husband has committed a legal or equitable wrong that entitles the wife to set aside the transaction.”<sup>858</sup>

## Avoiding constructive notice

- 36-274 His Lordship recognised that a bank could not be expected to conduct a detailed examination of the circumstances of each case in which a wife, a cohabitee or an aged parent offered to execute

a charge over a piece of property. The bank could avoid being fixed with constructive notice by taking reasonable steps to satisfy itself that the wife's consent was freely given. It satisfies these requirements by insisting "that the wife attend a private meeting (in the absence of the husband) with a representative of the creditor at which she is told of the extent of her liability as surety, warned of the risk she is running and urged to take independent legal advice".<sup>859</sup>

## O'Brien guidelines in practice

- 36-275 The practice of banks, both before and after the House of Lords issued its guidance in *O'Brien*, has been, and remains, not to have a private meeting with the surety.<sup>860</sup> It appears that banks have preferred not to adopt this course, probably because of the risk that the surety could later assert that the bank had somehow misrepresented the position. Instead, banks have made it their standard practice to insist both that the surety obtains independent legal advice on the nature and effect of the documents that she is to sign, and that the legal adviser confirms to the bank in writing that such advice has been given.<sup>861</sup> In *Royal Bank of Scotland Plc v Etridge (No.2)*,<sup>862</sup> the House of Lords expressed general approval of this practice, subject to certain controls, and dropped the requirement that the bank must have a private meeting with the surety.

## Etridge's case

- 36-276 In 2001, the House of Lords revisited this "difficult corner of the law" in *Royal Bank of Scotland Plc v Etridge (No.2)*.<sup>863</sup> The House of Lords heard eight appeals together. In seven of the appeals, the appellant was a wife who had agreed to subject her property, usually her interest in the matrimonial home, to a charge in favour of the bank in order to provide security for the payment of her husband's debts, or the debts of a company by means of which her husband carried on business. In each case the bank had started proceedings for possession of the mortgaged property, but the wife had defended the action on the ground that her agreement to grant the charge was brought about by the undue influence or misrepresentation of her husband and that, in the circumstances, the bank should not be allowed to enforce the charge against her. In each case the issue was whether the bank had notice of the husband's impropriety or alleged impropriety. In each case the bank had some reason to believe that a solicitor had acted for the wife in the transaction in question. So the question for their Lordships to decide was the extent to which the solicitor's participation, or believed participation, had absolved the bank of the need to make further inquiries about the circumstances in which the wife was persuaded to agree to grant the charge, or to take any further steps to satisfy itself that her consent was a true and informed consent.<sup>864</sup>

## Bank put on inquiry

- 36-277 In *Etridge*, the House of Lords recognised that Lord Browne-Wilkinson had not used the equitable concept of constructive notice in *O'Brien* in a conventional manner.<sup>865</sup> By contrast, in *Etridge* the House spoke in terms of the bank, or other creditor, being “put on inquiry”.<sup>866</sup> Two factors combine to put the bank on inquiry: the non-commercial relationship between the surety and the debtor and the fact that the transaction is on its face to the disadvantage of the surety. This is a low threshold and Lord Nicholls held it to be crossed whenever a wife offers to stand surety for her husband’s debts.<sup>867</sup>

## Relationship between surety and debtor

- 36-278 A bank will be put on inquiry where a wife guarantees her husband’s debts.<sup>868</sup> Similarly, the bank will be put on inquiry where a husband guarantees his wife’s debts or there is a heterosexual or homosexual relationship between surety and debtor (cohabitation not being essential), provided the bank is aware of the relationship.<sup>869</sup> The same rule applies where the bank knows of a parent and child relationship between debtor and surety.<sup>870</sup> Similarly, the rule applies where the bank is aware that there is a relationship of trust and confidence as between surety and debtor even though that relationship is not sexual.<sup>871</sup> However, *Etridge* is a landmark decision because Lord Nicholls was prepared to go even further than this. His Lordship did not want to draw an arbitrary boundary between those relationships that would activate the *O'Brien* principle and those that would not. Lord Nicholls held that, in future, banks should regulate their affairs on the basis that they are put on inquiry in every case where the relationship between the surety and the debtor is non-commercial.<sup>872</sup>

## Nature of the transaction

- 36-279 In *Etridge*, the House of Lords stressed that there would be other cases where a bank is not put on inquiry: e.g. where money is advanced to husband and wife jointly, unless the bank is aware that the loan is being made for the husband’s purposes, as distinct from their joint purposes.<sup>873</sup> Cases where the wife stands surety for the debts of a company whose shares are held by her and her husband were declared to be less clear-cut.<sup>874</sup> However, Lord Nicholls considered that a bank is put on inquiry in such cases, even where the wife is a director or secretary of the company. He

held that the shareholding interests, and the identity of the directors, was not a reliable guide to the identity of the person who actually had control of the conduct of the company's business.<sup>875</sup>

## Reasonable steps that a bank should take

- 36-280 Once put on inquiry, Lord Nicholls considered that a bank should not be expected to discover for itself whether a wife's consent had been procured by the exercise of undue influence, nor should it be expected to insist on confirmation from a solicitor that the solicitor has satisfied himself that the wife's consent has not been procured by undue influence.<sup>876</sup> Neither should the bank be compelled to hold a personal meeting with the surety.<sup>877</sup> According to Lord Nicholls<sup>878</sup>:

“The furthest a bank can be expected to go is to take reasonable steps to satisfy itself that the wife has had brought home to her, in a meaningful way, the practical implications of the proposed transaction. This does not wholly eliminate the risk of undue influence or misrepresentation. But it does mean that a wife enters into a transaction with her eyes open so far as the basic elements of the transaction are concerned.”

Lord Nicholls stressed that, *in the ordinary case*, it would be reasonable for the bank to rely upon confirmation from a solicitor,<sup>879</sup> acting for the wife,<sup>880</sup> that he has advised the wife appropriately.<sup>881</sup> However, *in an extraordinary case*, where the bank knows that the solicitor has not duly advised the wife or if the bank knows facts from which it ought to have realised that the wife has not received the appropriate advice, it will proceed at its own risk.<sup>882</sup>

## Future transactions

- 36-281 Lord Nicholls also gave detailed guidance to banks as to how they should act in future when looking to the fact that the wife has been, or reasonably appears to have been, advised independently by a solicitor.<sup>883</sup> This guidance is not to be considered as optional.<sup>884</sup> It can be summarised as follows:

(a)the bank should make direct contact with the wife and:

(i)explain to her the reason why it requires written confirmation from a solicitor, acting for her, that he has fully explained the nature of the documents to her and the practical implications they will have for her; and

(ii)ask her to nominate a solicitor to act for her and provide the necessary confirmation (she should be told that this may be the same solicitor that acts for her husband but that she may choose another solicitor if a solicitor is already acting for her and her husband).

*The bank should not proceed with the transaction until it has received an appropriate response directly from the wife.*

(b) The bank must provide the wife's solicitor with such financial information as he needs for the purpose of explaining the nature of the documents and their practical implications to her. It should be routine practice for banks to send necessary financial information to the solicitor. What is required depends on the facts of the case but, ordinarily, it will include information on the purpose for which the proposed new facility has been requested, the current amount of the husband's indebtedness, the amount of his current overdraft facility and the amount and terms of any new facility. A copy of any written application of the husband for a facility should also be sent to the solicitor. The bank will have to obtain the consent of the customer to the disclosure of confidential information, and the transaction should not be allowed to proceed without such consent (Lord Scott considered that a husband who proposes that his wife stands surety for his or his company's debts constitutes implied consent to disclosure,<sup>885</sup> but it is submitted that obtaining express consent to disclosure would be a much safer option from the bank's point of view, especially where the debtor is technically the husband's company<sup>886</sup>).

(c) In those exceptional cases where the bank believes or suspects that the wife has been misled by her husband or is not entering into the transaction of her own free will, the bank must inform the wife's solicitors of the facts giving rise to its belief or suspicion.

(d) The bank must in every case obtain from the wife's solicitor a written confirmation to the effect mentioned above.<sup>887</sup>

## Independent advice

36-282 Should the solicitor acting for the wife act for her alone? Does it matter that the solicitor also acts for the husband and/or the bank in the transaction? In the *Etridge* case, Lord Nicholls considered this to be a much-vexed question: one, he stressed, which could not be answered by reference to decided cases.<sup>888</sup> Lord Nicholls balanced the factors that suggest that the solicitor should act for the wife alone against those factors that suggest that he may also act for the husband or the bank, provided he is satisfied that this is in the wife's best interests and is satisfied also that this will not give rise to any conflicts of duty or interest. In Lord Nicholls' opinion, the latter proved more weighty than the former.<sup>889</sup> At the heart of Lord Nicholls' reasoning was the understanding that when advising the wife the solicitor owes his duties, both legally and professionally, to her and her alone. He is concerned only with her interests.<sup>890</sup>

## No imputation of solicitor's knowledge to bank<sup>891</sup>

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Does the solicitor act as the bank's agent for these purposes so that the solicitor's knowledge that he has not done his job properly, whatever he said on the certificate, can be imputed to the bank?

Lord Nicholls answered this question in the negative.<sup>892</sup> The idea central to the arrangement is that in advising the wife the solicitor is acting for her and no one else. According to his Lordship, “[t]o impute to the bank knowledge of what passed between the solicitor and the wife would contradict this essential feature of the arrangement”.<sup>893</sup> The mere fact that the bank, for its own purposes, asked the solicitor to advise the wife did not constitute the solicitor the bank's agent when giving that advice. Lord Nicholls concluded that, in the ordinary case, deficiencies in the advice given were a matter between the wife and the solicitor so that the bank was entitled to proceed on the assumption that a solicitor advising the wife has done his job properly. However, he held that the position would be different where the bank knew that the solicitor had not done his job properly, or if it knew facts from which it ought to have realised this. Similarly, Lord Scott thought that where the solicitor's only instructions came from the bank, and the bank was his only client, so that he never became the solicitor of the wife, his knowledge of what had or had not taken place regarding advice to the wife might well be imputed to the bank.<sup>894</sup>

## Rescission

- 36-284 Where a wife (or other surety) successfully raises an *O'Brien/Etridge* defence, she is entitled to rescind the transaction with the bank.<sup>895</sup> The fact that the person who exercised the undue influence, or made the misrepresentation, is not himself a party to the transaction is basically irrelevant. If, for example, the bank has constructive notice to the effect that the wife has been subjected to undue influence by her husband, it would be irrelevant that the charge was executed by the wife alone and not jointly by the spouses.<sup>896</sup> Where the wife has received benefits under the transaction with the bank, she should be required, as a condition of rescission, to make counter-restitution to the bank of the value of the benefit she has received.<sup>897</sup> However, the equitable remedy of rescission will not be made on terms where the wife obtained no benefit for herself from the transaction. In *TSB Bank Plc v Camfield*,<sup>898</sup> a wife was induced to stand surety by her husband's innocent misrepresentation that their maximum liability in respect of the loan for his business was £15,000, when in fact it was unlimited. The bank was held to have constructive notice of the misrepresentation and the issue turned on whether the security could be partially enforced up to £15,000. The Court of Appeal held that the security was to be set aside in full. Nourse LJ stated: “[t]he wife's right to have the transaction set aside *in toto* as against the husband is no less enforceable against the mortgagee”.<sup>899</sup> The decision may be criticised on the ground that as the wife was prepared to guarantee payment of £15,000, it was appropriate to impose terms.<sup>900</sup> Of course, in a case of undue influence, where the surety's consent is totally vitiated, it is right that the security be set aside in full.<sup>901</sup> However, even in a case of undue influence it may occasionally be possible to sever tainted material from untainted material in an instrument, and to set aside only the former, so long as this does not amount to rewriting the contract.<sup>902</sup>

## Duty of care

- 36-285 In the normal course of events, a bank is under no duty of care to proffer explanations as to the nature and effect of a security document executed by a surety, or to advise the surety to take independent legal advice.<sup>903</sup> However, a duty of care may arise where there are special factors, e.g. where it is clear that the bank is being looked to for advice or is in some close relationship with the prospective surety of a kind which gives rise to a fiduciary relationship between them.<sup>904</sup> Whether a duty of care is owed depends upon all the circumstances of the case, including relevant evidence of banking practice.<sup>905</sup> Although it seems established that no duty of explanation or advice normally arises where the surety is not a customer of the bank, there is some uncertainty whether the same can be said where the surety is an existing customer of the bank. In *Cornish v Midland Bank Plc*,<sup>906</sup> where the Court of Appeal held that the bank had been negligent in the advice it had given to its customer, the surety, Kerr LJ went on to consider, obiter, whether the bank was under a duty of care to give an explanation of the security documents. Kerr LJ came to the tentative conclusion that banks are under a duty to their own customers to proffer an adequate explanation of the nature and effect of the security documents they are about to sign. Kerr LJ's dictum has been considered in a number of subsequent cases and rejected in nearly all of them.<sup>907</sup> It is submitted that the better view is that customers should be treated in the same way as non-customers, and that there should normally be no duty of care to proffer an explanation or advice in either case. Imposition of a duty to proffer an explanation or advice would seem to undermine the arm's length nature of the banker-customer relationship.

## Damages

- 36-286 *O'Brien* and *Etridge* are not concerned with establishing liability for damages or equitable compensation, but preventing a party from relying upon a transaction that is tainted by wrongdoing.<sup>908</sup> However, where a bank attempts to explain the nature and extent of the security documents to the surety, will it be liable in damages for negligent advice if it fails to do so properly? In *Midland Bank Plc v Perry*,<sup>909</sup> the trial judge held the bank liable for negligence in such circumstances. In *Cornish v Midland Bank Plc*,<sup>910</sup> it was conceded, with the approval of the Court of Appeal, that the bank owed the surety a duty of care to give a full and proper explanation of the security documents when it had undertaken the task of giving an explanation.<sup>911</sup> However, in *Barclays Bank Plc v O'Brien*,<sup>912</sup> Scott LJ said that where equity required the bank to explain the nature of a security document to the surety, the bank was not to be placed under a duty of care. He distinguished between where the surety is a customer of the bank, or where the bank voluntarily assumes the role of adviser, when it may be under a duty to advise carefully, and where

the bank explains the security documents and the transaction to the surety to avoid the security being set aside in equity, when a duty of care would not arise. Nevertheless, a bank which proffers an explanation or advice as to the security documents runs the risk of crossing the line and being held to have voluntarily assumed the role of an adviser.<sup>913</sup> It is no wonder, therefore, that banks have sought to avoid this risk by adopting the practice of requiring the surety to take independent legal advice.<sup>914</sup>

## Footnotes

- 845 See Vol.I, paras 10-072 et seq. for general discussion of the doctrine of undue influence.
- 846 The normal bank–customer relationship does not give rise to a presumption of undue influence (*National Westminster Bank Plc v Morgan* [1985] A.C. 686, HL: see para.36-264 above), but see *Lloyds Bank Ltd v Bundy* [1975] Q.B. 326 (para.36-263 above) for an exceptional case. *Libyan Investment Authority v Goldman Sachs International* [2016] EWHC 2530 (Ch) illustrates just how hard it is for a claim based on undue influence (or unconscionable bargain) to succeed where commercial parties transact with each other and each side can be expected to negotiate their own terms without regard to the other side's interests. See also *Holyoake v Candy* [2017] EWHC 3397 (Ch) at [404]–[408] (court rejected allegation that loan agreement between seasoned businessmen induced by actual undue influence); *De Sena v Notaro* [2020] EWHC 1031 (Ch) at [218] (“a case of a hard negotiation by experienced business people in a commercial transaction, and nothing more”).
- 847 [1994] 1 A.C. 180.
- ⑧48 e.g. *Avon Finance Co Ltd v Bridger* [1985] 2 All E.R. 281; *Kingsnorth Trust Ltd v Bell* [1986] 1 W.L.R. 119. But in *O'Brien* (at 195), the House of Lords criticised the artificiality of the agency analysis in most surety transactions, and it is not likely to be applied unless the debtor acts as the bank's agent “in a real sense” (*CIBC Mortgages Plc v Pitt* [1994] 1 A.C. 200 at 211, HL). In *Nature Resorts Ltd v First Citizens Bank Ltd* [2022] UKPC 10 at [19(i)], the Privy Council noted that Court of Appeal of Trinidad and Tobago reasoned that there would be no difficulty in bank being affected by alleged undue influence of solicitor it had instructed to procure execution of mortgage deed because solicitor was acting as agent of bank. (The PC did not consider that issue as it held at [20] that presumption of undue influence was rebutted, and (obiter) did not arise in the first place (at [25]–[28])).
- 849 Note that the equitable concept of constructive notice is not used in a conventional manner in this context: see *Royal Bank of Scotland Plc v Ettridge (No.2)* [2001] UKHL 44, [2002] 2 A.C. 773 at [39], [108] and [145].
- 850 *Barclays Bank Plc v Boulter* [1999] 1 W.L.R. 1919, HL.
- 851 [2001] UKHL 44, [2002] 2 A.C. 773 at [84].
- 852 *Barclays Bank Plc v Boulter*, above.
- ⑧53

As to which, see Vol.I, paras 10-103—10-131. See, e.g. *Royal Bank of Scotland Plc v Chandra* [2011] EWCA Civ 192, [2011] N.P.C. 26 (held at [40] that no misrepresentation or undue influence); *Davies v AIB Group (UK) Plc* [2012] EWHC 2178 (Ch), [2012] 2 P. & C.R. 19 (held at [113]–[114] that no undue influence: husband made full disclosure of the entire transaction and all of the relevant documents so as to put wife's solicitor in the position to tender full and informed advice to her); *Nature Resorts Ltd v First Citizens Bank Ltd* [2022] UKPC 10 (held at [20] that presumption of undue influence rebutted by fact that mortgage deed executed by educated businessman who exercised free and independent judgment, and (obiter) at [25]–[28] that there was, in any event, no presumption of undue influence that needed to be rebutted because the transaction was readily explicable).

- 854 [1994] 1 A.C. 180.
- 855 [1993] Q.B. 109.
- 856 [1994] 1 A.C. at 190.
- 857 [1994] 1 A.C. 190 at 191. For further consideration of what constitutes constructive notice, contrast the approach of Lord Brown-Wilkinson in *O'Brien*, at 195–196, with that of Millet J in *MacMillan Inc v Bishopsgate Investment Trust Plc (No.3)* [1995] 1 W.L.R. 978, 1014; and for resolution of any inconsistency between the two approaches, see Lord Neuberger MR in *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd* [2011] EWCA Civ 347, [2012] Ch. 435 at [109], as explained by Lord Clarke in *Crédit Agricole Corp and Investment Bank v Papadimitriou* [2015] UKPC 13 at [12]–[21].
- 858 [1994] 1 A.C. 190 at 196. cf. *CIBC Mortgages Plc v Pitt* [1994] 1 A.C. 200, heard at the same time as *O'Brien*, where the loan appeared on its face to be a joint one for the benefit of both husband and wife.
- 859 [1994] 1 A.C. 190 at 196; but note that Lord Browne-Wilkinson added that, in circumstances in which a bank had knowledge of specific facts which rendered undue influence probable rather than a mere possibility, it ought to insist that (and not only to suggest) that independent advice be taken by the chargor.
- 860 *Royal Bank of Scotland Plc v Etridge (No.2)* [2001] UKHL 44, [2002] 2 A.C. 773 at [51].
- 861 *Royal Bank of Scotland Plc v Etridge (No.2)* [2001] UKHL 44, [2002] 2 A.C. 773 at [51]. This probably goes further than contemplated in *Barclays Bank Plc v O'Brien* [1994] 1 A.C. 180, since Lord Browne-Wilkinson considered (at 197) that it would only be the exceptional case in which the bank should not only advise the surety to obtain independent legal advice but should insist that she do so. For statements of industry standards, see The Standards of Lending Practice for Personal Customers 2021 (published by the Lending Standards Board on 8 April 2021 and effective from 1 July 2021: para.36-223 above) and The Standards of Lending Practice for Business Customers 2020 (updated by the Lending Standards Board on 5 August 2020: para.36-224). See also the Lending Standards Board's Information for Practitioners, which include the Standards of Lending Practice for Personal Customers: Account Maintenance and Servicing (September 2016 and updated on a rolling basis) Pt 8, setting out the standards applied to individuals who offer personal guarantees and indemnities.
- 862 [2001] UKHL 44, [2002] 2 A.C. 773 at [55].

- 863 [2001] UKHL 44, [2002] 2 A.C. 773. The quote is from Lord Hobhouse at [98]. The opinion of Lord Nicholls was said to command “the unqualified support of all members of the House”: per Lord Bingham at [3].
- 864 The eighth appeal before the House, *Kenyon-Brown v Desmond Banks & Co (a firm)*, was a case in which the wife had sued the solicitor who acted for her in this type of transaction alleging breaches of duty owed to her by the solicitor. This case raised an issue as to the extent of the duty lying on a solicitor who acts for a wife who is proposing to grant a charge over her property as security for her husband’s, or his company’s, debts.
- 865 At [39], [108] and [145].
- 866 At [44], where Lord Nicholls went on to accept that even this phrase is a misnomer as the bank is not required to make any inquiries.
- 867 At [44].
- 868 At [44], [46]. But that does not mean that the wife will easily be able to establish undue influence in the first place. Lord Nicholls (at [30]) did not think that, in the ordinary course, a wife’s guarantee of her husband’s business debts was to be regarded as a transaction which, failing proof to the contrary, was explicable only on the basis that it had been procured by the exercise of undue influence by the husband. See also Lord Scott at [162]. See above, Vol.I, paras 10-122—10-123.
- 869 At [47].
- 870 At [84].
- 871 At [83], citing *Crédit Lyonnais Bank Nederland NV v Burch* [1997] 1 All E.R. 144.
- 872 At [87]–[89]. See *Bank of Scotland Plc v Makris* Unreported 15 May 2009 (relationship between surety and debtor was held not to be non-commercial where debtor was joint venture company and surety was director and shareholder who took active interest in the company). See also *Trustees of Beardsley Theobalds Retirement Benefit Scheme v Yardley* [2011] EWHC 1380 (QB) at [47] (employee’s guarantee of employer’s obligations as tenant under lease). But the *O’Brien* principle only applies to suretyship transactions, i.e. tripartite transactions as described by Lord Nicholls in *Etridge* at [43]: *Chancery Client Partners Ltd v MRC 957 Ltd* [2016] EWHC 2142 (Ch) at [28]–[29]; *Deane v Coutts & Co* [2018] EWHC 1657 (Ch) at [125]–[127].
- 873 *CIBC Mortgages Plc v Pitt* [1994] 1 A.C. 200, HL. See also *Mortgage Agency Services Number Two Ltd v Chater* [2003] EWCA Civ 490, [2004] 1 P. & C.R. 4 (joint loan to mother and son); *Bradley v Governor of the Bank of Ireland* [2016] NICH 11 (joint loan to mother and son). Similarly, a third party is unlikely to be put on constructive notice when the agreement will confer a joint tenancy on the wife: *Darjan Estate Co Plc v Hurley* [2012] EWHC 189 (Ch), [2012] 1 W.L.R. 1782 at [34], and above, Vol.I, para.10-148. But contrast *Davies v AIB Group (UK) Plc* [2012] EWHC 2178 (Ch), [2012] 2 P. & C.R. 19 at [117], obiter (bank aware that joint loan being made for purposes of husband’s company, as distinct from their joint purposes).
- 874 See, e.g. *Goode Durrant Administration v Biddulph* [1994] 2 F.L.R. 551 (a joint loan case).
- 875 At [49]. See *Mahon v FBN Bank (UK) Ltd* [2011] EWHC 1432 (Ch), [2011] B.P.I.R. 1029 (bank still put on inquiry despite wife being sole shareholder and company secretary); *Syndicate Bank v Dansingani* [2019] EWHC 3439 (Ch), affd. [2021] EWCA Civ 714

(bank put on inquiry despite husband and wife being directors and shareholders of debtor company); cf. *National Westminster Bank Plc v Alfano* [2012] EWHC 1020 (QB) at [54] (guarantors were directors or senior managers of debtor company). For loan made to family partnership, see *O'Neill v Ulster Bank Ltd* [2015] NICA 64, [2016] B.P.I.R. 126 at [17] (arguable that situation analogous to where wife stands surety for loan made to company in which she is a shareholder).

- 876 At [53].
- 877 At [53]. See also Lord Clyde at [94]–[95]; Lord Scott at [148].
- 878 At [54].
- 879 This includes the case where the certificate is given by a legal executive, provided that the advice was independent and was given with the authority of the legal executive's principal: *Barclays Bank Plc v Coleman* [2001] Q.B. 20 at [78], affirmed [2001] UKHL 44, [2002] 2 A.C. 773 at [292]. The mere fact that the wife has seen a solicitor is not enough without confirmation that he has given her independent advice: *Lloyds TSB Bank Plc v Holdgate* [2002] EWCA Civ 1543, [2003] H.L.R. 25; *First National Bank Plc v Achampong* [2003] EWCA Civ 487, [2004] 1 F.C.R. 18; cf. *Gov and Co of the Bank of Scotland v Hill* [2002] EWCA Civ 1081, [2002] 29 E.G.C.S. 152. See also *UCB Corporate Services Ltd v Williams* [2002] EWCA Civ 555, [2002] 3 F.C.R. 448 (bank did not even know wife had seen a solicitor); *Syndicate Bank v Dansingani* [2019] EWHC 3439 (Ch), affd. [2021] EWCA Civ 714 (wife's confirmation to bank that implications of guarantee were known to her, and that she did not need legal advice, was merely an example of husband's assertion of dominance and control over her financial affairs).
- 880 In *National Westminster Bank Plc v Amin* [2002] UKHL 9, [2002] 1 F.L.R. 735, it was not clear that this requirement had been met.
- 881 At [56]. The steps that a solicitor should take when advising the wife or other surety are set out in Vol.I, para.10-151. See also *Padden v Bevan Ashford Solicitors* [2011] EWCA Civ 1616, [2012] P.N.L.R. 14 and [2013] EWCA Civ 824 (appeal following retrial).
- 882 At [56]–[57]; and also Lord Scott at [175]. See also *HSBC Bank Plc v Brown* [2015] EWHC 359 (Ch) (where despite certificate being signed by a solicitor, the bank ought to have realised that the surety had not received appropriate advice).
- 883 At [79]. See *Royal Bank of Scotland v Chandra* [2010] EWHC 105 (Ch), [2010] 1 Lloyd's Rep. 677, especially at [173]–[175], for a case where the court had to decide whether the transaction was "past" or "future" for the purposes of the *Etridge* guidance (no discussion of this issue on appeal: see [2011] EWCA Civ 192, [2011] N.P.C. 26).
- 884 Lord Hobhouse at [100], who thought that it should be applied equally to past as well as future transactions because it represented a reasonable response to being put on inquiry.
- 885 At [190].
- 886 See also the Lending Standards Board's Standards of Lending Practice for Personal Customers 2021 (para.36-223 above) at p.7 (Account maintenance and servicing), AM7; Lending Standards Board's, Standards of Lending Practice for Business Customers 2020 (para.36-224 above) at pp.11–12 (Product execution), point 7; Lending Standards Board's, Standards of Lending Practice for Personal Customers: Account Maintenance and Servicing (September 2016 and updated on a rolling basis), Pt 8.

- 887 See also *Trustees of Beardsley Theobalds Retirement Benefit Scheme v Yardley [2011] EWHC 1380 (QB)* at [51]: guarantee of tenant's obligations under lease held unenforceable where landlord failed to obtain acknowledgement from solicitor that he had given appropriate advice to guarantor; *HSBC Bank Plc v Brown [2015] EWHC 359 (Ch)* (held bank proceeded at own risk where, despite certificate being signed by a solicitor, the bank ought to have realised that the surety had not received appropriate advice).
- 888 At [69]–[70].
- 889 At [74]. See also Lord Clyde at [96] and Lord Scott at [173].
- 890 At [74]. See also *Kapoor v National Westminster Bank Plc [2010] EWHC 2986 (Ch)*, where it was held that the wife had received independent legal advice, and the bank was entitled to rely on the solicitor's certificate that she had received that advice, despite the fact that the wife had ignored the bank's suggestion to consult a different solicitor than the one advising her husband.
- 891 A separate question is whether knowledge of the surety's solicitor should be imputed to her. The general rule is that, subject to any statutory variation, a solicitor's knowledge is treated as that of his client (see *AIB v Martin and Gold Unreported 15 March 1999*, Jacob J), but in *Davies v AIB Group (UK) Plc [2012] EWHC 2178 (Ch)*, [2012] 2 P. & C.R. 19 at [116], without deciding the issue, Norris J thought that some caution might be required in the context of undue influence arguments: "A principle of attributing the knowledge of an agent to the principal does not really assist in identifying how an intention to enter a transaction was produced—freely or under undue influence".
- 892 At [77]–[78]. See also Lord Hobhouse at [122].
- 893 At 77.
- 894 At [180].
- 895 Subject to the usual bars, including that restitutio in integrum is impossible (but it need not be precise); there has been affirmation or delay (*First National Bank Plc v Walker [2001] 1 F.C.R. 21, CA*); there has been intervention of a bona fide purchaser for value without notice (*CIBC Mortgages Plc v Pitt [1994] 1 A.C. 200*). See generally, Vol.I, para.10-132. If the property subject to the security is jointly owned by a husband and wife then, even though the security may not be enforceable against the wife, it may be against the husband, and so the court may still order the property to be sold, under the *Trusts of Land and Appointment of Trustees Act 1996* s.14, in order to realise the husband's share: see *First National Bank Plc v Achampong [2003] EWCA Civ 487, [2004] 1 F.C.R. 18* (noted by Thompson [2003] Conv. 314). See also *Edwards v Lloyds TSB [2004] EWHC 1745 (Ch)*; *Santander UK Plc v Fletcher [2018] EWHC 2778 (Ch)*.
- 896 *Royal Bank of Scotland Plc v Etridge (No.2) [2001] UKHL 44, [2002] 2 A.C. 773* at [39], [144]–[146]; *Banco Exterior Internacional SA v Thomas [1997] 1 W.L.R. 221*.
- 897 See *Dunbar Bank Plc v Nadeem [1998] 3 All E.R. 876, CA*; *Society of Lloyds v Khan [1998] 3 F.C.R. 93*. See also *National Commercial Bank (Jamaica) Ltd v Hew [2003] UKPC 51* at [43].
- 898 [1995] 1 W.L.R. 430.
- 899 At 437.

- 900 But contrast C. Mitchell, P. Mitchell and S. Watterson (eds), Goff and Jones, *The Law of Unjust Enrichment*, 9th edn (2016), paras 40-14—40-15. For opposing arguments, see J. O’Sullivan “*Undue Influence and Misrepresentation after O’Brien: Making Security Secure*”, Ch.3 of F.D. Rose (ed.), *Restitution and Banking Law* (1998), pp.64–69, and G. Virgo’s reply, which appears in Ch.4 of the same book, pp.76–77. In *De Molestina v Ponton [2002] 1 Lloyd's Rep. 271*, Colman J rejected partial rescission. In Australia rescission on terms is accepted (*Vadasz v Pioneer Concrete (SA) Pty Ltd* (1995) 184 C.L.R. 102, HC), as it is in New Zealand (*Scales Trading Ltd v Far Eastern Shipping Co Public Ltd* [1999] 3 N.Z.L.R. 26, CA; the Privy Council, having made a different factual finding, did not express an opinion on the issue, [2001] 1 N.Z.L.R. 513). See also J. Poole and A. Keyser, “*Justifying Partial Rescission in English Law*” (2005) 121 L.Q.R. 273.
- 901 But see *Castle Phillips Finance v Piddington* (1994) 70 P. & C.R. 59, an undue influence case, where the Court of Appeal was able to mitigate the effect of setting aside the charge in full by subrogating the creditor to an earlier, valid charge. Applied in *UCB Group Ltd v Hedworth* [2003] EWCA Civ 1717 (a case of sub-subrogation). By contrast, where an earlier charge is voidable for undue influence, a replacement charge, taken out as a condition of discharging the earlier charge, will also be voidable, even though the replacement charge was not itself procured by undue influence (*Yorkshire Bank Plc v Tinsley* [2004] EWCA Civ 816, [2004] 1 W.L.R. 2380, emphasising at [26], [32] and [39] that the two charges were “inseparably connected”). But this will only occur where the undue influence which procured the first charge remained “operative”, in the sense that the grantor of the security was unaware that the first charge could have been set aside. The grantor will not be entitled to set aside the second charge where she was aware of her right to set aside the first charge before she entered into the second charge (*Wadlow v Samuel* [2007] EWCA Civ 155).
- 902 *Barclays Bank Plc v Caplan* [1998] 1 F.L.R. 532, Ch D.
- 903 *Chetwynd-Talbot v Midland Bank Ltd* (1982) 132 N.L.J. 901; *O'Hara v Allied Irish Banks Ltd* [1985] B.C.L.C. 52; *Westpac Banking Corp v McCreanor* [1990] 1 N.Z.L.R. 580; *Shivas v Bank of New Zealand* [1990] 2 N.Z.L.R. 327; *Barclays Bank Plc v Khaira* [1992] 1 W.L.R. 623; and *Union Bank of Finland v Lelakis* [1995] C.L.C. 27. cf. *Cornish v Midland Bank Plc* [1985] 3 All E.R. 513 at 522–523, per Kerr LJ; *Shotter v Westpac Banking Corp* [1988] 2 N.Z.L.R. 316.
- 904 *Barclays Bank Plc v Khaira* [1992] 1 W.L.R. 623, 637, Morison QC, sitting as Deputy High Court judge.
- 905 *Union Bank of Finland v Lelakis* [1995] C.L.C. 27, 47, Clarke J.
- 906 [1985] 3 All E.R. 513, 522–523.
- 907 *Westpac Banking Corp v McCreanor* [1990] 1 N.Z.L.R. 580; *Shivas v Bank of New Zealand* [1990] 2 N.Z.L.R. 327; *Barclays Bank Plc v Khaira* [1992] 1 W.L.R. 623; and *Union Bank of Finland v Lelakis* [1995] C.L.C. 27. cf. *Shotter v Westpac Banking Corp* [1988] 2 N.Z.L.R. 316. Kerr LJ’s dictum was not considered by the Court of Appeal in *Barclays Bank Plc v O'Brien* [1993] Q.B. 109, where the issue appears to have been left open.
- 908 *Deane v Coutts & Co* [2018] EWHC 1657 (Ch) at [126].
- 909 [1987] F.L.R. 237 (no appeal on this point).
- 910 [1985] 3 All E.R. 513.

- 911 See also *Barclays Bank Plc v Khaira* [1992] 1 W.L.R. 623 at 634.
- 912 [1993] Q.B. 109 at 140–141. See also Purchas LJ at 156. The House of Lords did not deal with this issue.
- 913 In *Midland Bank Plc v Kidwai* [1995] 4 Bank. L.R. 303, 307–308, Morritt LJ emphasised that *O'Brien* principles do not require the bank to take on the duties of a solicitor or other independent adviser.
- 914 *Royal Bank of Scotland Plc v Ettridge (No.2)* [2001] UKHL 44, [2002] 2 A.C. 773 at [51]. See above, para.36-275.

## **(vi) - Banks as Constructive Trustees**

**Chitty on Contracts 34th Ed.**

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**Volume II - Specific Contracts**

**Chapter 36 - Bills of Exchange and Banking**

**Section 2. - Aspects of Banking Law**

**(b) - The Relationship of Banker and Customer**

**(vi) - Banks as Constructive Trustees**

### **Introduction**

36-287 A bank's liability as constructive trustee is, conceptually, distinguishable from its liability for the breach of a fiduciary duty or of a special duty of care. Liability for the breach of such a duty is usually maintainable only in cases in which there is a proximate relationship between the bank and the person who seeks to hold it liable. Normally such a person would have to be a customer. By contrast, the bank's liability as a constructive trustee is incurred when another person, who is a trustee or otherwise subject to fiduciary duties, has committed a breach of trust or fiduciary duty and the bank has become involved in the matter in such a manner as to become answerable. The victim's claim is, thus, based on the bank's act or omission and not on his being able to establish proximity with it. It follows that although in many of the cases in which banks were sued as constructive trustees the claimant was a customer, the fate of his claim did not depend on this circumstance.

### **The nature of constructive trust claims**

36-288 The starting point of any analysis of this area of law is the classic dictum of Lord Selborne L.C. in *Barnes v Addy*:

“... strangers are not to be made constructive trustees merely because they act as the agents of trustees in transactions within their legal powers, transactions perhaps of which a Court of Equity may disapprove, unless (i) those agents receive and become

chargeable with some part of the trust property, or (ii) unless they assist with knowledge in a dishonest and fraudulent design on the part of the trustees.”<sup>915</sup>

Further, his Lordship continued, to ensure that “the transactions of mankind” can be conducted with safety, it is necessary that:

“... persons dealing honestly as agents [be] at liberty to rely on the legal power of the trustees, and are not to have the character of trustees constructively imposed upon them”.<sup>916</sup>

This qualification is relevant in respect of both branches of the doctrine.

- 36-289 The first type of liability is generally known as liability for “knowing receipt”. The second type of liability was known as liability for “knowing assistance” until a change in the law in 1995 made it more appropriate to refer to it as liability for “dishonest assistance”. In both cases liability is personal and not proprietary.<sup>917</sup> But there the similarity ends. The two types of liability are fundamentally different. As Lord Nicholls observed in *Royal Brunei Airlines v Tan*:

“The first limb of Lord Selborne L.C.’s formulation is concerned with the liability of a person as a *recipient* of trust property or its traceable proceeds. The second limb is concerned with what, for want of a better compendious description, can be called the liability of an *accessory* to a trustee’s breach of trust. Liability as an accessory is not dependent upon receipt of trust property. It arises even though no trust property has reached the hands of the accessory. It is a form of secondary liability in the sense that it only arises where there has been a breach of trust.”<sup>918</sup>

Lord Nicholls went on to opine that whereas “recipient liability is restitution-based; accessory liability is not”.<sup>919</sup>

- 36-290 The distinction between the two types of liability was again highlighted by the Court of Appeal in *Grupo Torras SA v Al-Sabah*:

“The basis of liability in a case of knowing receipt is quite different from that in a case of dishonest assistance. One is a receipt-based liability which may on examination prove to be either a vindication of persistent property rights or a personal restitutionary claim based on unjust enrichment by subtraction; the other is a fault-based liability as an accessory to a breach of fiduciary duty.”<sup>920</sup>

It should be noted, however, that until the issue is authoritatively decided upon by the higher courts, the precise relationship between liability under the receipt category of constructive trusteeship and the law of restitution remains unclear and uncertain under English law.<sup>921</sup> By contrast, following the Privy Council's landmark decision in *Royal Brunei Airlines v Tan*, the requirements for accessory liability can now be stated with more certainty. Accessory liability is "fault-based"; the "touchstone of liability" is the accessory's dishonesty.<sup>922</sup>

## Dishonest assistance

- 36-291 Liability for dishonest assistance will be imposed on anyone who has dishonestly been accessory to, or assisted in, a disposition of property in breach of trust or other fiduciary obligation. In such a case the accessory or assister is traditionally described as a "constructive trustee" and said to be "liable to account as a constructive trustee".<sup>923</sup> However, as the accessory or assister does not have to receive any trust property for this type of liability to arise, it seems misleading to describe him as a trustee at all.<sup>924</sup> In fact, the expressions "constructive trust" and "constructive trustee" are really "nothing more than a formula for equitable relief".<sup>925</sup> It would be more accurate, and less confusing, to regard dishonest participation in a breach of trust as a species of equitable wrong<sup>926</sup>: "the equitable counterpart of the economic torts",<sup>927</sup> or an "equitable tort".<sup>928</sup> These are cases of "ancillary liability" where the intervention of equity is "purely remedial".<sup>929</sup> The remedy for the wrongdoing is compensation for the loss caused by the dishonest assistance.<sup>930</sup>

## Requirements for accessory liability

- 36-292 There are four requirements for accessory liability to be imposed:
- (i)there must have been a trust or other fiduciary relationship;
  - (ii)there must have been a misfeasance or other breach of trust, though *Tan* establishes that such misfeasance or breach of trust need not itself be dishonest or fraudulent;
  - (iii)the person upon whom liability is to be imposed must, as a matter of fact, have been accessory to, or assisted in, the misfeasance or breach of trust, and
  - (iv)the accessory must have been dishonest.<sup>931</sup>

### **(i) Trust or other fiduciary relationship:**

36-293

Although the *Barnes v Addy* doctrine started life as a response to the misapplication of trust funds by express trustees, its coverage has since been extended to include the breach of fiduciary duties by others. The doctrine is now commonly applied in the corporate context where directors and other senior officers of the company are deemed to owe fiduciary duties to the company.<sup>932</sup>

## (ii) Misfeasance or other breach of trust:

36-294 In *Barnes v Addy*, Lord Selborne L.C. specifically referred to assistance “in a dishonest and fraudulent design on the part of the trustees”.<sup>933</sup> An attempt by Ungoed-Thomas J, in *Selangor United Rubber Estates Ltd v Cradock (No.3)*,<sup>934</sup> to jettison the reference to dishonesty and fraud, was emphatically rejected by the Court of Appeal in *Belmont Finance Corp Ltd v Williams*,<sup>935</sup> on the ground that to depart from it would introduce an undesirable degree of uncertainty over what degree of unethical conduct would suffice if dishonesty was not to be the criterion. It was not until 1995, when the Privy Council delivered its advice in *Royal Brunei Airlines v Tan*,<sup>936</sup> that the need to establish dishonesty or fraud on the part of the trustee or other fiduciary was finally abandoned as a prerequisite to accessory liability. This was the main point at issue in the case. Those earlier authorities holding that the breach of trust must be fraudulent may now be taken as overruled, although it should be noted that in most cases the breach of trust is likely to be a dishonest one.<sup>937</sup>

There remains uncertainty as to whether liability as a constructive trustee is restricted to assistance in a breach of trust in relation to property or whether it also extends to a case of dishonest assistance in *any* breach of fiduciary duty. In *Tan*, Lord Nicholls stated that:

“... a liability in equity to make good resulting loss attaches to a person who dishonestly procures or assists in a breach of trust or fiduciary obligation”.<sup>938</sup>

Lord Nicholls’ formulation does not require the misapplication of trust property or its proceeds, but as the point was not in issue in that case, where trust property had certainly been misappropriated, this cannot be taken as the last word on the subject. The issue was left open in a number of cases,<sup>939</sup> though in others the broader approach was rejected.<sup>940</sup> However, the Court of Appeal has recently held in *Novoship (UK) Ltd v Mikhaylyuk* that “the remedy of an account of profits is available against one who dishonestly assists a fiduciary to breach his fiduciary obligations, even if that breach does not involve a misappropriation of trust property”.<sup>941</sup>

## (iii) Accessory or assister:

36-296

The person upon whom liability is to be imposed must as a matter of fact have been accessory or assisted in the misfeasance or breach of trust. What is sufficient for “assistance” is “simply conduct which in fact assists the fiduciary to commit the act which constitutes the breach of trust or fiduciary duty”.<sup>942</sup> In many cases banks will not find it easy to avoid the charge that they were accessory to or assisted in a breach of trust, especially one that involves the fraudulent misapplication of trust funds. The provision of banking services to persons behaving in a fraudulent or improper manner often exposes a bank to potential liability under this head. The misapplied trust funds will usually be held in bank accounts and moved between bank accounts. The banks that hold those accounts, as well as any other bank involved as an intermediary in the funds transfer process, run the risk of being accused of providing assistance to the dishonest fiduciary. For example, payment by a bank on the instructions of fraudulent directors of a company of moneys of the company to another person may be such assistance.<sup>943</sup> More worrying still, at least from the bank’s point of view, is that the mere provision of advisory services to the fiduciary can be deemed “assistance” where there is a sufficient causative link between that advice and the breach of trust,<sup>944</sup> even though the bank itself never comes into contact with the misapplied funds.<sup>945</sup> It is because the “assistance” net can be cast so widely that attention has focused so crucially on the level of mental intent required the person giving assistance for him to be held liable under this head of constructive trusteeship. Banks and other financial institutions involved in millions of money transmission activities on a daily basis, and so particularly vulnerable to the charge of “assistance”, have always argued that the level of mental intent should be high.

#### (iv) Dishonesty:

36-297

The accessory must have been dishonest. It is the presence of the necessary level of mental intent, which, following *Royal Brunei Airlines v Tan*,<sup>946</sup> is dishonesty, that is the fourth requirement for accessory liability to be imposed. *Tan* has finally settled an issue that has plagued the English courts for many years.<sup>947</sup> The decision is to be welcomed for bringing a greater degree of certainty to this notoriously difficult area.

36-298



In *Tan*, Lord Nicholls, speaking by way of obiter dicta, confirmed that “dishonesty is a necessary ingredient of accessory liability. It is also a sufficient ingredient”.<sup>948</sup> Lord Nicholls also attempted to clarify the meaning of dishonesty in this context. The key passage from his judgment reads as follows:

“Whatever may be the position in some criminal or other context (see, for instance, *R. v Ghosh [1982] Q.B. 1053*),<sup>949</sup> in the context of the accessory liability principle acting dishonestly, or with a lack of probity, which is synonymous, means simply not

acting as an honest person would in the circumstances. This is an objective standard. At first sight this may seem surprising. Honesty has a connotation of subjectivity, as distinct from the objectivity of negligence. Honesty, indeed, does have a strong subjective element in that it is a description of a type of conduct assessed in the light of what a person actually knew at the time, as distinct from what a reasonable person would have known or appreciated. Further, honesty and its counterpart dishonesty are mostly concerned with advertent conduct, not inadvertent conduct. Carelessness is not dishonesty. Thus for the most part dishonesty is to be equated with a conscious impropriety. However, these subjective characteristics of honesty do not mean that individuals are free to set their own standards of honesty in particular circumstances. The standard of what constitutes honest conduct is not subjective. Honesty is not an optional scale, with higher or lower values according to the moral standards of each individual. If a person knowingly appropriates another's property, he will not escape a finding of dishonesty simply because he sees nothing wrong in such behaviour. In most situations there is little difficulty in identifying how an honest person would behave. Honest people do not intentionally deceive others to their detriment. Honest people do not knowingly take others' property. Unless there is a very good and compelling reason, an honest person does not participate in a transaction if he knows it involves a misapplication of trust assets to the detriment of the beneficiaries. Nor does an honest person in such a case deliberately close his eyes and ears, or deliberately not ask questions, lest he learns something he would rather not know, and then proceed regardless.”

<sup>950</sup>

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36-299

Lord Nicholls expressly referred to an “objective standard” of dishonesty. But he also spoke of honesty having “a strong subjective element” and that, for the most part, “dishonesty is to be equated with a conscious impropriety”. This left room for doubt and uncertainty as to the precise test to be adopted when assessing whether or not an accessory has been dishonest.<sup>951</sup> However, the “now clearly established”<sup>952</sup> test of dishonesty was explained in *Barlow Clowes International Ltd v Eurotrust International Ltd* by Lord Hoffmann as follows<sup>953</sup>:

“Although a dishonest state of mind is a subjective mental state, the standard by which the law determines whether it is dishonest is objective. If by ordinary standards a defendant's mental state would be characterised as dishonest, it is irrelevant that the defendant judges by different standards. Their Lordships held this to be a correct state of the law and their Lordships agree.”

In *Ivy v Genting Casinos (UK) Ltd*,<sup>954</sup> where the Supreme Court (obiter) adopted a unified test of dishonesty in both criminal and civil law, Lord Hughes acknowledged that the test of

dishonesty was as set out by Lord Nicholls in *Royal Brunei Airlines Sdn Bhd v Tan*, and by Lord Hoffmann in *Barlow Clowes*, and continued:

“When dishonesty is in question the fact-finding tribunal must first ascertain (subjectively) the actual state of the individual’s knowledge or belief as to the facts. The reasonableness or otherwise of his belief is a matter of evidence (often in practice determinative) going to whether he held the belief, but it is not an additional requirement that his belief must be reasonable; the question is whether it is genuinely held. When once his actual state of mind as to knowledge or belief as to facts is established, the question whether his conduct was honest or dishonest is to be determined by the fact-finder by applying the (objective) standards of ordinary decent people. There is no requirement that the defendant must appreciate that what he has done is, by those standards, dishonest.”

36-300

The *Ivey* test was adopted by the Court of Appeal in *Group Seven Ltd v Notable Services LLP*,  
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**U** a dishonest assistance case where knowledge was confined to actual and blind-eye knowledge for the purpose of the subjective first stage of the test: the existence of mere suspicions falling short of blind-eye knowledge, and the weight (if any) to be attributed to them, were matters to be taken into account at the objective second stage of the test. The imputation of blind-eye knowledge requires there to be (i) the existence of a suspicion, grounded on specific facts, that certain other facts may exist, and (ii) a conscious decision to refrain from taking any steps to confirm their existence.

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**U** Obiter, the Court of Appeal took the provisional view that the simplicity of the two-stage *Ivey* test for dishonesty should not be complicated by the introduction, as a matter of law, of a “minimum content of knowledge” requirement.

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**U** If dishonesty and blind eye knowledge is to be alleged against corporations, large or small, it has to be evidenced by the dishonesty of one or more natural persons: it is not possible to aggregate two innocent minds to make a dishonest whole.

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## Knowing receipt

- 36-301 The liability of a recipient of property disposed of in breach of trust is generally known as liability for knowing receipt.<sup>959</sup> The liability is personal and is to restore the value of any property received in breach of trust.<sup>960</sup>

## Requirements of recipient liability

- 36-302 There are three requirements, all of which must be met, for liability to arise under this category. They were summarised by Hoffmann LJ in *El Ajou v Dollar Land Holdings*, when he stated that the claimant must show:

“... first, a disposal of his assets in breach of fiduciary duty; secondly, the beneficial receipt by the defendant of assets which are traceable as representing the assets of the [claimant]; and thirdly, knowledge on the part of the defendant that the assets he received are traceable to a breach of fiduciary duty.”<sup>961</sup>

## Types of knowing receipt

- 36-303 In *Agip (Africa) Ltd v Jackson*, Millett J identified two main types of “knowing receipt” as follows:

“The first is concerned with that of the person who receives for his own benefit trust property transferred to him in breach of trust. He is liable as a constructive trustee if he receives with notice, actual or constructive, that it was trust property and that the transfer to him was a breach of trust; or if he received it without notice but subsequently discovered the facts. In either case he is liable to account for the property, in the first case as from the time he received the property, and in the second as from the time he acquired notice.

The second and ... distinct class of case is that of a person, usually an agent of the trustees, who receives the property lawfully and not for his own benefit but who then either misappropriates it or otherwise deals with it in a manner inconsistent with the trust. He is liable to account as constructive trustee if he received the trust property

knowing it to be such, though he will not necessarily be required in all circumstances to have known the exact terms of the trust.”<sup>962</sup>

The second class is sometimes referred to as “liability for inconsistent dealing”. But where the inconsistent dealing is not for the benefit of the agent, there seems to be a good case for saying that liability only arises if there has been dishonest assistance because beneficial receipt is the essence of the knowing receipt type constructive trust.<sup>963</sup>

## Beneficial receipt

36-304 If the transferred property is not trust property, there can be no liability for “knowing receipt”.

**U** 964

**U** Liability depends on *beneficial* receipt of the property disposed of in breach of trust or of its traceable product. Agents who receive trust money in a ministerial capacity, i.e. for the benefit of their principal and not for their own use and benefit, are not to be made liable for “knowing receipt”.

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**U** In *Agip (Africa) Ltd v Jackson*,

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**U** Millett J expressed the clear view (obiter) that paying and collecting banks could not normally be brought within the “knowing receipt” category since they do not generally receive money for their own benefit, acting only as their customer’s agent, but that the position would be otherwise if the collecting bank uses the money to reduce or discharge the customer’s overdraft, when it would be using the money for its own benefit.

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**U**

36-305 A bank account may fluctuate between credit and debit and so it may not be easy to ascertain whether money received into the account was received beneficially or not. Writing extra-judicially, Lord Millett (as he became) emphasised that the mere continuation of a running account should not be sufficient to render the bank liable as a recipient: there must probably be some conscious appropriation of the sum paid into the account in reduction of the overdraft.<sup>968</sup> This provides an important gloss to his Lordship’s dictum in *Agip*, although we await a court to adopt it.

36-306

Following Lord Millett's reasoning, if a bank receives trust property into an account in credit, knowing that it has been paid in breach of trust, the bank cannot be held liable under the "knowing receipt" category of constructive trust: it may, however, be held liable under the "dishonest assistance" category if the necessary elements of that head of liability are all present. Of course, a bank would be considered to have *beneficially* received trust property where it exercised a right of set-off against it once it was credited to the account, or debited its commission, fees or other charges against the trust property. Again, some conscious appropriation by the bank seems necessary.<sup>969</sup>

- 36-307 In *Trustor AB v Smallbone (No.2)*,<sup>970</sup> Morritt VC held that a court was entitled to pierce the corporate veil and recognise receipt by a company as receipt by the individuals in control of the company if the company was used as a device or façade to conceal the true facts thereby avoiding or concealing any liability of those individuals.

## Level of knowledge required

- 36-308 The third requirement, identified by Hoffmann LJ in *El Ajou v Dollar Land Holdings*,<sup>971</sup> for receipt-based liability relates to the knowledge of the recipient. Liability depends on the recipient's knowledge of the breach of trust. For this purpose, reference is often made the five categories of "knowledge" set out by Peter Gibson J in 1983 in *Baden v Société Générale pour Favoriser le Développement du Commerce et de l'Industrie en France SA*.<sup>972</sup> In that case the judge divided "knowledge" into the following five categories:

- (1)actual knowledge;
- (2)wilfully shutting one's eyes to the truth;
- (3)wilfully and recklessly failing to make such inquiries as a reasonable and honest man would make;
- (4)knowledge of circumstances which would indicate the facts to an honest and reasonable man; and
- (5)knowledge of circumstances which would put a reasonable man on inquiry.

Categories (1) to (3) represent "dishonesty"; categories (4) and (5) denote "negligence".

- 36-309 Some cases support the view that liability only arises if the recipient has knowledge falling within the first three *Baden* categories, i.e. only in cases of dishonesty or want of probity.<sup>973</sup> This approach has the superficial attraction of putting the level of knowledge necessary for the receipt category of liability on a par with the need for dishonesty under the assistance category. However, it ignores the fact that a recipient *beneficially* receives trust property, whereas the defendant may have assisted another's breach of trust without necessarily being personally enriched. This fact

alone seems to argue in favour of some difference in measure between them. Other cases suggest that knowledge within the first three categories is required in commercial transactions, but that knowledge falling within any of the five categories (so as to include constructive notice) is enough in non-commercial transactions.<sup>974</sup> A third line of cases support the view that liability arises whenever the recipient has knowledge falling within any of the five *Baden* categories, i.e. even negligence is enough to give rise to receipt-based liability.<sup>975</sup>

## Unconscionability as the test of liability

- 36-310** In *BCCI v Akindele*<sup>976</sup> *BCCI*'s liquidators claimed that A, a Nigerian businessman, was liable to repay the proceeds of an investment agreement that had been executed by *BCCI*'s directors in breach of trust. The liquidators claimed under both the "knowing receipt" and "dishonest assistance" heads of constructive trust. At first instance, both claims failed. There was no appeal on the assistance claim as the liquidators could not prove that A had been dishonest. The issue before the Court of Appeal turned on the level of knowledge required to impose liability under the receipt category. Nourse LJ delivered the judgment of the Court, which can be summarised as follows. First, dishonesty is not a necessary ingredient of liability in knowing receipt. Secondly, just as there is a single test of dishonesty for knowing assistance (see *Tan*), there should be a single test of knowledge for knowing receipt. Thirdly, all that is necessary is that the recipient's state of knowledge must be such as to make it unconscionable for him to retain the benefit of the receipt. Fourthly, a test based on unconscionability, while it could not avoid difficulties of application, ought to avoid the difficulties of definition which have bedevilled other categorisations of the requisite degree of knowledge, such as the *Baden* five point scale.<sup>977</sup> Applying the test of unconscionability to the facts of the case, the Court of Appeal held that A's state of knowledge was not such as to have made him liable under the head of knowing receipt.
- 36-311** It is submitted that the rejection of dishonesty as the appropriate fault element for knowing receipt is welcome. It is more appropriate to a cause of action founded on culpable acts, e.g. procuring or assisting a breach of trust, than it is to passive receipt.<sup>978</sup> However, the term "unconscionable" lacks objectivity and is open to subjective interpretation. This leads to uncertainty. In *Tan*, Lord Nicholls was particularly critical of the use of unconscionability as the test of liability for assistance:

"… [i]f it means no more than dishonesty, then dishonesty is the preferable label. If it means something different, it must be said that it is not clear what that something different is. Either way, the term is best avoided in this context."<sup>979</sup>

There has already been speculation as to what the term “unconscionable” means in this context.<sup>980</sup> In *Criterion Properties Plc v Stratford UK Properties LLC*,<sup>981</sup> the Court of Appeal held that an assessment of unconscionability based merely on whether the recipient had actual knowledge of the circumstances which gave rise to the breach of duty “was too narrow and one-sided a view of the matter”.

<sup>982</sup>

**U** The court was to have regard to the recipient’s actions and knowledge in the context of the commercial relationship as a whole to determine whether the test of unconscionability was satisfied. In *Akindele*, Nourse LJ was at pains to emphasise that the new test would enable the courts to give common sense decisions in the commercial context. This seems to mean that the courts will pay equal regard to the need for speed in commercial transactions, which limits the ability to investigate matters, while also recognising that there must be cases where there is no justification on the known facts for allowing a commercial man who has received funds paid in breach of trust to plead the shelter of the exigencies of commercial life.<sup>983</sup>

## Strict liability

36-312 Before *BCCI v Akindele*

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**U** was decided, it was sometimes suggested that liability for knowing receipt was restitutionary. Certain distinguished judges and scholars argued in favour of a standard of strict liability subject only to the defences of bona fide purchaser without notice and change of position.

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**U** Nourse LJ touched on the issue in *Akindele*. His Lordship doubted whether strict liability coupled with a change of position defence would be preferable to fault-based liability in many commercial transactions.

<sup>986</sup>

**U** Nourse LJ thought it was commercially unworkable, and also contrary to the internal management rule of company law, that simply on proof of an internal misapplication of the company’s funds, the burden should shift to the recipient to defend the receipt either by change of position or in some other way. There does seem good sense in this last observation. More recently, in *Byers v Samba Financial Group*, Newey LJ noted that, post-*Akindele*, the restitutionary explanation of knowing receipt had not prevailed.

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**U** For the moment, the issue must await determination by the Supreme Court.

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## Fault-based or property-based liability?

36-313 *Byers v Samba Financial Group*

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**U** raised the important question of whether a transferee, who upon receipt obtained title to the transferred property free from a beneficiary's equitable proprietary interest, could still be personally liable in equity for knowing receipt because he received the property with sufficient knowledge that the transfer was in breach of contract. Fancourt J (at first instance) noted that the question did not arise in relation to English property under the general law of England and Wales: a transferee who had sufficient knowledge of breach of trust could not be a bona fide purchaser of a legal estate without notice of the breach of trust.

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**U** However, he acknowledged that the question might arise under a statutory scheme for registration of title, e.g. under the *Land Registration Act 2002* or, as in the case before him, where under the applicable foreign law of property the transferee's title might have priority to the interest of the beneficial owner and knowledge of the interest was irrelevant.

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36-314 Fancourt J held that a claim in knowing receipt, where dishonest assistance was not alleged, would fail if, at the moment of receipt, the beneficiary's equitable proprietary interest was destroyed or overridden under the law applicable to the transfer, which he held to have occurred in the case before him.

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**U** The Court of Appeal upheld that decision.

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**U** Extinction of the beneficiary's equitable proprietary interest in the trust property under the lex situs defeated the claim in knowing receipt.

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**U** Newey LJ (delivering the judgment of the court) stated

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**U** :

“In short, a continuing proprietary interest in the relevant property is required for a knowing receipt claim to be possible. A defendant cannot be liable for knowing receipt if he took the property free of any interest of the claimant.”

Newey LJ rejected an explanation of knowing receipt that is based exclusively on fault on the ground that, for liability to arise, the defendant must also have received trust property or its traceable proceeds.

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Newey LJ’s reasoning appears to endorse a property-based explanation of knowing receipt.

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## Duties of care: third parties

- 36-315 The relaxation of the test of knowledge in the *Royal Brunei* case may have a bearing on yet another type of action that is occasionally brought against banks by persons other than customers, namely, an action in negligence based on the breach of a duty of care. Notably, in *Lipkin Gorman*,<sup>998</sup> the Court of Appeal indicated that, usually, such an action would succeed only in circumstances that might also give rise to an action in constructive trust. In a more recent case, *Chapman v Barclays Bank Plc*,<sup>999</sup> the Court of Appeal indicated, however, that such an action would lie only if a certain proximity between the bank and the claimant could be established on the facts. It is believed that, generally, the chances of a third party are, accordingly, slim.<sup>1000</sup>

## Footnotes

915 (1874) 9 Ch. App. 244 at 251.

916 (1874) 9 Ch. App. 244 at 251.

917 See *Re Montagu's ST* [1987] Ch. 264, 276, per Megarry VC, dealing with knowing receipt; *Twinsectra Ltd v Yardley* [1999] Lloyd's Rep. Bank. 438, 467, per Potter LJ, dealing with dishonest assistance.

918 [1995] 2 A.C. 378 at 382.

919 At 386.

920 [2001] Lloyd's Rep. Bank. 36 at [122]. See also *Byers v Samba Financial Group* [2021] EWHC 60 (Ch) at [108]–[109].

- 921 See below, paras 36-312—36-314.
- 922 See below, para.36-297.
- 923 See, e.g., *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] A.C. 669, 705, per Lord Browne-Wilkinson.
- 924 *Agip (Africa) Ltd v Jackson* [1990] Ch. 265, 292, per Millett J; *Paragon Finance Plc v DB Thakerar & Co (a firm)* [1999] 1 All E.R. 400, 409, per Millett LJ; *Dubai Aluminium Co Ltd v Salaam* [2002] UKHL 48, [2003] 2 A.C. 366 at [141], per Lord Millett. See generally, W. Swadling, “*The Fiction of the Constructive Trust*” (2011) 64 C.L.P. 400, especially 414–416; contrast C. Mitchell and S. Watterson, “Remedies for Knowing Receipt” in C. Mitchell (ed.), *Constructive and Resulting Trusts* (2010), pp.115–158, especially 129.
- 925 *Selangor United Rubber Ltd v Cradock (No.3)* [1968] 1 W.L.R. 155, 1582, per Ungoed-Thomas J.
- 926 See *Grupo Torras SA v Al-Sabah* [2001] *Lloyd's Rep. Bank.* 36 at [123], CA; *Casio Computer Co Ltd v Sayo* [2001] EWCA Civ 661 at [14]. See also Lord Nicholls, “Knowing Receipt: The Need for a New Landmark” Ch.15 in Cornish et al (eds), *Restitution—Past, Present and Future* (Oxford: Hart Publishing, 1988), 244.
- 927 *Twinsectra Ltd v Yardley* [2002] UKHL 12, [2002] 2 A.C. 164 at [127], per Lord Millett.
- 928 *Abou-Rahmah v Abacha* [2006] EWCA Civ 1492, [2007] 1 *Lloyd's Rep.* 115 at [2], per Rix LJ.
- 929 *Williams v Central Bank of Nigeria* [2014] UKSC 10, [2014] A.C. 1189 at [9], per Lord Sumption. The Supreme Court held (by a majority) that the words “trust” and “trustee” in s.21(1)(a) of the *Limitation Act 1980* bear their orthodox meanings, and that “trustee” does not include those who are liable to account in equity because they have dishonestly assisted in a breach of trust or knowingly received trust property. It was also held (by an even narrower majority) that the words “party or privy” to a fraud or fraudulent breach of trust within s.21(1) (a) applies only to claims brought against trustees and not to claims brought against anyone else who is involved in the fraud or fraudulent breach of trust, and that, in consequence, the limitation period for claims against dishonest assisters and knowing recipients is six years (but note the effect of s.32 of the 1980 Act which, in certain cases, postpones the commencement of the six years). For useful notes, see S. Watterson [2014] C.L.J. 253 and P. Davies [2014] L.M.C.L.Q. 313.
- 930 *Sinclair Investment Holdings SA v Versailles Trade Finance Ltd* [2007] EWHC 915 (Ch), [2007] 2 All E.R. (Comm) 993 at [120]–[125], where Rimer J stressed that the remedy was personal and not proprietary. Sometimes an account of profits will be awarded against an accessory who profits from the assistance: see *Novoship (UK) Ltd v Mikhaylyuk* [2014] EWCA Civ 908, [2015] Q.B. 499, requiring a sufficiently direct causal connection between the accessory’s gain and the dishonest assistance (noted by P. Davies (2015) 131 L.Q.R. 173; P. Devonshire [2015] C.L.J. 222); cf. *Akita Holdings Ltd v AG of Turks and Caicos Islands* [2017] UKPC 7, [2017] A.C. 590 and *Lifeplan Australia Friendly Society Ltd v Ancient Order of Foresters in Victoria Friendly Society Ltd* [2017] FCAFC 74, (2017) 250 F.C.R. 1 for approaches conflicting with *Novoship* (noted by P.G. Turner [2018] C.L.J. 255), and also *Ancient Order of Foresters in Victoria Friendly Society Ltd v Lifeplan Australia Friendly Society Ltd* [2018] HCA 43, (2018) 360 A.L.R. 1, HC of Aust (noted by A.B. Douglas (2019)

- 135 L.Q.R. 214). For further discussion of the remedies available against a dishonest assister, see *S.B. Elliott and C. Mitchell* (2004) 67 M.L.R. 16; *S. Baughen* [2007] L.M.C.L.Q. 545, 556–558; *P. Ridge* (2008) 124 L.Q.R. 445.
- 931 As summarised by Cresswell J in *Bankgesellschaft Berlin AG v Makris* Unreported 22 January 1999. See also summary in *FM Capital Partners Ltd v Marino* [2018] EWHC 1768 (Comm) at [82]–[85]; and in *Magner v Royal Bank of Scotland International Ltd* [2020] UKPC 5 at [10].
- 932 See, e.g. *Agip (Africa) Ltd v Jackson* [1990] Ch. 265; affirmed [1991] Ch. 547.
- 933 [1874] 9 Ch. App. 244 at 252.
- 934 [1968] 1 W.L.R. 1555.
- 935 [1979] Ch. 250.
- 936 [1995] 2 A.C. 378.
- 937 *W. Blair* (2000) 30 H.K.L.J. 74 at 88, n.44.
- 938 [1995] 2 A.C. 378 at 392.
- 939 *Brown v Bennett* [1999] 1 B.C.L.C. 649; *Fyffes Group Ltd v Templeman* [2000] 2 Lloyd's Rep. 643; *Goose v Wilson Sandiford & Co (No.2)* [2000] EWCA Civ 73, [2001] Lloyd's Rep. P.N. 189 at [88]; *Gencor ACP Ltd v Dalby* [2000] 2 B.C.L.C. 734, 757; *JD Wetherspoon Plc v Van de Berg & Co Ltd* [2009] EWHC 639 (Ch) at [518]; *Fiona Trust & Holding Corp v Privalov* [2010] EWHC 3199 (Comm) at [61].
- 940 *Satnam Investments Ltd v Dunlop Heywood & Co Ltd* [1999] 3 All E.R. 652, 651; *Petrotrade Inc v Smith* [2000] 1 Lloyd's Rep. 486, 491–492.
- 941 [2014] EWCA Civ 908, [2015] Q.B. 499 at [93]; per Longmore LJ (delivering the judgment of the court). See also *Schenk v Cook* [2017] EWHC 144 (QB) at [85].
- 942 *Madoff Securities International v Raven* [2013] EWHC 3147 (Comm) at [351].
- 943 See, e.g. *Selangor United Rubber Estates Ltd v Cradock (No.3)* [1968] 1 W.L.R. 1555; *Karak v Rubber Co Ltd v Burden (No.2)* [1972] 1 W.L.R. 602.
- 944 See *Brown v Bennett* [1999] B.C.C. 525 at 533.
- 945 In *Casio Computer Co Ltd v Sayo* [2001] EWCA Civ 661 at [15], the Court of Appeal held that loss caused by the breach of fiduciary duty is recoverable from the accessory without the need to show a precise causal link between the assistance and the loss. See also *Group Seven Ltd v Notable Services LLP* [2019] EWCA Civ 614 at [110]: “On authority, the matter must be approached in two stages. It must be shown that the conduct in fact assisted the breach of trust, and that the loss directly resulted from the breach of trust. The test at the first stage is that the assistance given must be more than minimal … The test at the second stage is that the loss in fact resulted from the breach of trust … What must be shown is that the conduct assisted the breach of trust and that but for the breach of trust the loss would not have occurred”. In *Bilta (UK) Ltd v Natwest Markets Plc* [2020] EWHC 546 (Ch) at [162]–[174], appeal allowed on finding of dishonesty and matter remitted for retrial [2021] EWCA Civ 680 (an unusual case, applying *Alpha Sim v CAZ Distribution Services* [2014] EWHC 207 (Ch)), it was held that the assistance of the defendant banks was through purchases by its traders of carbon credits from an intermediary that had purchased the credits from the claimant companies whose directors had acted in breach of fiduciary duty.
- 946 [1995] 2 A.C. 378.

- 947 For a thorough review of the conflicting authorities, see E.P. Ellinger and E. Lomnicka, *Modern Banking Law*, 2nd edn (1994), pp.205–211.
- 948 At 392.
- 949 In *Ivey v Genting Casinos (UK) Ltd [2017] UKSC 67, [2017] 3 W.L.R. 1212* the Supreme Court (obiter) has since adopted a unified test of dishonesty in both criminal and civil law which is essentially objective. Lord Hughes, delivering the judgment of the court, stated (at [74]) that the second (subjective) limb of the test propounded in *Ghosh* did not correctly represent the law. In *R. v Barton [2020] EWCA Crim 575, [2020] 3 W.L.R. 1333* at [105], the *Ivey* test of dishonesty was held by the Court of Appeal to apply in all criminal cases.
- ⑨50 At 389. Recklessness is not equivalent to dishonesty but it can be a sign of dishonesty: see Lord Nicholls at 389–391, as interpreted by Lewison LJ in *Clydesdale Bank Plc v Workman [2016] EWCA Civ 73, [2016] P.N.L.R. 18* at [48]–[53]. Lord Nicholls said that “[c]arelessness is not dishonesty” (above). See also *Ivey v Genting Casinos (UK) Ltd [2017] UKSC 67, [2017] 3 W.L.R. 1212* at [62]; *Singularis Holdings Ltd (In Liquidation) v Daiwa Capital Markets Europe Ltd [2017] EWHC 257 (Ch)* at [147], affirmed on other grounds [2018] EWCA Civ 84 and [2019] UKSC 50; *Stanford International Bank Ltd v HSBC Bank Plc [2021] EWCA Civ 535* at [46]–[47]; *Royal Bank of Scotland International Ltd v JP SPC 4 [2022] UKPC 18* at [88].
- 951 In *Twinsectra Ltd v Yardley [2002] UKHL 12, [2002] 2 A.C. 164* a majority of the House of Lords held that a “combined test” of dishonesty was to be applied in a case of dishonest assistance; in other words, before there could be a finding of dishonesty it must be established that the defendant’s conduct was dishonest by the ordinary standards of reasonable and honest people (the objective element) and that he himself realised that by those standards his conduct was dishonest (the subjective element).
- 952 *Ivey v Genting Casinos (UK) Ltd [2017] UKSC 67, [2017] 3 W.L.R. 1212* at [62], per Lord Hughes (obiter).
- 953 [2005] UKPC 37, [2006] 1 W.L.R. 1476 at [10]. Lord Hoffmann was also a party to the *Twinsectra* decision (above).
- 954 [2017] UKSC 67, [2017] 3 W.L.R. 1212 at [74].
- ⑨55 [2019] EWCA Civ 614, [2019] 3 W.L.R. 1011 at [52]–[58]. Other cases where the *Ivey* test has been applied to dishonest assistance claims include *Manolete Partners Plc v Nag [2022] EWHC 153 (Ch)* at [86]; *Stanford International Bank Ltd v HSBC Bank Plc [2021] EWCA Civ 535* at [41]; *Bilta (UK) Ltd v Natwest Markets Plc [2020] EWHC 546 (Ch)* at [160], appeal allowed on finding of dishonesty and matter remitted to retrial, but with the CA holding that judge had correctly directed himself as to the law on dishonest assistance [2021] EWCA Civ 680 at [122] and [134]; *Payroller Ltd (In Liquidation) v Little Panda Consultants Ltd [2020] EWHC 391 (QB)* at [66]; *Iranian Offshore Engineering & Construction Co v Dean Investment Holdings SA [2019] EWHC 472 (Comm)* at [153]; *FM Capital Partners Ltd v Marino [2018] EWHC 1768 (Comm)* at [82] (and see [2019] EWHC 725 (Comm) for issues arising from the taking of an account in relation to equitable compensation for dishonest assistance in this case); *Carr v Formation Group Plc [2018] EWHC 3116 (Ch)* at

[20]–[28] (expert evidence of market practice not admissible in relation to objective standard as to dishonesty); *Autogas (Europe) Ltd v Ochocki* [2018] EWHC 2345 (Ch) at [13]–[14]. In *Magner v Royal Bank of Scotland International Ltd* [2020] UKPC 5 at [11], Lord Hodge stated that the Solicitors Act 1974 s.85 “does not release a bank or building society from liability for the dishonest assistance of the misappropriation by a solicitor of his clients’ funds. But it discloses an intention by Parliament that, as a general rule, a banker is entitled to act upon the solicitor’s instructions relating to a client account without inquiring into the propriety of those instructions”. Lord Hodge added that “[t]he banker does not owe duties to the solicitor’s clients as a trustee of their funds”.

⑨56 [2019] EWCA Civ 614, [2019] 3 W.L.R. 1011 at [59]–[61], citing Lord Scott in *Manifest Shipping & Co Ltd v Uni-Polaris Insurance Co Ltd* [2003] 1 A.C. 469 at [116].

⑨57 [2019] EWCA Civ 614, [2019] 3 W.L.R. 1011 at [103]. For a critique, see P.S. Davies (2022) 138 L.Q.R. 32 (suggesting that accessory liability should arise only where the defendant knew of the essential matters of the primary wrongdoing, or at least turned a blind eye to them).

⑨58 *Stanford International Bank Ltd v HSBC Bank Plc* [2021] EWCA Civ 535 at [40]–[49], applying *Armstrong v Strain* [1952] 1 K.B. 232; *Greenridge Luton One Ltd v Kempton Investments Ltd* [2016] EWHC 91 (Ch), distinguishing *Sofer v Swissindependent Trustees SA* [2020] EWCA Civ 699.

959 It has been said that, according to modern authority, the recipient “is now better simply described as a person who is accountable in equity on such grounds”: *Relfo Ltd (In Liquidation) v Varsani* [2012] EWHC 2168 (Ch) at [71], per Sales J (affirmed [2014] EWCA Civ 360), citing *Paragon Finance Plc v DB Thakerar & Co* [1999] 1 All E.R. 400, 409; *Dubai Aluminium Co Ltd v Salaam* [2002] UKHL 48, [2003] 2 A.C. 366 at [142]; *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd (In Administrative Receivership)* [2011] EWCA Civ 347, [2011] 4 All E.R. 335 at [43]–[44]. Lord Sumption has described this form of liability as “ancillary” and equity’s intervention as “purely remedial”, see *Williams v Central Bank of Nigeria* [2014] UKSC 10, [2014] 2 W.L.R. 355 at [9] (and see also para.36-291 above).

960 *Arthur v Att-Gen of the Turks and Caicos Islands* [2012] UKPC 30 at [37]. But for the purpose of claiming a contribution from another wrongdoer under the Civil Liability (Contribution) Act 1978, the remedy for knowing receipt is deemed to be “compensatory”: see *Charter Plc v City Index Ltd* [2007] EWCA Civ 1382, [2008] 2 W.L.R. 950 at [32]. Whether the liabilities of knowing assistants and knowing recipients are distinct or whether knowing assistance and knowing receipt establish one overarching liability to account is uncertain: contrast *Novoship (UK) Ltd v Mikhaylyuk* [2014] EWCA Civ 908, [2015] Q.B. 499 with *Akita Holdings Ltd v AG of Turks and Caicos Islands* [2017] UKPC 7, [2017] A.C. 590 and *Lifeplan Australia Friendly Society Ltd v Ancient Order of Foresters in Victoria Friendly Society Ltd* [2017] FCAFC 74, (2017) 250 F.C.R. 1 (and see *P.G. Turner* [2018] C.L.J. 255), and also with *Ancient Order of Foresters in Victoria Friendly Society Ltd v*

*Lifeplan Australia Friendly Society Ltd* [2018] HCA 43, (2018) 360 ALR 1, HC of Aust (noted by A.B. Douglas (2019) 135 L.Q.R. 214).

- 961 [1994] 2 All E.R. 685 at 700. See also *Iranian Offshore Engineering & Construction Co v Dean Investment Holdings SA* [2019] EWHC 472 (Comm) at [175]. On the requirement that the disposal of the assets must be in breach of duty, see *Brown v Bennett* [1999] B.C.L.C. 649, 655, as interpreted by Nugee J (obiter) in *Courtwood Holdings SA v Woodley Properties Ltd* [2018] EWHC 2163 (Ch) at [190] (“it is a prerequisite of a claim in knowing receipt that the disposition to the recipient is ‘in breach of trust’, that is that the disposition is itself a breach of trust (or breach of fiduciary duty)”). On the question of tracing, the court may decide that funds held in the defendant’s bank account were the traceable proceeds of funds originally held by the claimant, notwithstanding that the claimant cannot prove every stage in the process by which the funds were ultimately transferred to the defendant, see *Relfo Ltd (In Liquidation) v Varsani* [2014] EWCA Civ 360, especially at [56]–[68] (noted by S. Watterson [2014] C.L.J. 496).

962 [1990] 1 Ch. 265 at 291; affirmed [1991] Ch. 547.

963 The point is made by *William Blair QC* in (2000) 30 H.K.L.J. 74 at 82.

- 964 [1990] 1 Ch. 265 at 291; affirmed [1991] Ch. 547. The point is made by *William Blair QC* in (2000) 30 H.K.L.J. 74 at 82. See also *Tecnimont Arabia Ltd v National Westminster Bank Plc* [2022] EWHC 1172 (Comm) at [98] and [100]. See also *Byers v Saudi National Bank* [2022] EWCA Civ 43 at [69], and para.36-314 below.

- 965 [1990] 1 Ch. 265 at 291; affirmed [1991] Ch. 547. The point is made by *William Blair QC* in (2000) 30 H.K.L.J. 74 at 82. See also *Tecnimont Arabia Ltd v National Westminster Bank Plc* [2022] EWHC 1172 (Comm) at [98] and [100]. See also *Byers v Saudi National Bank* [2022] EWCA Civ 43 at [69], and para.36-314 below.

- 966 [1990] Ch. 265 at 292.

- 967 Implicitly approved on appeal [1991] Ch. 547; and applied by the Supreme Court of Canada in *Citadel General Assurance Co v Lloyds Bank Canada*, 152 D.L.R. (4th) 411, 422–423 (1997).

968 *P.J. Millett* (1991) 107 L.Q.R. 71, 83, n.46.

- 969 It has been argued that a bank receives beneficially *all* money deposited, irrespective of the state of the account, as the bank is entitled to do as it pleases with money received to the credit of a customer provided it pays the customer an equivalent sum on demand: see Gleeson, “The Involuntary Launderer”, Ch.5 in PBH Birks (ed.), *Laundering and Tracing* (1995), pp.126–127; Bryan, “Recovering Misdirected Money from Banks: Ministerial Receipt at Law and in Equity”, Ch.10 in Rose, *Restitution and Banking Law* (1998), pp.180–187; cf. Mitchell, Ch.4 in Meredith Lectures 2002, *Dirty Money: Criminal and Civil Aspects* (2003), pp.199–226, citing the arguments of Moore, “*Restitution from Banks*”, unpublished D.Phil dissertation, University of Oxford, 2000, that banks receive money beneficially when deposited by the account holder but only ministerially when deposited by someone else. Moore-Bick LJ, speaking obiter in *Uzinterimpex JSC v Standard Bank Plc* [2008] EWCA Civ 819, [2008] 2

*Lloyd's Rep.* 456 at [40], saw “a good deal of force in Dr Bryan’s criticisms of the decision in *Agip v Jackson*”.

970 [2001] 1 W.L.R. 1177. But see *Law Society of England and Wales v Habitable Concepts Ltd* [2010] EWHC 1449 (Ch) for a case where the court refused to pierce the corporate veil.

971 See above, para.36-302.

972 [1993] 1 W.L.R. 509.

973 See, e.g., *Nelson v Larholt* [1948] 1 K.B. 339; as interpreted in *Carl-Zeiss-Stiftung v Herbert Smith & Co (No.2)* [1969] 2 Ch. 276; *Re Montagu's Settlement Trusts* [1987] Ch. 264.

974 See *Eagle Trust Plc v SBC Securities Ltd* [1994] 1 B.C.L.C. 464, although Vinelott J clouded the issue by relying on the concept of “inferred knowledge”; *Eagle Trust Plc v SBC Securities Ltd (No.2)* [1996] 1 B.C.L.C. 121; *Cowan de Groot Properties Ltd v Eagle Trust Plc* [1992] 4 All E.R. 700.

975 See *Nelson v Larholt*, above, as interpreted in *Cowan de Groot Properties v Eagle Trust* [1992] 4 All E.R. 700; *Belmont Finance Corp Ltd v Williams Furniture Ltd (No.2)* [1980] 1 All E.R. 393; *International Sales and Agencies Ltd v Marcus* [1982] 3 All E.R. 551; *Houghton v Fayers* [2000] *Lloyd's Rep.* Bank. 145, CA; *Westpac Banking Corp v Savin* [1985] 2 N.Z.L.R. 41 NZCA; *Powell v Thompson* [1991] 1 N.Z.L.R. 597 at 607–610; *Citadel General Assurance Co v Lloyds Bank Canada*, 152 D.L.R. (4th) 411, 429 (1997), Can SC.

976 [2001] Ch. 437; the *Akindale* test of “unconscionability” has been endorsed by the Court of Appeal in the following cases: *Criterion Properties Plc v Stratford UK Properties Ltd* [2002] EWCA Civ 1883, [2003] 1 W.L.R. 2108 at [20]–[39] (affirmed on different grounds: [2004] UKHL 28, [2004] 1 W.L.R. 1846); *Charter Plc v City Index Ltd* [2007] EWCA Civ 1382, [2008] Ch. 313 at [8]; *Uzinterimpex JSC v Standard Bank Plc* [2008] EWCA Civ 819, [2008] 2 *Lloyd's Rep.* 456 at [37]–[46]; and, following agreement of the parties, by the Privy Council in *Arthur v Att-Gen of the Turks and Caicos Islands* [2012] UKPC 30 at [33]–[36] (stressing the difference between proprietary and personal remedies). See also *Brent LBC v Davies* [2018] EWHC 2214 (Ch) at [558]–[563].

977 Nourse LJ added (at 455), “I have grave doubts about its utility in cases of knowing receipt”. See below, para.36-311.

978 *Nolan* [2000] C.L.J. 447.

979 [1995] 2 A.C. 378 at 392.

980 See, e.g. *Barkehall Thomas* (2001) 21 O.J.L.S. 239 at 253–264, who formulates guidelines so as to render the test economically efficient, and also *Stevens* [2001] R.L.R. 99, who considers Nourse LJ’s analysis to be “flawed”.

981 [2002] EWCA Civ 1883, [2003] 1 W.L.R. 2108 at [38]; affirmed on different grounds: [2004] UKHL 28, [2004] 1 W.L.R. 1846.

982 In *Papamichael v National Westminster Bank Plc* [2003] EWHC 164 (Comm), [2003] 1 *Lloyd's Rep.* 341 at [247], Judge Chambers QC treated actual knowledge as a necessary condition for liability. In *Crown Dilmun v Sutton* [2004] EWHC 52 (Ch), [2004] 1 B.C.L.C. 468 at [200], Peter Smith J, reluctantly applying the Court of Appeal decision in *Criterion Properties*, held that “attribution of knowledge is not enough. It must be unconscionable for the ... defendant to retain the benefit”. In *Starglade Properties Ltd v Nash Unreported* 26

*January 2010*, N. Strauss QC (sitting as a deputy judge of the High Court) said, at [57], that unconscionability provides “a flexible test, which requires the court to consider what is right, taking into account the nature and extent of the defendant’s knowledge and all the circumstances relating to the receipt. Actual knowledge which could put a reasonable man on enquiry, coupled with a failure to enquire, may suffice ...”. (Although the Court of Appeal reversed the deputy judge’s decision on the claim based on dishonest assistance (see para.36-304 above), there was no appeal against his decision on the knowing receipt claim: see *[2010] EWCA Civ 1314* at [6].) In *Law Society of England and Wales v Habitable Concepts Ltd* [2010] EWHC 1449 (Ch), Norris J held, at [16], that “[t]he unexplained nature of the bank credit and its sheer scale would call for enquiry to be made by anyone who wished to deal with the credit with a clear conscience”. In *Armstrong DLW GmbH v Winnington Networks Ltd* [2012] EWHC 10 (Ch), S. Morris QC (sitting as a deputy judge of the High Court) said, at [132], that, in a commercial context, *Baden* types (1) to (3) knowledge on the part of a defendant renders receipt of trust property unconscionable (adding that it is not necessary to show that the defendant realised that the transaction was “obviously” or “probably” in breach of trust or fraudulent; the possibility of impropriety or the claimant’s interest is sufficient); and that *Baden* types (4) and (5) knowledge also renders receipt “unconscionable” but only if, on the facts actually known to the defendant, a reasonable person would either have appreciated that the transfer was probably in breach of trust or would have made inquiries or sought advice which would have revealed the probability of the breach of trust. The comments of S. Morris QC (now Morris LJ) on *Baden* types (4) and (5) knowledge were applied by D. Halpern QC, sitting as a deputy High Court judge, in *Manolete Partners Plc v Nag* [2022] EWHC 153 (Ch) at [93]–[94], who noted that “[t]his is a lower threshold than is required for dishonest assistance”. In *Crédit Agricole Corp and Investment Bank v Papadimitriou* [2015] UKPC 13 at [20], where the (different) issue was whether the appellant bank was a bona fide purchaser of assets without constructive notice of an existing proprietary interest in them, the Privy Council stated that “[t]he bank must make inquiries if there is a serious possibility of a third party having such a right or, put in another way, if the facts known to the bank would give a reasonable banker in the position of the particular banker serious cause to question the propriety of the transaction”. Note Lord Sumption’s (at [33]) statement that “[w]hether a person claims to be a bona fide purchaser of assets without notice of a prior interest in them, or disputes a claim to make him accountable as a constructive trustee on the footing of a knowing receipt, the question what constitutes constructive notice or knowledge is the same”. See also *Thanakharn Kasikorn Thai Chamkat (Mahachon) v Akai Holdings Ltd* (2010) H.K.C.F.A.R. 479 at [135], where Lord Neuberger, delivering the judgment of the Hong Kong Court of Final Appeal, said that the test of “unconscionability” for knowing receipt was “effectively identical” to that of “irrationality” for determining whether a defaulting agent has apparent authority, and that “equity would follow the law” absent special circumstances (explained and criticised by *R. Lee and L. Ho* in (2012) 75 M.L.R. 91: for a return to the orthodox “unreasonableness” test as to when a third party is put on inquiry in a case of apparent authority, see *East Asia Co Ltd v PT Satria Tirtatama Energindo* [2019] UKPC 30). In *Relfo Ltd (In Liquidation) v Varsani* [2012] EWHC 2168 (Ch) at [79]–[80] (affirmed [2014] EWCA Civ 360), Sales J said “one

needs to be a little careful in using this formulation” (i.e. unconscionability), and preferred to speak in terms of the “relevant knowledge” identified by Millett J in *Agip (Africa) Ltd v Jackson [1990] 1 Ch. 265, 291F-G*, when referring to the first of the two main types of knowing receipt (see para.36-303 above). In *Arthur v Att-Gen of the Turks and Caicos Islands [2012] UKPC 30* at [40], Sir Terence Etherton, delivering the advice of the Privy Council, said “Knowing receipt in the *Akindele* sense is ... not merely absence of notice but unconscionable conduct amounting to equitable fraud. It is a classic example of lack of *bona fides*”. In *Payroller Ltd (In Liquidation) v Little Panda Consultants Ltd [2020] EWHC 391 (QB)* at [81], Freedman J said “[i]t is not necessary for the defendant to know all the facts associated with the wrong and it is sufficient that he knew enough of the facts surrounding the misapplication of the property to make it unconscionable for him to retain the benefit of the receipt”.

983 See Butterworths Corporate Law Update, 3 August 2000.

①984 [2001] Ch. 437.

①985 *Royal Brunei Airlines v Tan [1995] 2 A.C. 378*, 386, Lord Nicholls: and see above, paras 36-289–36-290. See also Birks, “Receipt”, in Birks & Pretto (eds), Breach of Trust (2002), 213; Lord Nicholls, writing extra-judicially, in Cornish et al (eds), Restitution—Past, Present and Future (1998), p.231; Lord Walker, “*Dishonesty and Unconscionable Conduct in Commercial Life*” (2005) 27 Sydney L.R. 187, 202.

①986 [2001] Ch. 437 at 456.

①987 [2022] EWCA Civ 43 at [17], citing *DD Growth Premium 2X Fund v RMF Neutral Strategies (Master) Ltd [2017] UKPC 36* at [58] (Lords Sumption and Briggs, with whom Lord Carnwath agreed), and also a number of cases where the courts have continued to treat the passage from Hoffmann LJ’s judgment in *El Ajou v Dollar Land Holdings Plc [1994] 2 All E.R. 685*, 700 (quoted in para.36-302, above), as explained in *Akindele*, as an accurate summary of the essential requirements of a knowing receipt claim notwithstanding its inclusion of “knowledge on the part of the defendant that the assets he received are traceable to a breach of fiduciary duty”.

①988 Dicta from the House of Lords favours strict liability: *Criterion Properties Plc v Stratford UK Properties LLC [2004] UKHL 28, [2004] 1 W.L.R. 1846* at [4], per Lord Nicholls; *Twinsectra Ltd v Yardley [2002] UKHL 12, [2002] 2 A.C. 164, 194*, per Lord Millett; but contrast *Farah Constructions Pty Ltd v Say-Dee Pty Ltd [2007] HCA 22* at [131] and [151]–[155], noted with approval by *Conaglen and Nolan [2007] C.L.J. 515, 516*, where the High Court of Australia (obiter) preferred fault-based liability over strict liability, applied in *Bell Group Ltd (In Liquidation) v Westpac Banking Corp [2008] WASC 239*, and see also *D. Salmons [2017] C.L.J. 399*.

①989

[2021] EWHC 60 (Ch) (Fancourt J); upheld on appeal at [2022] EWCA Civ 43 (Newey LJ delivered the judgment of the Court of Appeal that was also composed of Aspin and Popplewell LJJ). See also above, Vol.I, para.32-194.

①990 [2021] EWHC 60 (Ch) at [5].

①991 [2021] EWHC 60 (Ch) at [5]. Fancourt J (at [106]) considered that registration under the Land Registration Act 2002 overrode the beneficiary's interest with the recipient's notice and knowledge being "irrelevant", but Newey LJ ([2022] EWCA Civ 43 at [77]) declined to express a view on the subject.

①992 [2021] EWHC 60 (Ch) at [114].

①993 [2022] EWCA Civ 43 at [69]–[78].

①994 Saudi Arabian law was the lex situs and the Court of Appeal could find no reason to overturn the judge's finding of fact that the beneficiary's equitable proprietary interest in the trust assets was extinguished under Saudi Arabian law.

①995 [2022] EWCA Civ 43 at [79].

①996 At [69]. Earlier in his judgment, Newey LJ stressed (at [20]) that for liability in knowing receipt to arise "[k]nowledge and possession must coincide". See also *ED&F Man Capital Markets Ltd v Come Harvest Holdings Ltd* [2022] EWHC 229 (Comm) at [635]–[641], where Calver J held that, following rescission of a voidable transaction and the imposition of a constructive trust, liability for knowing receipt could not be retrospectively imposed on a third party recipient, even though equity permits retrospective vesting of a transferor's beneficial interest following rescission for the purposes of tracing.

①997 R. Ferro (2022) 6 J.I.B.F.L. 380, 382.

998 [1989] 1 W.L.R. 1340; reversed on different grounds [1991] 2 A.C. 548.

999 [1997] 6 Bank. L.R. 315.

1000 See, e.g. *Jeremy D Stone Consultants Ltd v National Westminster Bank Plc* [2013] EWHC 208 (Ch) at [255]–[260].

## (vii) - Duty of Secrecy

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Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 36 - Bills of Exchange and Banking

Section 2. - Aspects of Banking Law

(b) - The Relationship of Banker and Customer

(vii) - Duty of Secrecy <sup>1001</sup>

### Duty of secrecy

36-316

The relationship of banker and customer is of a confidential nature and, as a general rule, the banker is under a duty of secrecy. The leading English case is *Tournier v National Provincial Bank*, where Atkin LJ <sup>1002</sup> observed that this duty applies not only to information derived by the banker from the account, but extends also to information obtained from other sources, if the occasion upon which the information is obtained arises out of the banking relationship of the bank and its customer. It does not, however, preclude the bank from referring to or disclosing information which the enquirer can readily obtain from another source, such as a caution in bankruptcy proceedings and, presumably, a caveat. <sup>1003</sup> Generally, though, the bank's duty of confidentiality does not terminate on the closing of the account and, presumably, survives the death of the customer. In *Tournier's* case the Court of Appeal indicated, further, that the banker may disclose such information in the following cases <sup>1004</sup>:

(a)when there is compulsion by law, e.g. when the banker is obliged to give evidence in legal proceedings  
<sup>1005</sup>

;

(b)when public interest calls for disclosure, e.g. when during war time the customer's activities disclose dealings with the enemy <sup>1006</sup>; and

(c)when the disclosure is necessary in the banker's own interest, e.g. when, in order to claim repayment of an overdraft, he has to disclose that the customer's account is overdrawn.<sup>1007</sup>

Finally, *Tournier's* case indicates that the banker is entitled to give information when expressly or impliedly authorised so to do by the customer.<sup>1008</sup> There is an established trade practice that banks provide each other with credit references relating to their customers. In the past banks justified this practice on the ground that their customers gave their implied consent to it. However, in *Turner v Royal Bank of Scotland Plc*,<sup>1009</sup> a case where the customer had a personal account with the bank, the Court of Appeal held that this practice was not sufficiently "notorious" (i.e. known to the bank's customers) to make it an implied term of the banker–customer contract.<sup>1010</sup> The Court of Appeal ignored the fact that the customer also held a business account at the bank, and so it is unclear whether *Turner* applies to business customers.<sup>1011</sup>

## Extraterritorial orders

**36-317** Specific problems arise where courts in one country issue orders for the disclosure of information which are meant to have effect in another country.

**U** 1012

In practice, this type of case arises principally where courts or grand juries in the United States issue orders addressed to overseas branches of American banks or instruct a bank's American head office to acquire the information involved from its branches abroad. The customer of the respective overseas branch may, of course, object to the disclosure of the information and, where necessary, apply for an injunction to preclude his branch from complying with the American order. Predictably, English courts have shown no sympathy for the foreign courts' trespass into their jurisdiction. Thus, in *Re Westinghouse Uranium Contract*<sup>1013</sup> the House of Lords held that a request for the disclosure of information made in a letter rogatory addressed by the United States District Court to the High Court ought to be denied if the information involved was subject to bank secrecy in the United Kingdom. Their Lordships placed considerable weight on an opinion submitted by the Attorney-General, who took the view that the wide investigatory procedures applicable under the United States' anti-trust law against foreign citizens constituted an infringement of the law of the United Kingdom.

**36-318** In another case, *X A G v A Bank*,<sup>1014</sup> Leggatt J showed no hesitation in enjoining an American bank from complying with an American Department of Justice's subpoena duces tecum which was supported by an order issued by the United States District Court, in which the bank's head office was instructed to produce in the United States records maintained with its London office. Holding

that the proper law of the contract between the bank and the relevant customer was English law, his Lordship observed that if the order were carried out, it:

“... would take effect in London for the production of documents in breach of what might be termed a private interest in the sense that what is directly involved is a contract between banker and customer. But this indubitably is also a matter of public interest, because it raises issues of wider concern than those peculiar to the [instant] parties.”

<sup>1015</sup>



Weighing all the circumstances of the case and taking into account the interests of both the bank and the customer, Leggatt J enjoined disclosure.

- 36-319 English courts are, thus, strongly disinclined to uphold a foreign court’s order which is contrary to English law or which conflicts with what may be best termed the local public interest. A more recent instance of the same policy is to be seen in *Libyan Arab Foreign Bank v Bankers’ Trust Co.*<sup>1016</sup> In this case Staughton J ordered an American bank to effect payment of an amount deposited with its London office, notwithstanding an order in which President Reagan sought to freeze balances maintained by Libyan Government bodies with all the branches of American banks. As a corollary to their firm stand against extraterritorial orders issued overseas, the English courts have shown an unwillingness to issue orders for the disclosure of evidence that would have to take effect outside the United Kingdom.<sup>1017</sup>

## Footnotes

- 1001 Banks also have to take account of relevant data protection legislation. The EU’s General Data Protection Regulation 2016/679 (EU GDPR), which applies across the EEA as from 25 May 2018, was applicable under UK law until the end of the Brexit implementation period (11pm UK time on 31 December 2020). The UK General Data Protection Regulation, Retained Regulation (EU) 2016/679 (UK GDPR) applies under UK law from the end of the Brexit implementation period. The *Data Protection Act 2018* contains detailed provisions relating to the application of the UK GDPR regime.
- 1002 *[1924] 1 K.B. 461, 485*, and see Bankes LJ at 474. In *Tournier* the bank’s duty of confidentiality was held to be an implied term of the bank–customer contract; alternatively, it may arise from an express assurance of confidentiality by the bank (see, e.g. *Primary Group (UK) Ltd v Royal Bank of Scotland Plc [2014] EWHC 1082 (Ch)*, where “negotiating damages” awarded, applying the now preferred nomenclature of *Morris-Garner v One Step (Support) Ltd [2018] UKSC 20* at [3]), or out of an equitable obligation of confidence (see, e.g. *CF Partners (UK) LLP v Barclays Bank*

*Plc [2014] EWHC 3049 (Ch)*, where “negotiating damages” awarded). When dealing with information which would, in any event, attract confidentiality at common law, and there exists also an express obligation of confidentiality, the better view is that some greater weight should be given to that obligation of confidentiality: *Saab v Dangate Consulting Ltd [2019] EWHC 1558 (Comm)* at [151] (dealing with the defence of public interest disclosure). For case law relating to the prohibition of disclosure to other companies in the same group, see *Bank of Tokyo v Karoon [1987] A.C. 45n, CA, 53–54; Bhogal v Punjab National Bank [1988] 2 All E.R. 296, 305, CA*. See the Standards of Lending Practice for Personal Customers 2021 (para.36-223 above) at AM6 (“Firms will maintain the security of customers’ data but may share information about the day-to-day running of a customer’s account(s), including positive data, with credit reference agencies where the firm has agreed to follow the principles of reciprocity. [CONC 5]”), and for the same guidance with regard to business customers, see the Standards of Lending Practice for Business Customers 2020 (para.36-224 above) at p.11 (Product execution), point 6.

- 1003      *Christofi v Barclays Bank Plc [1998] 1 W.L.R. 1245; affirmed [2000] 1 W.L.R. 937.*
- 1004      “Where the case is within one of the qualifications to the duty of confidence, the duty, ex hypothesi, does not exist”: *El Jawhary v Bank of Credit and Commerce International SA [1993] B.C.L.C. 396* at 400, per Nicholls VC See also *Barclays Bank Plc v Taylor [1989] 1 W.L.R. 1066* at 1074, per Lord Donaldson MR.
- 1005      Consider, e.g. the banker’s duty of making payment to sequestrators and of disclosing to them the state of the customer’s account: *Bucknell v Bucknell [1969] 1 W.L.R. 1204; Eckman v Midland Bank Ltd [1973] Q.B. 519*. For other examples of legal compulsion, see, the Bankers Books Evidence Act 1879 s.7, and its recent analysis in *Meng v HSBC Bank Plc [2021] EWHC 342 (QB)* (term “legal proceeding” in s.7 was limited to legal proceedings taking place within the UK; phrase “entries in a banker’s book” was limited to transactional records), and also *Trading Ltd v Clydesdale Bank Plc [2021] EWHC 850 (Ch)* at [109]–[116]; Police and Criminal Evidence Act 1984 s.9; the Companies Act 1985 ss.434(2), 452(1A); Insolvency Act 1986 ss.236, 366; Financial Services and Markets Act 2000 Pt XI. Note that disclosure of such information by way of a discovery will be ordered, as a matter of justice, in respect of proceedings in which the bank’s customer is sued in fraud by a third party: *A v C [1980] 2 All E.R. 347; Bankers Trust Co v Shapira [1980] 3 All E.R. 353; C v S [1999] Lloyd’s Rep. Bank. 26* (giving important guidance to banks served with a disclosure order and also concerned with prosecution for “tipping off”: two “tipping off” offences are now to be found in the Proceeds of Crime Act 2002 s.333A, with the separate offence of prejudicing an investigation in s.342; see also *Bank of Scotland v A Ltd [2001] EWCA Civ 52, [2001] 1 W.L.R. 751; Tayeb v HSBC Bank Plc [2004] EWHC 1529 (QB), [2004] 4 All E.R. 1024*). And note that where the bank is compelled to disclose, it is not under a duty to oppose the orders or to notify the customer: *Barclays Bank v Taylor [1989] 1 W.L.R. 1066, CA*. A bank is likewise not in breach of its duty of confidentiality where it produces documents as ordered in a subpoena duces tecum (now called a “witness summons” under the Civil

Procedure Rules 1998): *Robertson v Canadian Imperial Bank of Commerce [1994] 1 W.L.R. 824, PC*. Legislation to combat money laundering and the financing of terrorist activities is particularly draconian. A bank commits an offence if it fails to disclose to the National Crime Agency its knowledge or suspicion, or that it has reasonable grounds for knowledge or suspicion, that a customer is engaged in money laundering or terrorist offences (Proceeds of Crime Act 2002 s.330; Terrorism Act 2000 s.21A, as inserted by the Anti-terrorism, Crime and Security Act 2001 Sch.2 Pt 3). The threshold for suspicion is low: the bank only has to consider that there is a more than fanciful possibility that the relevant facts exist (*K Ltd v National Westminster Bank Plc [2006] EWCA Civ 1039, [2007] 1 W.L.R. 311* at [16], applied in *Shah v HSBC Private Bank (UK) Ltd [2009] EWHC 79 (QB), [2009] 1 Lloyd's Rep. 328* at [45], reversed *[2010] EWCA Civ 31, [2011] 1 All E.R. (Comm) 67*, but *K Ltd* applied at [21], and also applied by Upperstone J at the trial of the action: *[2012] EWHC 1283 (QB)* at [67]–[69])). Subjectively, the bank may itself know or suspect the customer is engaged in money laundering or terrorist offences but, even if it does not, it may objectively have reasonable grounds for such knowledge or suspicion. Such disclosure is a “protected disclosure”, i.e. it “is not to be taken to breach any restriction on the disclosure of information (however arising)” (Proceeds of Crime Act 2002 s.337(1); Terrorism Act 2000 s.21B(1), as inserted). In general terms, a customer who opens an account at a bank in the UK must be taken to have accepted and be entitled to assume that the bank will act in accordance with applicable anti-money laundering and terrorism legislation (*Tayeb v HSBC Bank Plc [2004] EWHC 1529 (Comm), [2004] 4 All E.R. 1024* at [57], per Colman J). A bank (the paying bank) may be granted a Norwich Pharmacal order against another bank (the beneficiary’s bank) compelling it to disclose information in relation to the identity of certain of its customers who were beneficiaries of electronic payments made as a result of the paying bank’s own mistakes, e.g. making a duplicate payment, selection of an incorrect mandate or insertion of an incorrect account number, see *Santander UK Plc v National Westminster Bank Plc [2014] EWHC 2626 (Ch)*; *Santander UK Plc v Royal Bank of Scotland Plc [2015] EWHC 2560 (Ch)* at [11]–[17], but with criticism of the ruling in *Santander UK Plc v National Westminster Bank Plc*, above, that a claim in unjust enrichment was a wrong capable of justifying a Norwich Pharmacal order (noted by *M. Campbell [2016] L.M.C.L.Q. 42*).

1006 For recent cases recognising the existence of an independent ground of disclosure under this qualification, see *Price Waterhouse v BCCI Holdings (Luxembourg) SA [1992] B.C.L.C. 583; Douglas v Pindling [1996] A.C. 890, PC; Pharaon v Bank of Credit and Commerce International SA (In Liquidation) [1998] 4 All E.R. 455*. For earlier tentative (and obiter) recognition, see *Libyan Arab Foreign Bank v Bankers Trust Co [1989] Q.B. 728, 771*, per Staughton J. See also *Rodaro v Royal Bank of Canada, 59 O.R. (3d) 74 (2002), Ont CA*, noted by *Ogilvie (2004) 19 B.F.L.R. 103*.

1007 See *Kaupthing Singer & Friedlander Ltd v Coomber [2011] EWHC 3589 (Ch)* at [52], [56]; *Deutsche Bank (Suisse) SA v Khan [2013] EWHC 482 (Comm)* at [384]–[393]. See also *Sunderland v Barclays Bank Ltd (1938) 5 L.D.A.B. 163; Nam Tai Electronics Inc v Price-waterhouseCoopers [2008] 1 H.K.C. 427* at [49], [53], [54] HKCFA. See

also *Primary Group (UK) Ltd v Royal Bank of Scotland Plc [2014] EWHC 1082 (Ch)* at [192], where disclosure was held not to be “reasonably necessary” for the bank’s own protection. The “interests of the bank exception” probably needs to be reassessed in the light of developments in the law of confidence, misuse of private information and data protection (as to which, see *R. Spearman [2012] J.I.B.F.L.* 78).

1008 It has been suggested that where such consent has been given not freely but under compulsion, for instance, by a foreign court, the bank ought to refuse to make disclosure: *Re ABC [1985] F.L.R. 159* Cayman Islands. But see R. Cranston, E. Avgouleas, K. van Zwieten, C. Hare and T. van Sante, *Principles of Banking Law*, 3rd edn (2018), 266. For examples where legislation allows disclosure but only with customer consent, see the *Small and Medium Sized Business (Credit Information) Regulations 2015 (SI 2015/1945)* regs 3(2), 6(1)(b); the *Small and Medium Sized Business (Finance Platforms) Regulations 2015 (SI 2015/1946)* regs 3(4), 6(3)(b).  
 1009 [1992] 2 All E.R. (Comm) 664.

1010 *Turner* dealt with banking practice between 1986 and 1989, and therefore predates the 1994 revision of the Banking Code (for personal customers) which made banker’s references subject to the express consent of the customer concerned. A similar requirement was contained in the Business Banking Code (for business customers) first published in 2002. Both Codes were replaced in November 2009 by a new Banking and Payment Services (BPS) conduct regime (see above, para.36-220). See now the Lending Standards Board’s Standards of Lending Practice for personal customers (2021) and its Standards of Lending Practice for business customers (2020) (paras 36-223—36-224 above), neither of which make direct reference to the practice of giving banker’s references, although the Standards of Lending Practice for Business Customers (2020) state that “[f]irms should ensure that the customer’s consent is sought prior to sharing any business or personal details with a third party or an alternative source of finance” (Product information, point 4). A bank has been held to owe a duty of care to its customer when providing information to credit reference agencies in relation to that customer, and to owe a duty of care to the customer’s spouse where she was a joint holder of the same account and a co-director of the family business which largely depended on her husband’s credit (but “almost certainly” not in the ordinary case): *Gatt v Barclays Bank Plc [2013] EWHC 2 (QB)* at [35], where held that bank was not liable to spouse in contract (she was also a customer of the bank), negligence or defamation where it sent computerised information about her husband to credit reference agencies stating that an account, which was a joint account with her, was “delinquent” because the overdraft exceeded the agreed limit. See also *Boyo v Lloyds Bank Plc [2019] EWHC 2279 (QB)* at [53]–[57] for availability of bank’s defence of qualified privilege to customer’s defamation action, and at [65]–[67] for bank’s duty of care, when providing information to credit reference agencies. For the duty imposed on designated banks to provide information about their small and medium-sized business customers to designated credit reference agencies (CRAs), and the duty on designated CRAs to provide credit information about small and medium-

- sized businesses to finance providers, see the [Small and Medium Sized Business \(Credit Information\) Regulations 2015 \(SI 2015/1945\)](#).
- 1011 E.P. Ellinger, E. Lomnicka and C.V.M. Hare, [Ellinger's Modern Banking Law](#), 5th edn (2011), pp.195–197.
- 1012 Letters of request to obtain evidence in relation to a “civil or commercial matter” are governed by the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters 1970, and, where the requested court is in the UK, the position is governed by the [Evidence \(Proceedings in Other Jurisdictions\) Act 1975](#) and [Civil Procedure Rules rr.34.16–34.21](#). Where a letter of request is sent from a requesting court in an EU Member State to a receiving court in another EU Member State, the position is governed by Council Regulation (EC) 1206/2001 on the co-operation between Member States in the taking of evidence in civil or commercial matters (except for Denmark).
- 1013 [1978] *A.C.* 547.
- 1014 [1983] *2 All E.R.* 464.
- 1015 [1983] *2 All E.R.* 464 at 477. But see *First American Corp v Sheikh Zayed Al-Nahyan* [1999] *1 W.L.R.* 1154; *Pharaon v BCCI SA (In Liquidation)* [1998] *4 All E.R.* 455: the public interest in making documents available in the foreign court in respect of international fraud usually outweighs concerns about bank confidentiality. See also *Sakab Saudi Holding Co v Al Jabri* [2021] *EWHC 3390 (QB)* (disclosure ordered following letter of request issued by Canadian court dealing with case of alleged international fraud).
- 1016 [1988] *1 Lloyd's Rep.* 259; and see *Libyan Arab Foreign Bank v Manufacturers Hanover Trust Co* [1988] *2 Lloyd's Rep.* 494; and *Libyan Arab Foreign Bank v Manufacturers Hanover Trust (No.2)* [1989] *1 Lloyd's Rep.* 608 (Hirst J).
- 1017 *R. v Grossman* (1981) *73 Cr. App. R.* 302; *MacKinnon v Donaldson, Lufkin & Jenrette Securities Corp* [1986] *Ch.* 482; *Serious Organized Crime Agency v Perry* [2012] *UKSC* 35, [2013] *1 A.C.* 182 (on extraterritorial effect of Proceeds of Crime Act 2002 s.357); *R. (on the application of KBR Inc) v Director of the Serious Fraud Office* [2021] *UKSC* 2 (on extraterritorial effect of Criminal Justice Act 1987 s.2(3)). See also *Société Eram Shipping Co Ltd v Compagnie Internationale de Navigacion* [2003] *UKHL* 30, [2003] *3 W.L.R.* 21 at [22]–[23] and [67], HL (similar principles expressed when court refuses to grant third party debt order over credit balance in foreign bank account). cf. *Masri v Consolidated Contractors International Co SAL (No.2)* [2008] *EWCA Civ* 303, [32]–[35], per Lawrence Collins LJ, but see also *Masri v Consolidated Contractors International Co SAL (No.4)* [2008] *EWCA Civ* 876, [15]–[16], [80], [2009] *UKHL* 43, [19], [26]; *Bilta (UK) Ltd v Nazir (No.2)* [2015] *UKSC* 23, [2016] *A.C.* 1 at [212]. Interestingly, in *Credit Suisse Trust Ltd v Intesa Sanpaolo SpA* [2014] *EWHC* 1447 (*Ch*), the English High Court granted Norwich Pharmacal relief to the victim of fraud by ordering the London branches of two Italian banks to provide information about a customer, despite the fact that the banking activity took place in Italy and all the information sought was held in Italy: the only link to the UK was that the banks

had branches in London. In *Bank Mellat v HM Treasury [2019] EWCA Civ 449*, the judge was held to have properly exercised her discretion to order disclosure (subject to confidentiality restrictions) by an Iranian bank of unredacted documents said to contain confidential customer information which would constitute a breach of Iranian criminal law. In *Byers v Samba Financial Group [2020] EWHC 853 (Ch)*, Fancourt J balanced the actual risk of prosecution in the foreign state triggered by an English disclosure order against the importance of the disclosure to conducting a fair trial (applying the test set out in *Bank Mellat* at [63]), and found (at [107]) that the balancing exercise favoured the ordering of disclosure.

## **(viii) - Termination of Relationship**

**Chitty on Contracts 34th Ed.**

**Consolidated Mainwork Incorporating First Supplement**

**Volume II - Specific Contracts**

**Chapter 36 - Bills of Exchange and Banking**

**Section 2. - Aspects of Banking Law**

**(b) - The Relationship of Banker and Customer**

**(viii) - Termination of Relationship**

### **Termination of relationship by consent**

36-320

**U** The contract may fix the period the bank-customer relationship is to last, e.g. as with a fixed term deposit, so that there can be no early termination without the consent of both parties. By contrast, where an account is repayable on demand, as with a current account or easy access savings accounts, the customer may at common law terminate the relationship at any time by withdrawing the credit balance and closing the account.<sup>1018</sup> For accounts that fall within the scope of the *Payment Services Regulations 2017*,<sup>1019</sup> such as current accounts and easy access savings accounts, the contract may be terminated by the customer at any time, unless a period of notice (not exceeding one month) has been agreed.<sup>1020</sup> The position is different where the bank wishes to terminate the relationship. At common law, as confirmed by Lord Hoffmann in *National Commercial Bank of Jamaica Ltd v Olint Corp Ltd*<sup>1021</sup>:

“... in the absence of express contrary agreement or statutory impediment, a contract by a bank to provide banking services to a customer is terminable upon reasonable notice.”

1022



However, current accounts and easy access savings accounts will constitute “framework contracts” under the [Payment Services Regulations 2017](#), so that a bank may only close an account opened for an indefinite period by giving at least two months’ notice, if the contract so provides.<sup>1023</sup>

## Footnotes

- 1018 But see [\*Bank of Baroda v Mahomed \[1999\] Lloyd's Rep. Bank. 14, CA\*](#) (limitation point arising because customer made separate demands for repayment).
- 1019 [Payment Services Regulations 2017 \(SI 2017/752\)](#) (“PSRs 2017”), as amended. See above, paras 36-225 et seq., and below, paras 36-411 et seq.
- 1020 Termination of a “framework contract”, such as one for a current account or easy access savings account, including the bank’s right to charge for closing the account, is provided for in the [PSRs 2017 reg.51](#). A framework contract is defined in [reg.2\(1\)](#) to mean “a contract for payment services which govern the future execution of individual and successive payment transactions and which may contain the obligation and conditions for setting up a payment account”. The regulation does not affect the parties’ rights to treat the framework contract, in accordance with the general law of contract, as unenforceable, void or discharged ([PSRs 2017 reg.51\(7\)](#)). Where the framework contract is also a regulated agreement under the [Consumer Credit Act 1974](#), PSRs 2017 reg.51 does not apply ([PSRs 2017 reg.41\(2\)](#)).
- 1021 [\[2009\] UKPC 16](#) at [1].
- 1022 As to what constitutes a reasonable period of notice, see [\*Prosperity Ltd v Lloyds Bank Ltd \(1923\) 39 T.L.R. 372\*](#) (refusing to grant a mandatory injunction ordering the bank to reopen the account). See also [\*National Commercial Bank of Jamaica Ltd v Olint Corp Ltd\*](#), above, at [16]–[21], where application for injunction also refused on grounds that, where customer disputes closure of his account, damages will usually be an adequate remedy. cf. [\*N v S \[2015\] EWHC 3248 \(Comm\)\*](#) at [12]–[13], reversed [\[2017\] EWCA Civ 253](#): at trial—[\*N v Royal Bank of Scotland Plc \[2019\] EWHC 1770 \(Comm\)\*](#) at [92]–[95]—it was held that the bank had considered, rationally and in good faith (and, if required, reasonably), that there had been “exceptional circumstances” for closing its customer’s accounts without notice (as the bank was contractually entitled to do under its account terms). Compare investor’s claim for damages arising from termination of Bitcoin trading account and cancellation of open trades in [\*Ang v Reliantco Investments Ltd \[2020\] EWHC 3242 \(Comm\)\*](#), which went beyond sum deposited in account and extended to loss of investment returns. See also P. Coppel and S. Hanif (2021) 10 J.I.B.F.L. 690.
- 1023 PSRs 2017 reg.51(4).

## **(i) - Rights and Duties of the Banker**

Chitty on Contracts 34th Ed.

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Chapter 36 - Bills of Exchange and Banking

Section 2. - Aspects of Banking Law

(c) - The Current Account

(i) - Rights and Duties of the Banker

### **Nature of relationship**

36-321

The relationship between the banker and a customer who has opened a current account is that of debtor and creditor.<sup>1024</sup> The debt is, however, payable only on demand at the branch in which the account is kept.<sup>1025</sup> Thus, it is not the banker's duty to seek his creditor, the customer, and repay the debt. The banker is under an obligation to honour cheques of the customer, provided an adequate credit balance is available.<sup>1026</sup> When drawing a cheque the customer, acting as principal, authorises his banker—his agent—to make payment.<sup>1027</sup> A relationship of principal and agent is, accordingly, superimposed on the basic relationship of creditor and debtor. In carrying out instructions given to the bank by its customer—the principal—it must exercise reasonable care and skill.<sup>1028</sup> Its main duty, though, is to adhere strictly to the terms of its mandate.

<sup>1029</sup>



### **The mandate to pay: electronic means of payment**

36-322

In modern banking practice, a bank usually agrees with its customer to honour payment instructions delivered by electronic means, e.g. by use of a debit card, or by use of a password communicated

to the bank over a telephone or internet link.<sup>1030</sup> The bank is probably not obliged to provide these services to its customer without special agreement whereas it is obliged to honour cheques drawn by its customer under the express or implied terms of the banker–customer contract which arises when an account is opened.<sup>1031</sup> In fact, current accounts are now more commonly accessed by electronic means than by the customer drawing a cheque on the account. Banks have standard terms and conditions that govern the operation of a customer’s current account and which provide for access to the account through electronic means. Such terms and conditions usually reflect the statutory rights and duties that apply through the provisions of the **Payment Services Regulations 2017 (PSRs 2017)**,<sup>1032</sup> and also the FCA’s Banking Conduct of Business Sourcebook, which provide mandatory rules for those residual cases where the **PSRs 2017** do not apply.<sup>1033</sup> Regulation 82(5) of the **PSRs 2017** provides that:

“... [w]here all the conditions of the payer’s framework contract with the account servicing payment service provider have been satisfied, the account servicing payment service provider may not refuse to execute an authorised payment order irrespective of whether the payment order is initiated by the payer, through a payment initiation service provider, or by or through a payee, unless such execution is otherwise unlawful.”<sup>1034</sup>

Detailed consideration of the **PSRs 2017** is found later in this chapter.<sup>1035</sup> Cheques fall outside the **PSRs 2017**.<sup>1036</sup>

## The mandate to pay: cheques

- 36-323 The customer’s cheque is a mandate authorising the banker to honour the cheque when presented by the payee or a holder.<sup>1037</sup> The mandate may be limited by the inclusion of a general or special crossing, as well as by including in the cheque words prohibiting transfer.<sup>1038</sup>

## Limits on duty to honour cheque

- 36-324 There are several limitations to the banker’s duty to honour a cheque drawn by the customer. First, the banker is under an obligation to honour a cheque only if the customer’s account is either actually in credit, or, where it is in debit, if the customer has been granted an overdraft.<sup>1039</sup> Thus, if the customer has made a deposit, but a cheque is presented before the banker has had reasonable time for crediting the amount deposited to the account, he is not liable if he dishonours the cheque.<sup>1040</sup> Similarly, if the customer instructs his bankers to collect cheques and credit his account with the proceeds, he is not entitled to draw against these cheques until they have been cleared. However, once the account is credited the customer is, in the absence of stipulation to the contrary, entitled

to draw the full amount, although some cheques paid in may not have been cleared.<sup>1041</sup> Secondly, the cheque is a mandate requesting the banker to pay it at the branch at which the account is kept. The customer is not entitled to demand payment at another branch, and, if a cheque is, in point of fact, cashed for a holder at another branch of the bank, this branch is probably to be considered as discounting or collecting the cheque.<sup>1042</sup> Thirdly, a cheque should be paid only if presented during ordinary business hours. However, if a banker pays a cheque shortly after business hours, he does not exceed his authority.<sup>1043</sup> Finally, as a matter of practice, bankers do not honour cheques that have been outstanding for a long period, and one presented more than 6 months after the date of issue is unlikely to be paid.<sup>1044</sup> It is, likewise, the practice not to pay an undated cheque<sup>1045</sup>; but a banker would honour it, if the holder exercised his *prima facie* authority to complete the instrument within a reasonable time.

## Overdrafts

- 36-325 Where there are insufficient funds available to cover the full amount of the customer's cheque, the bank may refuse to honour it. In such circumstances the cheque stands as an offer by the customer to the bank to extend credit to him on the bank's usual terms as to interest and other charges, unless other terms have been agreed between them.

<sup>1046</sup>

**U** The bank may either reject the offer or accept it by paying the cheque and, in doing so, allow the customer to overdraw.<sup>1047</sup> In the case of a joint account, all the account holders will be liable for the overdrawn balance where the bank advances funds at the request of only one of them, even though as between the account holders themselves this was unauthorised, so long as the bank acts within the terms of the original mandate agreed when the account was opened, e.g. where only one signature is required on the cheque.<sup>1048</sup>

## Combining accounts

- 36-326 It has been held in *Garnett v M'Kewan*<sup>1049</sup> that if a customer has a current account which is in credit with one branch of the bank, and another account which is overdrawn with another branch, the banker is entitled to combine the two accounts,<sup>1050</sup> so as to set off the overdraft against the credit balance. The nature of this right and of its abrogation by contract are discussed in *National Westminster Bank Ltd v Halesowen Presswork and Assemblies Ltd*.<sup>1051</sup> The plaintiffs maintained an account with the defendant bank. In April 1968, when this account showed a substantial debit balance, an account No.2 was opened for the plaintiffs' trading operations. The bank agreed that,

in the absence of a material change of circumstances, account No.1 would remain frozen for a period of four months. On 12 June 1968, the plaintiffs passed a resolution to wind up voluntarily. On 19 June, the bank informed the liquidator that it had determined to set off the debit balance in account No.1 against the credit balance in account No.2. The majority of the House of Lords held that the bank was entitled to take this course. In the first place, the resolution to wind up involved a change in the circumstances under which the bank had agreed to keep the two accounts separate, whereupon the bank regained its right to combine the accounts. Secondly, the dealings between the plaintiffs and the bank were “mutual” within the meaning of [s.31 of the Bankruptcy Act 1914](#).<sup>1052</sup> This provision, which has since been superseded by [s.323 of the Insolvency Act 1986](#), conferred on the bank a statutory right of set off. Their Lordships pointed out that this right of set off, as well as the ordinary right to combine accounts, is to be distinguished from the banker’s lien. Sums standing to the credit of the customer’s account constitute a debt payable to him by the bank and the actual funds involved are the bank’s property. The bank cannot have a lien over its own property.<sup>1053</sup>

## Effect of agreement

36-327 *Halesowen’s* case does not question the validity of an agreement abrogating the bank’s right to combine accounts in situations in which [s.31](#), or currently [s.323](#), is inapplicable.<sup>1054</sup> An agreement to keep an account separate can be inferred where it is opened for a specific purpose, e.g. for the paying of an employee’s wages,<sup>1055</sup> or when the customer indicates, when opening the account, that it may not be combined with other accounts and a note to this effect is entered in the ledger.<sup>1056</sup> Moreover, an account which the customer opens as trustee, or as agent or as nominee of another person, may not be combined with the customer’s private account.<sup>1057</sup> Similarly, where an amount constituting a “retention fund” under a building contract is paid into a joint account in the names of the contractor and the landowner, the bank cannot combine the balance standing to the credit of this account with the debit balance in the contractor’s personal account.<sup>1058</sup> A question that has arisen in recent years is whether a bank is entitled to exercise an equitable set-off as against money standing to the credit of X’s account, if the beneficial owner of the funds is Y, who is indebted to the bank. It has been held that such a right of set-off is exercisable only if X concedes, or the bank can clearly establish on the evidence, that the money is due to Y as equitable owner.<sup>1059</sup> A bank may have a common law right of combination of accounts maintained within the jurisdiction but in different currencies due to express agreement or the way the parties conducted themselves during the course of their banking relationship.<sup>1060</sup>

## Customer’s remedies for dishonour

36-328

A cheque which is returned unpaid by a banker usually bears on its face a written answer. The practice of bankers to make such an answer is, however, compulsory only where the cheque is presented through a clearing house which so stipulates. Answers on unpaid cheques must be composed with some care. “Refer to drawer”, is ordinarily met with in cases of want of funds, and may be libellous if used in other circumstances. Although the words seem merely to invite the presenter of the cheque to inquire of the drawer as to the reason of dishonour,<sup>1061</sup> they have acquired a certain notoriety.<sup>1062</sup> Where words are not plainly defamatory, the test is not what they would convey to a particular person, but what they would suggest to a person of average intelligence.<sup>1063</sup> In New Zealand “Present again” has been held to be libellous<sup>1064</sup> as of course are the words “Not sufficient”.<sup>1065</sup>

## Damages for breach of contract

- 36-329 Apart from any rights that may arise in tort from the nature of the written answer, the wrongful dishonour of the cheque, in itself, entitles the customer to damages for breach of contract.<sup>1066</sup> For many years the amount of damages recoverable by the customer differed according to whether he was a trader or a non-trader. Where the customer was a trader or, probably a professional man, he could recover substantial damages for injury to his credit and reputation without proof of actual loss,<sup>1067</sup> but where he was a non-trader he could only recover nominal damages for breach of contract, unless he proved actual loss.<sup>1068</sup> However, the distinction between traders and non-traders has now been swept away by the Court of Appeal in *Kpohraror v Woolwich Building Society*.<sup>1069</sup> Evans LJ observed that in modern social conditions it is not only tradesmen for whom the dishonour of a cheque might be obviously injurious.<sup>1070</sup> The credit rating of individuals is as important for their personal transactions, including mortgages and hire-purchase and banking facilities, and it is notorious that central registers are kept containing information relevant to credit ratings. Accordingly, the Court of Appeal held that in every case (trader and non-trader alike) there is a presumption of fact that the customer suffers some injury to his credit and reputation when his cheque is wrongfully dishonoured.<sup>1071</sup> This development is to be welcomed for it acknowledges the important role of credit in modern consumer society.<sup>1072</sup>

## Mandate and third parties

- 36-330 A bank is entitled, and indeed bound, to refuse to honour its customer’s cheque or other payment instruction where to do so would render it liable as an accessory to misfeasance or breach of trust.<sup>1073</sup> However, the bank must have positive evidence of misfeasance or breach of trust: mere suspicion is not enough to refuse its customer’s instructions.<sup>1074</sup> The bank may face a dilemma in

cases where it is aware that the customer is the subject of criminal investigation. On the one hand, if the bank allows the customer to operate the account and withdraw misappropriated funds, it could be held liable as a constructive trustee of the funds and made to account to the victim<sup>1075</sup>; on the other hand, if it raises the issue with the customer, it could commit a “tipping off” offence under the **Proceeds of Crime Act 2002**, where the disclosure is likely to prejudice an investigation.<sup>1076</sup> It was held by the Court of Appeal in *Governor and Company of the Bank of Scotland v A Ltd*,<sup>1077</sup> that in such a case the bank may ask the court for an interim declaration as to what information can be disclosed to the customer but once that information has been identified the bank had to take a commercial decision as to the course of action it then wishes to take, i.e. whether or not to contest proceedings brought by the customer for repayment of his deposit. Lord Woolf CJ added that “it seems almost inconceivable that a bank which takes the initiative in seeking the court’s guidance should subsequently be held to have acted dishonestly so as to incur accessory liability”.<sup>1078</sup>

## Proceeds of Crime Act 2002

- 36-331 A bank must freeze an account where it knows or suspects that the account contains the proceeds of crime.<sup>1079</sup> In practice, the bank cannot give an explanation to its customer for fear of committing a “tipping-off” offence,<sup>1080</sup> unless the relevant authorities (the National Crime Agency (NCA))<sup>1081</sup> consent or the court so directs.<sup>1082</sup> The bank does not act in breach of contract by refusing to honour its customer’s payment instructions where it is suspicious that the money in the account is criminal property.<sup>1083</sup> The bank must report its knowledge or suspicion to NCA.<sup>1084</sup> If, after an initial period of seven days to investigate the matter, NCA refuses to give the bank consent to deal with the suspect account, it remains frozen for a further period of 31 days.<sup>1085</sup> At any stage the bank, or any other person affected by the freezing of the account, may ask NCA to look at the matter again.<sup>1086</sup> At the end of the 31 day moratorium, NCA must apply to the court for an order to prohibit further dealing with the funds in the account.<sup>1087</sup> Unless such an order has been made, the bank is now bound to act in accordance with its customer’s instructions.

## Footnotes

- 1024      *Foley v Hill (1848) 2 H.L. Cas. 28; Joachimson v Swiss Bank Corp [1921] 3 K.B. 110.* A bank opening a current account must satisfy certain “customer due diligence” requirements contained in the **Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017** (SI 2017/692), as amended, Pts 3–4 (for amendments to the UK’s anti-money laundering and counter terrorist financing regime following Brexit, see above, para.36-257, notes). It must also normally satisfy the requirements of the Banking Conduct of Business Sourcebook (BCOBS) and the

- Payment Services Regulations 2017 (SI 2017/752), as amended. For details, see E.P. Ellinger, E. Lomnicka and C.V.M. Hare, Ellinger's Modern Banking Law, 5th edn (2011), Ch.7, s.2.
- 1025 *Joachimson v Swiss Bank Corp*, above; *Arab Bank Ltd v Barclays Bank DCO [1954] A.C. 495*. The rule that repayment must be demanded at the branch of the bank that holds the account is ripe for review in the light of modern technology and business practices when customers can now access their accounts remotely, via cash machines and through debit cards, and where some banks operate over the internet and through telephone banking services with no branches at all. The courts in one overseas jurisdiction seem prepared to jettison the rule (*Damayanti Kantilal Doshi v Indian Bank [1999] 4 S.L.R. 1, 11, Sing CA*).
- 1026 *Joachimson v Swiss Bank Corp*, above; *Bank of New South Wales v Laing [1954] A.C. 135, 154*; *Barclays Bank Ltd v WJ Simms Ltd [1980] 1 Q.B. 692, 699*; *Sierra Leone Telecommunication Co Ltd v Barclays Bank Plc [1998] 2 All E.R. 821, 827*; *Re Spectrum Plus Ltd [2005] 2 A.C. 680* at [59].
- 1027 *London Joint Stock Bank v Macmillan [1918] A.C. 777*; *Westminster Bank v Hilton (1926) 43 T.L.R. 124*. This remains the case even where the account is overdrawn: *Coutts & Co v Stock [2000] 1 W.L.R. 906* at 909, Lightman J, endorsed by the Court of Appeal (obiter) in *Hollicourt (Contracts) Ltd v Bank of Ireland [2001] 2 W.L.R. 290* at 296, 300.
- 1028 *Astro Amo Compania Naviera SA v Elf Union SA (The Zographia M) [1976] 2 Lloyd's Rep. 382, 393*; *Barclays Bank Plc v Quincecare Ltd [1992] 4 All E.R. 363, 376*.
- 1029 Conflict can exist between the bank's duty to honour the mandate and its duty to exercise reasonable care and skill in and about the execution of the mandate, e.g. where an agent authorised to draw on his principal's bank account does so for his own benefit or for an unauthorised purpose: see *Lipkin Gorman (a firm) v Karpnale Ltd [1989] 1 W.L.R. 1340, CA*, varied on another point: *[1991] 2 A.C. 548*; *Barclays Bank Plc v Quincecare Ltd [1992] 4 All E.R. 363*; *Verjee v CIBC Bank & Trust Co (Channel Islands) Ltd [2001] Lloyd's Rep. Bank. 279*; *JP Morgan Chase Bank NA v Federal Republic of Nigeria [2019] EWCA Civ 1641*; *Singularis Holdings Ltd (In Liquidation) v Daiwa Capital Markets Europe Ltd [2017] EWHC 257 (Ch)*, affirmed *[2018] EWCA Civ 84* and *[2019] UKSC 50*; *Royal Bank of Scotland International Ltd v JP SPC 4 [2022] UKPC 18* at [39(ii)]; *Philipp v Barclays Bank UK Plc [2022] EWCA Civ 318* at [34].
- 1030 The bank's standard terms and conditions often allow a customer to give, and the bank to act on, oral instructions (see *Earles v Barclays Bank Plc [2009] EWHC 2500 (QB)* at [17]). On its true construction, a "one signature" mandate expressed to authorise payment by cheques or other written instructions and "for all other purposes" has been held to bind a partnership in respect of loan agreements signed by only one of the partners (*Kotak v Kotak [2017] EWHC 1821 (Ch)*).
- 1031 *Libyan Arab Foreign Bank v Bankers Trust Co [1989] Q.B. 728, 749*.

- 1032 SI 2017/752 (“PSRs 2017”), as amended. For when the PSRs 2017 apply, see above, paras 36-225—36-226, and below, paras 36-411—36-414. The PSRs 2017 may be disapplied in favour of the Consumer Credit Act 1974 (PSRs 2017 regs 41, 64).
- 1033 BCOBS Ch.5, in particular BCOBS 5.1.11R (bank’s liability for unauthorised payments) and 5.1.12R (banking customer’s liability for unauthorised payments). BCOBS 5.1.11R–5.1.19R are similar to Pt 7 of the PSRs 2017.
- 1034 For definition of a “framework contract”, see reg.2(1) and para.36-320 above. But note the “force majeure” provision set out in reg.96.
- 1035 See below, paras 36-411 et seq.
- 1036 PSRs 2017 Sch.1 Pt 2(g), the exclusion under this paragraph also include travellers’ cheques, bankers’ drafts, paper-based vouchers and paper postal orders.
- 1037 At the time the account was opened, the customer will have identified those individuals who are authorised to sign cheques and draw on the account. But even a customer’s irrevocable authority to a bank to accept the written demand of a particular person may later be overridden by the oral instructions of the customer himself: *Morrell v Workers Savings & Loan Bank [2007] UKPC 3* at [10].
- 1038 As regards crossing cheques, see above, paras 36-159 et seq.; as regards words prohibiting transfer, see ss.8 and 81A of the Act, discussed in paras 36-026—36-028 and 36-166—36-169, above.
- 1039 See below, para.36-325.
- 1040 *Marzetti v Williams (1830) 1 B. & Ad. 415, 424.*
- 1041 *Capital and Counties Bank v Gordon [1903] A.C. 240, 249.*
- 1042 *Woodland v Fear (1857) 7 E. & B. 519.* But see also above, para.36-321.
- 1043 *Baines v National Provincial Bank (1927) 32 Com. Cas. 216.*
- 1044 In New Zealand it has been recognised that a cheque becomes stale after 6 months: *Commissioners of Inland Revenue v Thomas Cook (NZ) Ltd [2003] 2 N.Z.L.R. 296* at [31]–[39], upheld on different grounds [2004] UKPC 53.
- 1045 *Griffiths v Dalton [1940] 2 K.B. 264.*
- 1046 *Emerald Meats (London) Ltd v AIB Group (UK) Ltd [2002] EWCA Civ 460* at [12]; *Lloyds Bank Plc v Voller [2000] 2 All E.R. (Comm) 978* at 982, CA; *Barclays Bank Ltd v WJ Simms, Son & Cooke (Southern) Ltd [1980] Q.B. 677* at 699. The Supreme Court has held that bank charges levied on personal current account customers in respect of unauthorised overdrafts constitute part of the price or remuneration for the banking services provided and, in so far as the terms giving rise to the charges are in plain intelligible language, no assessment of the fairness of those terms, under the Unfair Terms in Consumer Contracts Regulations 1999, may relate to their adequacy as against the services provided: see *Office of Fair Trading v Abbey National Plc [2009] UKSC 6, [2010] 1 A.C. 696* (but contrast European Court of Justice’s strict interpretation of art.4(2) exception in underlying EC Directive 1993/13/EEC: *Kásler v OTP Jelzálogbank Zrt (C-26/13) EU:C:2014:282*; *Jean-Claude Van Hove v CNP Assurances SA (C-96/14) EU:C:2015:262*; *Andriciuc v Banca Românească SA (C-186/16) EU:C:2017:703*). Note that, in response to the Supreme Court’s decision

in *OFT v Abbey National Plc*, the Consumer Rights Act 2015 s.64(2), introduces an additional requirement for the application of the exclusion from the test of unfairness of terms relating to the main subject matter of the contract or the price/quality ratio: the term must be both transparent (expressed in plain and intelligible language and, in the case of a written term, legible: subs.(3)) and (which is new) prominent (brought to the consumer's attention in such a way that an average consumer would be aware of the term: subss.(4)–(5)), and not a term listed in Pt 1 of Sch.2 of the 2015 Act (subs.(6)) **Pt 2 of the 2015 Act** replaced the **1999 Regulations** for contracts made on or after 1 October 2015 (see below, Ch.40)). Andrew Smith J held at first instance in *Abbey National* that such bank charges could not be characterised as penalties because they were levied other than upon a breach of contract: [2008] EWHC 875 (Comm), [2008] 2 All E.R. (Comm) 625. When reviewing the penalty clause jurisdiction in *Cavendish Square Holding BV v Makdessi* [2015] UKSC 67, [2016] A.C. 1172, the Supreme Court (at [40]–[43]) declined to follow the approach taken in Australia and retained the requirement that the penalty doctrine is only triggered by breach. The different approaches to the breach requirement in the two jurisdictions has been confirmed by the High Court of Australia in *Paciocco v ANZ Banking Group Ltd* [2016] HCA 28 at [7]–[10] and [119]–[127], and see also *Andrews v Australia and New Zealand Banking Group Ltd* [2012] HCA 30, (2012) 290 A.L.R. 595. For whether overdraft charges can be challenged as part of an “unfair credit relationship” under **Consumer Credit Act 1974 ss.140A–D**, see *D. Cook, A. Ibrahim and A. Khan* [2011] J.I.B.F.L. 212, and the expanding case law on these provisions, including *Plevin v Paragon Personal Finance Ltd* [2014] UKSC 61, [2014] 1 W.L.R. 4222 (the leading case); *Nelmes v Nram Plc* [2016] EWCA Civ 491; *McMullon v Secure the Bridge Ltd* [2015] EWCA Civ 884; *Barclays Bank Plc v McMillan* [2015] EWHC 1596 (Comm); *Deutsche Bank (Suisse) SA v Khan* [2013] EWHC 482 (Comm) (providing a helpful, non-exhaustive list of potentially relevant factors); *Carney v NM Rothschild & Sons Ltd* [2018] EWHC 958 (Comm); *Broomhead v National Westminster Bank Plc* [2018] EWHC 1574 (Ch); *Greenlands Trading Ltd v Pontearso* [2019] EWHC 278 (Ch); *Pilgrim Rock Ltd v Iwaniuk* [2019] EWHC 203 (Ch); *Wood v Commercial First Business Ltd* [2019] EWHC 2205 (Ch); *Promontoria (Henrico) Ltd v Samra* [2019] EWHC 2327 (Ch); *Canada Square Operations Ltd v Potter* [2020] EWHC 672 (QB); *Kerrigan v Elevate Credit International Ltd* [2020] EWHC 2169 (Comm); *Bank of Beirut (UK) Ltd v Moukarzel* [2021] EWHC 3777 (Comm).

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*Barclays Bank Ltd v WJ Simms, Son & Cooke (Southern) Ltd* [1980] Q.B. 677. See also *Office of Fair Trading v Abbey National Plc* [2008] EWHC 875 (Comm), [2008] 2 All E.R. (Comm) 625 at [79] (bank must exercise its decision honestly and rationally). In *Verjee v CIBC Bank and Trust Co (Channel Islands) Ltd* [2001] Lloyd's Rep. Bank. 279, it was held that the mere fact that a cheque was drawn against an inadequate balance did not put the bank on inquiry and that, by honouring the cheque, the bank did not commit a breach of a duty of care to the customer.

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*Royal Bank of Scotland Plc v Fielding* [2003] EWHC 986 (Ch) at [81], [85], per Hart J; affirmed. [2004] EWCA Civ 64 (but Jonathan Parker J suggesting (at [108]) (without

- deciding the point) that bank might breach its duty of care to one account holder if it continued to operate the account even though it “had some reason to suppose the mandate was being abused” by the other account holder, or (at [101]) had “notice that a fraud is being committed”).
- 1049     (1872) *L.R. 8 Ex. 10*. See also *Barclays Bank Ltd v Okenarhe* [1966] 2 *Lloyd's Rep.* 87. For a detailed discussion see E.P. Ellinger, E. Lomnicka and C.V.M. Hare, Ellinger's Modern Banking Law, 5th edn (2011), pp.248–268, 884–891.
- 1050     *Garnett v M'Kewan*, above, does not regard the right of combination as subject to notice; *National Westminster Bank Ltd v Halesowen Presswork and Assemblies Ltd* [1972] A.C. 785, 807, 810, 820 treats the question as still open but contains strong dicta suggesting that notice, even though with immediate effect, is required. For retail customers, the bank's right of set-off (or combination) is now regulated by the FCA's Banking Conduct of Business Sourcebook (BCOBS), which imposes certain information requirements pre-contract (BCOBS 4.1.4AG(2)(a)(i),(ii)), pre-use of set-off rights (BCOBS 4.1.4AG(2)(b)(i),(ii)) and post-use of set-off rights (BCOBS 4.1.4AG(2)(c)). BCOBS also imposes limits on the use of set-off rights against retail customers: see BCOBS 5.1.3AG(1),(2)(a) (customer must be left with a “subsistence balance”); BCOBS 5.1.3AG(2)(b)(i),(ii) (no set-off of personal debts against ring-fenced or earmarked funds) and BCOBS 5.1.3BG(1),(2) (refund is usual remedy unless not fair to do so). Neither the Standards of Lending Practice for Personal Customers 2021 nor the Standards of Lending Practice for Business Customers 2020 (paras 36-223—36-224 above) have detailed provisions about the use of the right of set off.
- 1051     Above, reversing the decision of the Court of Appeal and restoring Roskill J's judgment: [1971] 1 Q.B. 1. See also Vol.I, paras 23-041 et seq.
- 1052     Mutual dealings and set-off rules are now to be found in r.14.24 (administration) and r.14.25 (winding up) of the Insolvency (England and Wales) Rules 2016 (SI 2016/1024).
- 1053     But note that it is now accepted that a bank can have a charge over funds deposited with it: *Re Bank of Credit and Commerce International SA* [1998] A.C. 214; overturning *Re Charge Card Services Ltd* [1987] Ch. 150; affirmed (on another point) [1989] Ch. 497; *Re Spectrum Plus Ltd* [2005] UKHL 41, [2005] 2 A.C. 680 at [60], per Lord Hope.
- 1054     It appears that the right under s.323 cannot be abrogated by contract: *Halesowen's* case, above, at 805, 809, 824; *Fraser v Oystertec Plc* [2006] 1 B.C.L.C. 491 at [16].
- 1055     *Re EJ Morel (1934) Ltd* [1962] 1 Ch. 21. cf. *Re James R Rutherford & Sons Ltd* [1964] 1 W.L.R. 1211. And see *Coca-Cola Financial Corp v Finsat International Ltd* [1998] Q.B. 43, CA. For a case involving a bank's refusal without notice to sanction further advances under a facility agreement, see: *Socomex Ltd v Banque Bruxelles Lambert SA* [1996] 1 *Lloyd's Rep.* 156 (Mance J).
- 1056     *Barclays Bank Ltd v Okenarhe* [1966] 2 *Lloyd's Rep.* 87. Usually the arrangement remains in effect only insofar as there is no substantial change in the circumstances: *British Guiana Bank v OR* (1911) 104 L.T. 754; *Halesowen's* case, above; cf. *Direct Acceptance Corp Ltd v Bank of New South Wales* (1968) 88 W.N. (N.S.W.) (Pt 1) 498. As regards the combination of a current account and a loan account, see *Bradford Old Bank Ltd v Sutcliffe* [1918] 2 K.B. 833, 847.

- 1057     *Union Bank of Australia v Murray-Aynsley [1898] A.C. 693; Barclays Bank Ltd v Quistclose Investments Ltd [1970] A.C. 567.* But an account opened by a person as trustee may be subject to combination with that person's other accounts if the bank is not aware of the existence of a trust: *Thomson v Clydesdale Bank [1893] A.C. 282; Royal Bank of Scotland Plc v Wallace International Ltd [2000] All E.R. (D) 78, CA.* Solicitors Act 1974 s.85(b) provides that "client accounts" of a solicitor may not be combined with their personal accounts.
- 1058     *MPS Construction Pty Ltd (In Liquidation) v Rural Bank of NSW [1980] A.C.L.R. 835,* especially at 842–843 Aust.
- 1059     *Punjab National Bank v Basna [1988] F.L.R. 97.* See also *Neste Oy v Lloyds Bank Plc [1983] Com. L.R. 145*, concerning the combination of an account maintained by the customer as an agent with his personal account. And see *Bhogal v Punjab National Bank [1988] 2 All E.R. 296*; followed in *Uttamchandani v Central Bank of India (1989) 133 S.J. 262*; and *Saudi Arabian Monetary Agency v Dresdner Bank AG [2003] EWHC 3271 (Ch), [2004] 2 Lloyd's Rep. 19; affirmed. [2004] EWCA Civ 1074, [2005] 1 Lloyd's Rep. 12.*
- 1060     *Syndicate Bank v Dansingani [2019] EWHC 3439 (Ch) at [295]–[298], affd. [2021] EWCA Civ 714.*
- 1061     *Szek v Lloyds Bank (1908)*, in Legal Decisions Affecting Bankers, Vol.II, p.159; *Flach v London and South Western Bank (1915) 31 T.L.R. 334; Plunkett v Barclays Bank [1936] 2 K.B. 107; Jayson v Midland Bank Ltd [1968] 1 Lloyd's Rep. 409.* cf. *Pyke v Hibernian Bank [1950] Ir. Rep. 195.*
- 1062     See E.P. Ellinger, E. Lomnicka and C.V.M. Hare, Ellinger's Modern Banking Law, 5th edn (2011), pp.509–513. See also *Aktas v Westpac Banking Corp Ltd [2010] HCA 25* (where the High Court of Australia, by a majority, rejected a defence of qualified privilege); criticised by *Tobin & Hare [2012] L.M.C.L.Q. 1.*
- 1063     *Frost v London Joint Stock Bank (1906) 22 T.L.R. 760.*
- 1064     *Baker v Australia and New Zealand Bank [1958] N.Z.L.R. 907.*
- 1065     *Davidson v Barclays Bank [1940] 1 All E.R. 316.*
- 1066     See also below, para.36-416, for the payer's rights against the payer's bank under the *Payment Services Regulations 2017 (SI 2017/752)*, as amended, for non-execution or defective execution of an (electronic) payment transaction that falls within the scope of the Regulations; for the payee's rights against the payee's bank, see below, paras 36-419 et seq.
- 1067     *Wilson v United Counties Bank Ltd [1920] A.C. 102* at 112, per Lord Birkenhead.
- 1068     *Gibbons v Westminster Bank [1939] 2 K.B. 882; Rae v Yorkshire Bank Plc [1988] F.L.R. 1, CA.*
- 1069     *[1996] 4 All E.R. 119.*
- 1070     At 124.
- 1071     For factors that may be relevant to an assessment of the quantum of general damages on wrongful dishonour of a cheque, see *Nicholson v Knox Ukiwa [2007] EWHC 2430 (QB)* at [83]–[118].
- 1072     *R. Hooley [1996] C.L.J. 189* at 191; cf. *N. Enonchong (1997) 60 M.L.R. 412.*

- 1073      *Royal Brunei Airlines Sdn v Tan [1995] 2 A.C. 378, PC.* See above, paras 36-291—36-299.
- 1074      *TTS International v Cantrade Private Bank* Unreported 1995, Royal Court of Jersey, but see (1995) 4 J. Int. Tr. 60.
- 1075      See above, para.36-296.
- 1076      s.333A (“tipping off” offences). See also s.342 (offence of prejudicing an investigation). The **Terrorism Act 2000** s.39, as amended by the **Anti-terrorism, Crime and Security Act 2001**, also provides for a “tipping off” offence.
- 1077      [2001] EWCA Civ 52, [2001] 1 W.L.R. 751.
- 1078      At [47]. To similar effect, see *Tayab v HSBC Bank Plc [2004] EWHC 1529, [2004] 4 All E.R. 1024* at [75]—[77].
- 1079      *Squirrell Ltd v National Westminster Bank Plc [2005] EWHC 664 (Ch), [2006] 1 W.L.R. 637*, considering s.328 of the Proceeds of Crime Act 2002 which creates an offence of facilitating the acquisition, retention, use or control of criminal property.
- 1080      s.333A (“tipping-off” offences). See also s.342 (offence of prejudicing an investigation).
- 1081      The NCA replaced the Serious Organised Crime Agency in 2013.
- 1082      *Bank of Scotland v A Ltd [2001] EWCA Civ 52, [2001] 1 W.L.R. 751; Amalgamated Metal Trading Ltd v City of London Police Financial Investigation Unit [2003] EWHC 703 (Comm), [2003] 1 W.L.R. 2711*. But see also *National Crime Agency v N [2017] EWCA Civ 253* at [71], where Hamblen LJ said that *Bank of Scotland v A*, a tipping-off case, had to be “considered with caution and cannot be regarded as providing general guidance” in the context of the statutory consent regime contained in **POCA 2002**.
- 1083      *K Ltd v National Westminster Bank Plc [2006] EWCA Civ 1039, [2007] 1 W.L.R. 311*, where it was held that the bank does not have to adduce evidence to support any such suspicion or even show that there were reasonable grounds for the suspicion. But in *Shah v HSBC Private Bank (UK) Ltd [2010] EWCA Civ 31, [2011] 1 All E.R. 67*, the Court of Appeal held that where a customer brings non-summary proceedings against his bank claiming damages to compensate for loss caused to him because of the bank’s failure to carry out his payment instructions, and the bank relies on its suspicion that the requested transfer involved funds which were criminal property, there was no reason why the bank should not be required at trial to prove that it had the relevant suspicion: at the trial the High Court held that HSBC did in fact have a genuine suspicion that the funds were criminal property, see [2012] EWHC 1283 (QB). See also *Lonsdale v National Westminster Bank Plc [2018] EWHC 1843 (QB)* at [54]—[66], where the judge refused to strike out and/or summarily dismiss the claimant customer’s claim that the defendant bank acted in breach of contract by freezing his accounts. The judge stressed (at [64]) that whether or not the bank had a genuine suspicion was a primary fact, which the customer had put in issue, that required to be proved by evidence that would be tested at trial. The judge also refused to strike out and/or summarily dismiss the customer’s claims against the bank (a) for breach of his rights under the Data Protection Act 1998 to see personal data held by the bank, and (b) for defamation (stating, at [131]—[134], that absolute privilege for defamatory words should not be extended to cover

- reports to the NCA, but that a bank which reports suspicious activity to the NCA would have the benefit of qualified privilege).
- 1084     Proceeds of Crime Act 2002 s.330(2)(a) and (b) extend the reporting requirement to where the bank has reasonable grounds for knowledge or suspicion that another person is engaged in money laundering. The report constitutes an “authorised disclosure” under s.338 of the 2002 Act, amended by the Serious Crime Act 2015 from 1 June 2015 to include a new subs.(4A), which provides that “when an authorised disclosure is made in good faith, no civil liability arises in respect of the disclosure on the part of the person by or on whose behalf it is made”.
- 1085     s.335. The court has recently been given power to extend the moratorium period up to 186 days through amendments to Pt 7 of the 2002 Act, introduced by the Criminal Finances Act 2017 s.10 (in force on 31 October 2017).
- 1086     *R. (on the application of UMBS Online Ltd) v Serious Organised Crime Agency [2007] EWCA Civ 406*. In *National Crime Agency v N [2017] EWCA Civ 253* at [59]–[64], the Court of Appeal held that the court had jurisdiction to override the compulsory statutory consent procedure under POCA 2002 by granting interim relief, but stated that, as the balance of convenience is likely to lie in favour of the public interest in the prevention of money laundering in most cases, such intervention was likely to be exceptional.
- 1087     s.41.

## **(ii) - Termination of Duty to Pay**

**Chitty on Contracts 34th Ed.**

**Consolidated Mainwork Incorporating First Supplement**

**Volume II - Specific Contracts**

**Chapter 36 - Bills of Exchange and Banking**

**Section 2. - Aspects of Banking Law**

**(c) - The Current Account**

**(ii) - Termination of Duty to Pay**

### **Countermand of payment**

36-332 Section 75(1) of the Bills of Exchange Act 1882 provides that the banker should not honour a cheque if the customer has countermanded, or “stopped”, it. If the banker pays a cheque after having received notice of countermand, he is not entitled to debit the customer’s account. However, the notice given by the customer to the banker must be unambiguous and should identify the cheque; otherwise the banker is not at fault if he honours it.<sup>1088</sup> At the same time, if the notice is clear, it is effective, and the banker is not entitled to rely on a business practice prevailing in his firm in order to disregard it. In *Burnett v Westminster Bank Ltd*<sup>1089</sup> the plaintiff had one current account with the X branch of the defendant bank and another one with its Y branch. The payment of cheques drawn on the Y branch was done through a computer, which calculated whether there were sufficient funds in the account for meeting the cheque, and then forwarded it to the branch on which it was drawn, where the teller would check the signature. The computer identified the account and the branch on which the cheque was drawn by decoding numbers printed on each cheque with magnetic ink. Customers were, therefore, requested, in a clause printed on the folder of each cheque book, not to use cheque forms contained in it for drawing on any other account. Despite this clause, the plaintiff used a form contained in the cheque book supplied by the Y branch in order to draw a cheque on the X branch, changing the address in the form to that of the X branch. On the next day he gave notice of countermand to the X branch. The cheque was presented through the clearing house, and was forwarded by the computer to the Y branch and honoured. It was held on the facts that the clause demanding that forms contained in the cheque book be used for drawing cheques only on the Y branch, was not a term of the contract between the plaintiff and

the defendant bank, and that notice of countermand given to the X branch, on which the cheque was drawn, was sufficient.

## When effective

- 36-333 The notice of countermand becomes effective only when it reaches the teller or ledger clerk, and the mere fact that a letter countermanding payment has arrived at the banker's address at the time the cheque is honoured, does not render the banker liable. However, if the letter remains unopened for an unreasonable time, and as a result the teller is not notified of the countermand and the cheque is honoured, the banker may be liable in an action in negligence.<sup>1090</sup> Unless otherwise agreed, no particular form is required for an effective countermand. The countermand may be made orally, in person or by telephone, or by letter, telex, fax, email or other writing. However, in each case the bank must be able reasonably to satisfy itself that the countermand is that of its customer. The bank is not obliged to accept an unauthenticated message as countermand of its duty and authority to pay in accordance with its customer's mandate, although it may rely on the unauthenticated message to delay payment pending confirmation.<sup>1091</sup> Use of an agreed password may even authenticate a countermand given over the telephone or via the internet. Notice of countermand given at one branch is not an effective countermand at any other branch of the bank<sup>1092</sup>; but it is sufficient if the customer gives notice of countermand to the branch on which the cheque is drawn.<sup>1093</sup>

## Payment Services Regulations 2017

- 36-334 The [Payment Services Regulations 2017 \(“PSRs 2017”\)](#) reg.67(3) provide that the payer’s consent to a payment transaction can be withdrawn at any time before the point at which the payment order can no longer be revoked under [reg.83](#).<sup>1094</sup> Regulation 83(1) restricts the ability of a payment service user to revoke a payment order by providing that, subject to certain exceptions, the payment service user may not revoke a payment order after it has been received by the payer’s payment service provider.<sup>1095</sup> In the case of a payment transaction initiated by a payment initiation service provider, by or through the payee, the payer may not revoke the payment order after giving consent to the payment initiation service provider to initiate the payment transaction or giving consent to execute the payment transaction to the payee.<sup>1096</sup> In the case of a direct debit, the payer may not revoke the payment order after the end of the business day preceding the day agreed for the debiting of funds.<sup>1097</sup>

## Death of customer

- 36-335 Section 75(2) of the Act provides that *notice* of the customer's death terminates the banker's duty and authority to pay a cheque. This section seems to overcome, as regards payment of cheques, the principle that the authority of an agent is automatically determined by the principal's death and that the agent is liable for any act performed after it.<sup>1098</sup>

## Mental disorder of customer

- 36-336 There is no authority regarding the effect of the insanity of the customer on the banker's duty to pay his cheques.<sup>1099</sup> It has been held in *Yonge v Toynbee*<sup>1100</sup> that the authority of an agent is determined by the principal's insanity. The relationship of customer and banker is not, however, solely that of principal and agent and it may, thus, be doubted whether the principle of *Yonge v Toynbee* applies. It is thought that *notice* of the customer's insanity terminates the banker's authority to pay cheques.<sup>1101</sup> Where an order is made under the Mental Capacity Act 2005 the position should be clearer.

## Winding up

- 36-337 The bank has to exercise extreme caution where a customer, who is a body corporate, is being wound up. By s.127 of the Insolvency Act 1986, in a winding-up of a company by the court, any disposition of the company's property made after the commencement of the winding-up is, unless the court orders otherwise, void. According to s.129 of the 1986 Act, the winding-up of a company by the court is deemed to commence at the time of the presentation of the petition for winding-up (or, if the company was already in voluntary liquidation, at the time when the resolution for voluntary winding-up was passed). Section 127 does not specify the appropriate remedy of the company's liquidator when the disposition is avoided but the Court of Appeal indicated in *Hollcourt (Contracts) Ltd v Bank of Ireland* that the right of recovery is restitutionary.<sup>1102</sup>

**U** Problems for the bank arise if, due to oversight or to its ignorance of the pending petition, the bank allows payments to be made into and out of the company's account.

<sup>1102</sup>

**U** Until recently, all payments into and out of a company's bank account were considered to be dispositions of the company's property and void.

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**U** That view has turned out to be too sweeping. Payments into an account in credit have been held not to constitute dispositions of the company's property as the amount standing to the credit of the customer's account is increased.

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**U** Payments into an overdrawn account do constitute dispositions of the company's property and are void under [s.127](#) unless validated by the court.

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**U** Payments made out of a company's bank account, whether the account is in credit or overdrawn, have been held not to constitute a disposition of the company's property to the bank, which merely acts as the company's agent in making a disposition in favour of the third party.

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**U** In any event, a bank is well advised to ask the company for a validation order under [s.127](#) before allowing it to continue to operate the account as notice of the winding-up petition terminates the bank's authority to honour its customer's cheques.

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## Bankruptcy

36-338 The bankruptcy of an individual commences with the day on which the bankruptcy order is made.<sup>1109</sup> By [s.284\(1\) of the 1986 Act](#) any disposition of property made by the bankrupt between the presentation of the bankruptcy petition and the vesting of the bankrupt's estate in his trustee (i.e. the day he is appointed) is void, except to the extent that it is made with the consent of, or is ratified by, the court. The wording of [s.284\(1\)](#) is similar to that of [s.127 of the 1986 Act](#), and so [s.284\(1\)](#) should apply to dispositions of the type caught by [s.127](#).<sup>1110</sup> The discretion vested in the court under [s.284\(1\)](#) is also likely to be exercised in a way similar to the discretion vested under [s.127](#). If the bank makes a payment which is caught by [s.284\(1\)](#), but does so unaware of the presentation of the petition, the court is likely to ratify the payment. The bank is given further protection by [s.284\(5\)](#) which allows it to maintain a debit if the bank pays against the bankrupt's payment instruction after the making of a bankruptcy order, unless the bank did so with notice of the bankruptcy or it is not reasonably practical to recover the amount from the payee. It would seem that the subsection only applies where the payment is made out of an overdrawn account, because only then has the bankrupt "incurred a debt to a banker" by reason of the making of the payment.<sup>1111</sup> A bank which receives a payment into the account before the bankruptcy order may

be protected by s.284(4). By subs.(4), the amount paid into the account is irrecoverable if received before the commencement of the bankruptcy in good faith, for value and without notice of the presentation of the bankruptcy petition.

## Third party debt orders

36-339 Service of a third party debt order (formerly called a “garnishee order”) relieves the banker of his obligation to pay his customer’s cheques or other payment instruction, until the order is discharged, regardless of the respective amounts of the balance and the judgment debt.  
1112

**U** In many interim third party debt orders, however, a named sum is now expressed as the limit attachable, in which case it is the practice of bankers to earmark such specified amount together with an additional sum to cover estimated costs and to allow the customer to operate on the remaining balance. A third party debt order attaches foreign currency balances maintained with a bank in the United Kingdom,

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**U** but not with a foreign branch unless by the law applicable in that place an English order would be recognised as discharging the liability of the third party to the judgment debtor.  
1114

**U** The procedural rules relating to third party debt orders are to be found in Pt 72 of the Civil Procedure Rules 1998  
1115

**U** where reference is made to a third party debt order being made in respect of “any debt due or accruing due to the judgment debtor from a third party”.  
1116

**U** The essential condition for the effectiveness of a third party debt order is that there should be a subsisting debt owed to the judgment debtor  
1117

**U**; execution cannot be levied against a debt if the judgment debtor has parted with his interest in it.  
1118

**U** Doubts as to whether money standing to the credit of a customer in a current account could be deemed “due or accruing” were resolved in *Joachimson v Swiss Bank Corp.*  
1119

**U** Ordinarily a demand is necessary before moneys so credited strictly fall due, but the Court of Appeal held that service of a garnishee summons operated as a demand.

[1120](#)

**U** Compliance with a final third party debt order discharges the bank's indebtedness to its own customer, but there is no discharge if the bank pays in reliance on only an interim order.

[1121](#)

**U** *Ion Science Ltd v Persons Unknown* is thought to be the first time an English court has made a third party debt order against a cryptocurrency exchange (the third party) following an allegedly fraudulent cryptocurrency initial coin offering.

[1122](#)

**U**

## Period of limitation

36-340 The amount credited to the customer's account is payable on demand.<sup>[1123](#)</sup> It follows that the six-year limitation period does not run against the customer in respect of his credit balance in a current account until a demand for payment has been made. It has been suggested that when the account is overdrawn the period of limitation runs against the bank from the date of the advance.<sup>[1124](#)</sup> However, if the banker grants the customer an overdraft, repayable on demand, the time begins to run from the time of the demand.<sup>[1125](#)</sup>

36-341 Where a customer (the payer) seeks redress against his own bank (the payer's bank) for an unauthorised or incorrectly executed (electronic) payment transaction under the [Payment Services Regulations 2017](#),<sup>[1126](#)</sup> the payer must notify the payer's bank without delay, and in any event no later than 13 months after the debit date, on becoming aware of any unauthorised or incorrectly executed payment transactions.<sup>[1127](#)</sup>

## Effect of war

36-342 The effect of war on the banker's duty to pay his customer's cheques depends largely on legislation, e.g. the [Trading with the Enemy Act 1939](#), which may prohibit the honouring of certain types of cheques, e.g. those of persons residing in territory occupied by the enemy. The outbreak of hostilities or of war may further suspend the banker's duty to pay if it becomes impossible to do so, e.g. if hostilities are carried on in his place of business. When the banking business can safely

be resumed, the banker's duty to pay the customer's cheques is revived, and any credit balance becomes again payable on demand.<sup>1128</sup>

## Effect of extraterritorial orders

- 36-343 From time to time attempts are made by certain governments, such as the United States, to freeze or block accounts maintained by designated persons or bodies not only within the territory but even in places over which the government concerned has no sovereignty.<sup>1129</sup> An instance was President Reagan's Order of 8 January 1986 which sought to freeze all property and interests of the Government of Libya and any entities controlled by it which were at that date, or came thereafter, into the possession or control of any "US persons including overseas branches of US persons". This Order created problems for Libyan banks, which maintained accounts with American banks. Whilst an attempt to challenge the Order in the United States would have been futile, attempts were, predictably, made to enforce payment of amounts deposited by Libyan bodies with American banks in other countries.

## The Libyan Arab Bank cases

- 36-344 In the leading case, *Libyan Arab Foreign Bank v Bankers Trust Co*,<sup>1130</sup> the L Bank, which was a Libyan government body, maintained a Eurodollars account with BT's office in London and another account, used predominantly for transfers and settlements, with BT's head office in the United States. After the making of the Order, the L Bank demanded payment in London of the US \$140m deposited with the London office. BT refused, arguing that its contractual relationship with the L Bank was governed, in its entirety, by the law of the United States. It was, further, argued that even if the proper law of the deposit made in London was English law, payment should not be ordered as it would involve the performance of an act in the United States which was illegal under American law. To substantiate this second argument, BT called expert evidence to show that an amount of such magnitude could be cleared and settled only in the United States. Giving judgment for the L Bank, Staughton J held that, although there was only one contract between the two banks, it was governed by two separate proper laws. American law governed the deposit made in the United States, whilst English law governed the deposit made in London.<sup>1131</sup> On this basis his Lordship concluded that President Reagan's Order did not affect the deposit made in London. He accepted, at the same time, that, in English law, it would be wrong to order BT to perform an act, such as the settlement of a debt or its payment through an American clearing system, if the process involved the performance in the United States of an act there illegal. Staughton J held, however, that BT could pay the amount involved in cash in US dollars notes, as these could be imported without an infringement of American law from the United States. Alternatively, payment could be effected in pounds sterling of an amount equal to US \$140m. His Lordship pointed out that the

conversion of the currencies, namely the sale of the US dollars and the purchase of the required pounds sterling, could be effected in London. It should be emphasised that in the instant case the contract between the banks did not include a jurisdiction or choice of law clause. The outcome may, possibly, have differed if the contract between the parties had been made subject to the law of New York. It is interesting to note that some banks seek to protect themselves against problems of the type here encountered by including in their standard terms and conditions respecting deposits in foreign currency a clause which makes payment subject to the “lawful and instant availability” of clearing facilities in the country in whose currency the account is denominated.

## Closure of bank

- 36-345 If the bank closes down or is being wound up, its duty to honour the customer's cheques is terminated. The balance standing to the customer's account becomes, in such cases, payable at once, and without the need of a demand.<sup>1132</sup>

## Footnotes

- 1088     *Westminster Bank v Hilton* (1926) 43 T.L.R. 124. See also *Giordano v Royal Bank of Canada* [1973] 3 O.R. 771 Canada.
- 1089     [1966] 1 Q.B. 742.
- 1090     *Curtice v London City and Midland Bank* [1908] 1 K.B. 293; *Reade v Royal Bank of Ireland* [1922] 2 Ir.R. 22.
- 1091     *Curtice v London City and Midland Bank Ltd* [1908] 1 K.B. 293.
- 1092     *London Provincial and South Western Bank v Buszard* (1918) 35 T.L.R. 142.
- 1093     *Burnett v Westminster Bank Ltd* [1966] 1 Q.B. 742; *Royal Bank of Canada v Boyce*, 57 D.L.R. (2d) 683 (1966).
- 1094     See also PSRs 2017 reg.67(4) for withdrawal of consent to the execution of a series of payment transactions. For application of the PSRs 2017 in general, see above, paras 36-225 et seq., and below, paras 36-412 et seq. The PSRs focus only on electronic means of payment, so that, for example, cheques fall outside their scope.
- 1095     For the time of receipt of a payment order, see PSRs 2017 reg.81.
- 1096     PSRs 2017 reg.83(2) (contrast differently worded PSRs 2009 reg.67(2)).
- 1097     PSRs 2017 reg.83(3). For further provisions relating to revocation, see PSRs 2017 reg.83(4)–(6).
- 1098     *Campanari v Woodburn* (1854) 15 C.B. 400. And see E.P. Ellinger, E. Lomnicka and C.V.M. Hare, Ellinger's Modern Banking Law, 5th edn (2011), pp.479–481.
- 1099     But see *Drew v Nunn* (1879) 4 Q.B.D. 661; *Daily Telegraph Newspaper Co v McLaughlin* [1904] A.C. 776. See also Vol.I, paras 11-075 et seq.
- 1100     [1910] 1 K.B. 215.

- 1101 Hart, Law of Banking, 4th edn, p.302; *F.H. Ryder*, “*Bankers and the Law relating to Lunacy*” (1934) 55 *J.I.B.* 14; cf. Megrah, The Banker’s Customer, 2nd edn, p.76.
- 1102 [2001] *Ch. 555, CA*. A change of position defence may defeat the restitutive claim, although this will depend on the circumstances of the particular case: see *Re Tain Construction Ltd* [2003] *B.P.I.R.* 1188. See also *Rose v AIB Group (UK) Plc* [2003] 1 *W.L.R.* 2791 at [41]–[43]; *Re D’Eye* [2016] *B.P.I.R.* 883 at [55]; *Clark v Meerson* [2018] *B.P.I.R.* 661 at [47]; *Officeserve Technologies Ltd v Annabel’s (Berkeley Square) Ltd* [2018] *EWHC* 2168 (*Ch*) at [41]; *Re MKG Convenience Ltd (in liquidation)* [2019] *EWHC* 1383 (*Ch*) at [67]–[70]; *Skandinaviska Enskilda Banken AB v Conway* [2019] *UKPC* 36 at [114]–[117] (where issue was whether change of position defence available to restitutive claim following voidable preference); *Bucknall v Wilson* [2021] *EWHC* 2149 (*Ch*) at [86] (a case concerning s.339 of the Insolvency Act 1986); *Re Changtel Solutions UK Ltd (In Liquidation)* [2022] *EWHC* 694 (*Ch*) at [154] (a s.127 case, where ICC Judge Barber, following *Re MKG Convenience Ltd*, proceeded on basis that “the circumstances in which a change of position defence can succeed are constrained in the same way and for the same reasons as the exercise of the court’s discretion to validate”).
- 1103 See generally, *S.H.C. Lo*, “*Current accounts and void dispositions after commencement of winding up*” [2020] *J.B.L.* 624.
- 1104 *Re Gray’s Inn Construction Ltd* [1980] 1 *W.L.R.* 711, *CA*.
- 1105 *Re Barn Crown Ltd* [1994] 4 *All E.R.* 42, criticised in K van Zwieten (ed.), *Goode on Principles of Corporate Insolvency Law*, 5th edn (2018), para.13-125.
- 1106 *Re Gray’s Inn Construction Ltd*, above; *Re Tain Construction Ltd* [2003] *B.P.I.R.* 1188.
- 1107 *Hollcourt (Contracts) Ltd v Bank of Ireland*, above, *CA*, endorsing the ruling of Lightman J in *Coutts & Co v Stock* [2000] 1 *W.L.R.* 906. But in *Officeserve Technologies Ltd (In Liquidation) v Anthony-Mike* [2017] *EWHC* 1920 (*Ch*), HH Judge Paul Matthews, sitting as Judge of the High Court, stated obiter (at [88]) that whilst he agreed with Lightman J that there is no disposition of the company’s property to the bank on the facts of *Coutts & Co v Stock*, where the account was overdrawn, he considered that there is a disposition caught by s.127 where the account is in credit because the bank’s liability to the company has been reduced. The judge (at [88]) preferred the reasoning of Blackburne J at first instance in *Hollcourt (Contracts) Ltd v Bank of Ireland* [2000] 1 *W.L.R.* 895, although he did not refer to the Court of Appeal’s reasoning when reversing Blackburne J on appeal at [2001] *Ch. 555*, and (at [97]) relied on dicta of Lord Neuberger in *Akers v Samba Financial Group* [2017] *UKSC* 6, [2017] *A.C.* 424 at [74] to the effect that the giving up of contractual rights by a company would be a “disposition” within s.127.

1108 *Pettit v Novakovic [2007] B.P.I.R. 1643* at [7]. Presentation of the petition does not automatically terminate the bank's mandate: *Hollcourt (Contracts) Ltd v Bank of Ireland*, above. The issue and delivery of a cheque by a company to a creditor may well be a disposition and, for the purposes of s.127, any payment made from funds on a company's account in satisfaction of a cheque drawn on that account is a separate disposition in favour of the creditor (*Re Changtel Solutions UK Ltd (In Liquidation) [2022] EWHC 694 (Ch)* at [53]–[55]). The principles that govern the validation of a disposition, either prospectively or retrospectively, are set out in *Re Gray's Inn Construction Ltd [1980] 1 W.L.R. 711, CA*; and in *Denney v John Hudson & Co Ltd [1992] B.C.L.C. 901*; see also *Wilson v 375 Live Ltd [2015] EWHC 870 (Ch)*. *Re Gray's Inn Construction Ltd* was explained and amplified by the Court of Appeal in *Express Electrical Distributors Ltd v Beavis [2016] EWCA Civ 765, [2016] 1 W.L.R. 4783*, where Sales LJ (at [56]) said validation would ordinarily only be granted “if there is some special circumstance which shows that the disposition in question will be (in a prospective application case) or has been (in a retrospective application case) for the benefit of the general body of unsecured creditors, such that it is appropriate to disapply the usual pari passu principle”. Sales LJ’s approach to validation orders was applied in *Re MKG Convenience Ltd (In Liquidation) [2019] EWHC 1383 (Ch)* at [47], and in *Re Changtel Solutions UK Ltd (In Liquidation) [2022] EWHC 694 (Ch)* at [64].

1109 Insolvency Act 1986 s.278(a).

1110 See above, para.36-337. But note that there are differences between the two regimes and differences between s.127 and s.284: *Pettit v Novakovic*, above. See also *Thomas v D'Eye [2016] B.P.I.R. 883* at [49], per Baister R., who said of s.284, “we are not dealing with unjust enrichment generally but a particular statutory regime which gives rise to an account for money had and received to which there are limited defences”.

1111 Paget’s Law of Banking, 15th edn (2018), para.21.9.

1112 *Rogers v Whiteley [1892] A.C. 118*. See also *Edmunds v Edmunds [1904] p.362*. For a detailed analysis including the question of priorities, see E.P. Ellinger, E. Lomnicka and C.V.M. Hare, Ellinger’s Modern Banking Law, 5th edn (2011), pp.459–470, and 477 for similarities and differences between a freezing injunction (which also relieves a bank of its duty to honour its customer’s mandate) and an interim third party debt order. For the nature of the duty of disclosure in an application for an interim third party debt order, and how it differs from disclosure in the case of freezing orders, see *State Bank of India v Mallya [2019] EWHC 995 (QB)* at [9]–[11]; *BCS Corporate Acceptances Ltd v Terry [2018] EWHC 2349 (QB)* at [70]–[78]; *Merchant International Co Ltd v Natsionalna Aktsionerna Kompaniya Naftogaz Ukrainy [2014] EWHC 391 (Comm)* at [68]–[71].

1113 *Choice Investments Ltd v Jeromnimon (Midland Bank Garnishee) [1981] Q.B. 149*; *Camdex International Ltd v Bank of Zambia (No.3) (1997) 6 Bank. L.R. 44, CA*.

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*Société Eram Shipping Co Ltd v Compagnie Internationale de Navigation [2003] UKHL 30, [2004] 1 A.C. 260; Kuwait Oil Tanker Co SAK v Qabazard [2003] UKHL 31, [2004] 1 A.C. 300.* The situs of the debt is vitally important. In *Taurus Petroleum Ltd v State Oil Marketing Company of the Ministry of Oil, Republic of Iraq [2017] UKSC 64* at [31]–[32], [60], [72], [83], [124]–[125], the Supreme Court held (unanimously), overturning *Power Curber International Ltd v National Bank of Kuwait [1981] 2 Lloyd's Rep. 394* on the point, that the general rule that the situs of a debt is the debtor's residence (i.e. the place where the debt is recoverable) applies to letters of credit: for a credit issued by the London branch of an overseas bank, when the credit incorporated UCP 600 (art.3 of which provides that “[b]ranches of a bank in different countries are to be considered as separate banks”), the situs of the debt due under the credit was London, thereby making the debt susceptible to a third party debt order made by an English court. For a review of the authorities on locating the situs of a debt, and a summary of the principles emerging therefrom (including displacement of the general rule that the debt is properly recoverable or enforceable in the place of residence, or domicile, of the debtor), see *Hardy Exploration and Production (India) Inc v India [2018] EWHC 1916 (Comm)* at [53]–[82]. See also *Balengani v Sharifpoor [2020] EWHC 3888 (Ch)* (unusually, a third party debt order was made in respect of a debt situated abroad), and also *Ross Leasing Ltd v Nile Air [2021] EWHC 2201 (Comm)* (court declined to make interim third party debt order final where debt situated abroad), where the *Balengani* case was said (at [30]) to have been “resolved on rather special facts and might be described as in the nature of the exception which proves the rule”.

1115 Pt 72 of the Civil Procedure Rules 1998 came into effect on 25 March 2002, replacing RSC Ord.49.

1116 In *Alawiye v Mahamood [2005] EWHC 277 (Ch), [2006] 3 All E.R. 668*, Lindsay J held that, in the absence of any contrary indication, the court could and should accept, as sufficient for the purposes of an interim third party debt order under CPR r.72.4, evidence in which the judgment creditor was able to say no more than that the judgment debtor had previously had an account with the third party bank and that it had previously been in credit. Lindsay J also stated (obiter) that the fact that the account had previously been overdrawn did not of itself preclude there being a debt to the judgment debtor from the third party, at least where there is nothing to indicate that, overall, the bank is not a debtor to the judgment debtor.

1117 An order can only be made when the debt is owed solely to the judgment debtor: *Taurus Petroleum Ltd v State Oil Marketing Company of the Ministry of Oil, Republic of Iraq [2017] UKSC 64* at [24], citing Field J at first instance *[2013] EWHC 3494 (Comm), [2014] 1 Lloyd's Rep. 432* at [13]. See also *National Bank of Kazakhstan v Bank of New York Mellon SA/NV [2020] EWHC 916 (Comm)* at [92] and [104] (where, for purposes of Belgian garnishment order, English court had to decide whether debt was payable

by London branch of defendant bank to Republic of Kazakhstan or National Bank of Kazakhstan).

1118 *Taurus Petroleum Ltd v State Oil Marketing Company of the Ministry of Oil, Republic of Iraq [2017] UKSC 64* at [68]. See also *Merchant International Co Ltd v Natsionalna Aktsionerna Kompania Naftogaz Ukrayny [2014] EWCA Civ 1603*; *Rekstin v Severo Sibirsko Gosudarstvennoe Aksionernoe Obschestvo Koseverputj and the Bank for Russian Trade Ltd [1933] 1 K.B. 47*; *Re General Horticultural Co (1886) 32 Ch. D. 512, 515* (which, according to Lord Clarke in *Taurus*, above, at [45]–[46], does not establish any independent principle of “honest dealing”, but merely reaffirms that a judgment creditor cannot by means of a third party debt order levy execution on property that does not belong to the judgment debtor); *Hardy Exploration and Production (India) Inc v India [2018] EWHC 1916 (Comm)* at [120] (there must be an existing obligation in respect of the debt at the date of the making or service of the Interim Third Party Debt Order: there is no existing obligation where a contingency or condition precedent has not yet been satisfied at the relevant date).

1119 *[1921] 3 K.B. 110, 131.*

1120 By contrast, no debt is “due or accruing due” when loan repayable on 30 days’ written notice, which was held to be a condition precedent to an obligation to repay the sums loaned, unless and until notice served, *Michael Wilson & Partners Ltd v Sinclair [2020] EWHC 1249 (Comm)* at [22]–[33] (applying *Insolvency Act 1986 s.285(3), s.346(1)*), the CA held it impossible for judgment creditor to pursue appeal where judgment debtor made bankrupt before hearing of appeal, unless the creditor had a reasonable prospect of obtaining an order under *s.346(6) of the Act*, which it did not have: [2021] EWCA Civ 505). As regards the right of the bank served with a third party debt order to deduct its expenses from the amount attached, see *Gerry Webb Transport v Brenner [1985] C.L. 152.*

1121 *Crantrave Ltd v Lloyds TSB Bank Plc [2000] Q.B. 917, CA.* Where there is a prior equitable charge or flawed asset arrangement over the account, the court will not make a third party debt order final: *Fraser v Oystertec Plc [2004] EWHC 1582 (Ch), [2005] B.P.I.R. 381.*

1122 *Unreported, 28 January 2022* (Master Cook made final order).

1123 *Joachimson v Swiss Bank Corp [1921] 3 K.B. 110.*

1124 *Parr’s Banking Co v Yates [1898] 2 Q.B. 460.*

1125 *Lloyds Bank v Margolis [1954] 1 W.L.R. 644.* As regards a fresh demand and acknowledgement of the debt, see *Bank of Baroda v Mahomed [1999] 1 Lloyd’s Rep. Bank. 14, CA.* See also Vol.I, paras 31-039—31-040.

1126 SI 2017/752 (“PSRs 2017”), as amended. See above, paras 36-225 et seq. (noting, in particular, the scope of the PSRs 2017), and below, paras 36-411 et seq.

- 1127 PSRs 2017 reg.74(1) makes the payment service user's reporting obligation a condition for redress under regs 76, 91, 92, 93 or 94. PSRs 2017 reg.74(2) relieves the user of this obligation if the user's bank has failed to comply with the various information requirements set out in Pt 6. The payee's rights to redress under these provisions are also subject to the same time-bar.
- 1128 *Arab Bank Ltd v Barclays Bank DCO [1954] A.C. 495*. See also Vol.I, para.26-030.
- 1129 Sanctions may also be imposed by the UN Security Council or the EU against states, governments, individuals and other entities in order to bring about a change in their policy or activity. For a recent example, where a bank was held to have been entitled to freeze the bank accounts of one of its customers, as it had reasonable cause to suspect, for the purposes of the *Syria (European Union Financial Sanctions) Regulations 2012*, that the funds in the account might be held by, controlled by or owned by her husband, who had been identified by the Council of the European Union as benefitting from or supporting the regime in Syria, see *Hmicho v Barclays Bank Plc [2015] EWHC 1757 (QB)*. The UK did not opt into, and was not bound by, Regulation (EU) 655/2014 on the freezing of bank accounts, which enables a claimant to make a single application to the courts of one Member State to obtain a European Account Preservation Order, which freezes bank accounts held by a defendant in other Member States, without further intervention by the courts in those Member States.
- 1130 *[1989] Q.B. 728*. See also *Libyan Arab Foreign Bank v Manufacturers Hanover Trust Co [1988] 2 Lloyd's Rep. 494*; and *Libyan Arab Foreign Bank v Manufacturers Hanover Trust (No.2) [1989] 1 Lloyd's Rep. 608* (Hirst J).
- 1131 At common law, the bank-customer contract and the account contract are governed by the law of the place of the branch where the account is held. The same principle applied under the *Contracts Applicable Law Act 1990*, implementing the Rome Convention on the Law Applicable to Contractual Obligations (*Sierra Leone Telecommunications Co Ltd v Barclays Bank Plc [1998] 2 All E.R. 820, 827*) and continues to apply under the Rome I Regulation (EC) 593/2008 on the Law Applicable to Contractual Obligations (in force 17 December 2009) arts 4(1)(b), 19(2), as the law applicable to banking operations is *prima facie* "the place where the branch ... is located", although the applicable law may be that of the jurisdiction where the bank has its head office when two or more accounts are held in different jurisdictions (art.4(2)). After the end of the implementation period (31 December 2020), the Rome I Regulation became part of retained EU law subject to minor amendment (Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment, etc.) (EU Exit) Regulations 2019/834 reg.10). On the effects of Brexit generally, see Vol.I, paras 1-016 et seq. See E.P Ellinger, E. Lomnicka and C.V.M. Hare, *Ellinger's Modern Banking Law*, 5th edn (2011), pp.380–381.
- 1132 *Re Russian Commercial and Industrial Bank [1955] Ch. 148*. See also *Bank of Credit and Commerce International SA v Malik [1996] B.C.C. 15*.

## **(iii) - Protection of Paying Banker in Cases of Unauthorised Payment**

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Volume II - Specific Contracts

Chapter 36 - Bills of Exchange and Banking

Section 2. - Aspects of Banking Law

(c) - The Current Account

**(iii) - Protection of Paying Banker in Cases of Unauthorised Payment**

## **Payment Services Regulations 2009 and 2017**

- 36-346 The law set out in this section of the chapter reflects the general common law and statutory position as it emerged before the enactment and coming into force of the [Payment Services Regulations 2009](#) (“PSRs 2009”).<sup>1133</sup> On 13 January 2018 the [PSRs 2009](#) were revoked and replaced by the [Payment Services Regulations 2017](#) (“PSRs 2017”).<sup>1134</sup> The pre-2009 law remains applicable to cheques (as cheques fall outside the scope of the [PSRs 2009](#) and [PSRs 2017](#))<sup>1135</sup> and to other payment transactions that do not fall within the scope of the Regulations.<sup>1136</sup> In respect of payment transactions that fall within their scope, the [PSRs 2017](#) (and [PSRs 2009](#) before them) do not expressly preserve the common law position.<sup>1137</sup> There are restrictions on opting out of the [PSRs 2017](#) (as there were with the [PSRs 2009](#)) where the payment service user is a consumer, a micro-enterprise or a charity.<sup>1138</sup>

## **Discharge**

- 36-347 If the banker pays a cheque in compliance with the terms of his mandate, he is entitled to debit the customer’s account. Likewise, he gives an effective discharge of the cheque by paying it in due course, and is entitled to debit the customer’s account.<sup>1139</sup> Payment, it should be noted, is complete when the money is placed on the counter; if the cashier appreciates immediately thereafter that the

customer's account is overdrawn, the money is not recoverable from the payee, even though, at the moment, he may be counting the money in the cashier's presence.<sup>1140</sup> If the banker does not pay the cheque in compliance with his mandate or in due course, he may nevertheless be able to rely on some special defences. Under the common law he is protected, if he is able to show either that the customer is precluded from asserting wrongful payment, or that such payment was caused by the customer's own fault or negligence. The *Bills of Exchange Act 1882* and the *Cheques Act 1957* provide special defences for bankers who pay cheques bearing forged or irregular indorsements. All these defences require a detailed discussion.

## Estoppel

36-348 The customer may, by his conduct, be precluded from asserting that the banker exceeded his mandate by paying a cheque. Thus, if the customer assured his banker, before payment of the cheque, that his signature was genuine, he would later on be precluded from asserting that it had been forged.<sup>1141</sup> In *Greenwood v Martins Bank*<sup>1142</sup> a husband was aware that his wife had forged and cashed his cheques, but did not disclose this fact to his bankers for a long period. In the meantime the wife forged further cheques and, when threatened by him with exposure, committed suicide. It was held that the husband was estopped from pleading the forgery of any of these cheques and that, as his silence had lulled his bankers into security, he could not recover from them the amount paid on any of these forgeries. It was further held that the detriment sustained by the bank was its inability, resulting from the customer's silence, to proceed against the wife. In a case like *Greenwood v Martins Bank Ltd*, the customer must have actual knowledge of the forgery, or have deliberately turned a blind eye, for an estoppel to be raised successfully against him. Constructive knowledge, in the sense that the customer had knowledge of circumstances which would cause a hypothetical reasonable customer to discover the fraud, is not enough.<sup>1143</sup>

## The Liggett defence

36-349 Where the banker is unable to establish an absolute defence based on an estoppel, he may nevertheless have a partial defence if it can be shown that the customer's loss is smaller than the amounts of the cheques wrongfully honoured. Thus, where cheques drawn by an employee without authority are wrongfully honoured by the banker but a portion of the proceeds is injected by the employee into the customer's business, the banker is obligated to re-credit the customer's account only with the amount misappropriated by the employee. This rule is based on the equitable doctrine that a person who pays the debts of another without authority is allowed the benefit of such payment.<sup>1144</sup>

## Ratification

- 36-350 Where an agent exceeds his authority in drawing a given cheque, his act may be ratified by the principal. The ratification precludes the principal from seeking reimbursement from the drawee bank which has paid the cheque. Cases of this type arise where an agent draws on his principal's account a cheque for an amount exceeding his mandate or where a director, who is authorised to draw on the company's account jointly with another person, draws a cheque without obtaining that other person's signature. The latter type of case arose in *London Intercontinental Trust Ltd v Barclays Bank Ltd.*<sup>1145</sup> Here the cheques, which were honoured by the bank although they bore the signature of one director instead of the required two signatures, were drawn principally in order to transfer funds from one of the company's accounts to another. Initially, when the board of directors discovered the discrepancy, it resolved not to take any action. Subsequently, the company ran into financial difficulties and a new board was appointed. It was then resolved to bring an action against the bank, alleging that the cheques in question had been paid in breach of mandate. Lynn J gave judgment for the bank on three grounds. First, he held that the director in question had the actual authority to transfer the relevant amounts so that he could have issued in his own name a written or oral instruction to this effect. The bank was, therefore, entitled to act on this specific instruction of the director although he gave it by means of cheques signed by himself only.

“The bank as a result of its failure to observe the discrepancy took a risk in honouring the cheque that [the director] was not in fact authorised. In the case of both these cheques ... he was so authorised.”<sup>1146</sup>

Secondly, his Lordship concluded, on the facts, that the original meeting of the board had adopted the director's act with the full knowledge that the cheques had been improperly drawn. The company had therefore ratified the payment of these cheques by the bank. Thirdly, his Lordship noted that before the company brought its action against the bank it had pursued a claim in liquidation before the Stock Exchange on the basis that the transactions were valid. In this way the company made its election and was bound by it. An election, however, denotes ratification only if it is final and unequivocal. In *Limpgrave Ltd v BCCI SA*<sup>1147</sup> Staughton J held that an entry in the customer's books, which treated a debt as due from a third party rather than from the bank, did not in itself constitute a final election and hence did not amount to a ratification of the bank's unauthorised payment to the third party.

## Pass books and periodic statement

- 36-351

Credit entries in a periodic statement or pass book constitute *prima facie* evidence against the banker but may be rectified within a reasonable time to show the true facts.<sup>1148</sup> If in reliance on an erroneous credit entry the customer changes his position, the bank is estopped from asserting the mistake and, thus, is unable to recover the amount involved.<sup>1149</sup> But this principle applies only where the customer establishes that it would be inequitable to require him to effect reimbursement.<sup>1150</sup> The fact that the customer does not object to entries in his pass book or periodic statement does not preclude him from alleging, subsequently, that they have been wrongfully made. Modern English authorities indicate that in the absence of an express contractual undertaking, the customer is neither under any implied obligation to examine the debit entries in his pass book or periodic statement of account nor to check the validity of any cancelled cheques which the banker may forward him.<sup>1151</sup> It has been held that not even the return of a pass book to the banker by a customer, without comment and with the entries ticked, constitutes a settled account, and that the customer is not prevented from subsequently challenging the correctness of the entries.<sup>1152</sup> One possible solution is to incorporate a suitable clause in the bank's standard terms and conditions. Canadian cases indicate that if a customer signs an undertaking to examine a pass book or periodic statement and to inform the banker of any errors before a stated date, the banker will then be absolved by the customer's neglect, provided consideration for the undertaking is established.<sup>1153</sup> But the Privy Council's decision in *Tai Hing Cotton Mills Ltd v Liu Chong Hing Bank Ltd*<sup>1154</sup> suggests that to be effective, such a clause must impose on the customer a definite duty to peruse his statement and, further, must convey to him that the entries made in the statement will be conclusively binding on him unless he queries them within the prescribed period.

## Customer's negligence in drawing cheque

- 36-352 If the customer has been so careless when drawing a cheque as to facilitate a fraud by a third party, he is precluded from asserting the forgery against the bank. In *London Joint Stock Bank v Macmillan*<sup>1155</sup> a clerk prepared a cheque for £2 payable to bearer. There was no sum in words then written on the cheque, but after it had been signed by his employers the clerk altered the figures to £120 and wrote the words "one hundred and twenty pounds" in the space provided. The clerk presented the cheque and, as the forgery was not readily apparent, received payment and absconded. The banker was held entitled to debit the customer's account. Lord Finlay L.C. said:

"A cheque drawn by a customer is in point of law a mandate to the banker to pay the amount according to the tenor of the cheque. It is beyond dispute that the customer is bound to exercise reasonable care in drawing the cheque to prevent the banker being misled. If he draws a cheque in a manner which facilitates fraud, he is guilty of a breach of duty as between himself and the banker, and he will be responsible to the banker for any loss sustained by the banker as a natural and direct consequence of this breach of duty."<sup>1156</sup>

## Scope of principle

- 36-353 The principle in *Macmillan*'s case may well be extended so as to prejudice the right of recovery against the banker of a customer who has left in blank the amount payable on a promissory note made by him, or on a bill of exchange which he has accepted, provided that these instruments are expressed to be payable at a named bank.<sup>1157</sup> Where the note or bill is not expressed to be payable at a bank, however, it seems that no duty is owed to anyone to guard against fraud.<sup>1158</sup> Even in the case of cheques, a customer is not always considered negligent if he leaves a blank space. The question is, always, whether a reasonable man would leave such a blank space or not. In *Slingsby v District Bank*,<sup>1159</sup> the customer left a blank space between the name of the payee and the words "or order", and a fraudulent third party filled up this space by making the cheque payable to the payee "per pro" himself, and then negotiated the cheque by indorsing it in his own name. It was held that the customer was not negligent and that, although the alteration was not apparent, the banker could not debit the customer's account with the amount paid against the cheque.

## Carelessness not connected with the drawing of a cheque

- 36-354 Negligence of the customer which is not connected with the actual drawing of a cheque does not, usually, afford a defence to a banker who has wrongfully honoured the cheque. Parke B. in *Bank of Ireland v Evans' Trustees*,<sup>1160</sup> which related to the negligent keeping of a seal, expressed to the House of Lords the unanimous opinion of the judges: "If there was negligence in the custody of the seal, it was very remotely connected with the act of transfer". The learned judge went on to explain that:

"If such negligence could disentitle the plaintiffs, to what extent is it to go? If a man should lose his cheque-book, or neglect to lock the desk in which it is kept, and a servant or stranger should take it up, it is impossible in our opinion to contend that a banker paying his forged cheque would be entitled to charge his customer with that payment. Would it be contended that if he kept his goods so negligently that a servant took them and sold them, he must be considered as having concurred in the sale, and so be disentitled to sue for their conversion on a demand and refusal?"

## Tai Hing

36-355 Thus, while a customer must be careful not to facilitate fraud when drawing cheques, he is not under a duty to his banker to take reasonable care in organising his business so as to prevent opportunities for others to forge his cheques.<sup>1161</sup> Any doubts that could have existed on this point were settled by the Privy Council's decision in *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd*.<sup>1162</sup> A book-keeper perpetrated a series of frauds on his employers. In some cases he tricked them into signing blank or incomplete cheques which he converted and completed in a manner that suited his purposes. In other cases, he resorted to the cruder method of forging the required signatures. As the rogue, who had the custody of the firm's cheque books with its three banks, enjoyed his employers' utmost trust, there was no attempt to check his activities and his frauds went undetected for approximately six years. When he was eventually unmasked, the employers accepted responsibility for all cheques which carried genuine signatures, but demanded that the three banks recredit the firm's respective accounts with the amounts paid out against the forged cheques. The banks' defence was, principally, that the frauds were occasioned by the firm's negligence in the way it conducted its business, pleading that the firm should, accordingly, be estopped from disputing the validity of the payments made by the banks. Reversing the Hong Kong Court of Appeal's decision in favour of the banks, Lord Scarman emphasised that, on the facts, none of the contracts made between the firm and the banks included an express term imposing on the firm a duty to conduct its business in a manner aiming to combat the perpetration of a fraud. At common law, a customer's duty of care was confined to what could:

“... be seen to be plainly necessary incidents of the relationship. Offered such a [current account] service, a customer must obviously take care in the way he draws his cheque, and must obviously warn his bank as soon as he knows that a forger is operating his account.”<sup>1163</sup>

His Lordship rejected the view that the customer's duty at common law went further than this.<sup>1164</sup> As already pointed out, a wider duty could, however, be imposed on the customer by means of an express verification clause. A question which was not raised in *Tai Hing* is whether a bank may effectively recover losses resulting from the payment of forged cheques of the type here encountered by suing the rogue in deceit and by seeking to hold the employers vicariously liable.<sup>1165</sup>

## Forged indorsement

36-356

If an indorsement is forged on a cheque payable *to bearer*, and the banker pays it to a holder or his agent, he will—in the absence of special circumstances—be considered as having paid the cheque in due course. The holder, in such cases, obtains his title by the delivery to him of the cheque, and does not claim under the forged indorsement. If, however, a cheque payable *to order* bears a forged indorsement of the payee, a transferee is, it appears, not a holder,<sup>1166</sup> and payment to him does not constitute payment in due course. However, [s.60 of the Bills of Exchange Act 1882](#) protects the banker in such cases. It provides that if a banker pays a cheque payable to order in good faith and in the ordinary course of business, he is deemed to have paid it in due course although it may bear a forged indorsement of the payee or of a subsequent holder.<sup>1167</sup> This section applies regardless of whether a cheque has been paid over the counter or through the clearing system.<sup>1168</sup> The phrase “in the ordinary course of business” probably means: the mode of transacting business which is adopted by the banking community at large.<sup>1169</sup> It has been held that if the banker pays a crossed cheque over the counter,<sup>1170</sup> or honours a cheque bearing an irregular indorsement,<sup>1171</sup> he does not pay it in the ordinary course of business. It is not certain whether a banker, who acts negligently, may nevertheless be considered as paying a cheque in the ordinary course of business. In *Carpenters' Co v British Mutual Banking Co*<sup>1172</sup> Greer LJ expressed the view that, when a banker acts negligently, he cannot be regarded as paying a cheque in the ordinary course of business. Slesser LJ, who concurred with Greer LJ's judgment on other grounds, thought that a banker may be acting in the ordinary course of business despite his negligence, and his view was supported by Mackinnon LJ, who delivered a dissenting judgment.

## Payment with negligence

36-357 [Section 60](#) appears wide enough to give adequate protection to the banker both in the case of uncrossed as well as crossed cheques bearing a forged indorsement. But [s.60](#) cannot apply to cheques crossed “account payee” or “account payee only” as such cheques are non-transferable ([s.81A\(1\) of the Bills of Exchange Act 1882](#)) and, therefore, cannot be payable to order as required by the section.<sup>1173</sup> [Section 80](#), however, expressly provides a similar protection to a banker who pays a crossed cheque (a) in conformity with the tenor of the crossing; (b) in good faith and; (c) “without negligence”. This last phrase thus replaces the words “in the ordinary course of business” of [s.60](#). [Section 80](#) appears to reproduce [s.9 of the Crossed Cheques Act 1876](#) and the need to include it, in addition to [s.60](#), in the 1882 Act has been questioned.<sup>1174</sup> However, there are points of difference between the two sections. [Section 80](#) only covers crossed cheques, [s.60](#) extends to crossed and uncrossed cheques. [Section 60](#) only covers cheques payable to order, [s.80](#) extends to cheques which under [s.81A of the 1882 Act](#) or otherwise are not transferable. A banker is not to be treated for the purposes of [s.80](#) as having been negligent by reason only of his failure to concern himself with any purported indorsement of a cheque which under [s.81A\(1\) of the 1882 Act](#) or otherwise is not transferable.<sup>1175</sup> In other words, the paying banker can ignore any purported indorsement on the cheque, as it is the responsibility of the collecting banker to ensure that a non-

transferable cheque is collected only for the account of the named payee. However, there may be additional circumstances, e.g. where the paying banker is reliably informed that the cheque has been stolen from the payee (assuming the drawer has not, as yet, countermanded payment), in which it might be negligent for a bank to pay a non-transferable cheque bearing a purported indorsement without first satisfying itself that it was in fact being paid to the person entitled to receive it.<sup>1176</sup>

## Irregularity in or absence of indorsement

36-358 Section 60 protects the paying banker only in cases of a forged indorsement which is regular on its face. Section 1 of the Cheques Act 1957 protects a banker who, in good faith and in the ordinary course of business, pays a cheque which is not indorsed or is irregularly indorsed. It provides that a banker who pays such a cheque is deemed to have paid it in due course within the meaning of s.59 of the Bills of Exchange Act 1882.<sup>1177</sup> However, the Committee of London Clearing Bankers has taken the view that the public interest would best be served by retaining the need for indorsement in certain circumstances. These circumstances are set out in a circular of 23 September 1957,<sup>1178</sup> forwarded by that Committee to Clearing Bank Managers. The procedure laid down in this circular may, no doubt, be taken as establishing “the ordinary course of business” and if disregarded would deprive a banker of the protection of s.1. This is especially so because s.1 provides that the banker does not incur liability by “reason only of” the irregular indorsement. As from the date of the circular, the banker, when paying an irregularly indorsed cheque, not only pays despite this defect but also in disregard of standard banking practice. Insofar as that circular relates to the paying banker, it provides that indorsements will continue to be required where cheques or other instruments are cashed over the counter, but that otherwise the paying banker need not concern himself with indorsements unless the instruments are travellers’ cheques, bills of exchange (other than cheques) and promissory notes.

## Where cheque avoided by forgery

36-359 Do the paying bank’s statutory defences, under ss.60 and 80 of the Bills of Exchange Act 1882 and under s.1 of the Cheques Act 1957, apply where a cheque bears a forged signature of the drawer or if it has been materially altered by a fraudster? The paying bank’s statutory defences do not apply where the drawer’s signature is forged because the instrument is not a cheque at all. By s.24 of the Bills of Exchange Act 1882, a forged or unauthorised signature is “wholly inoperative” and so the instrument does not meet the statutory definition of a bill of exchange and, therefore, of a cheque.<sup>1179</sup> However, common law defences do remain open to the bank.<sup>1180</sup> In *Slingsby v District Bank*,<sup>1181</sup> Scrutton and Greer LJJ thought that a cheque, which, under s.64, was avoided by a material alteration, ceased to be a cheque and hence fell outside the ambit of these provisions.

It is submitted that this remains good law. Indeed, in *Smith v Lloyds TSB Bank Plc*,<sup>1182</sup> where a claim was brought against a collecting bank in conversion, it was held by the Court of Appeal that:

“... the effect of the presence of the word ‘avoided’ in s.64(1) of the 1882 Act is that the materially altered cheque or draft is, subject to the qualifications in the section, a worthless piece of paper.”

Section 64(1) does go on to provide that, where the material alteration is not apparent, the instrument is enforceable in the hands of a holder in due course according to its original tenor. However, as most cheques drawn on United Kingdom banks are crossed and marked “account payee”, so as to be non-transferable under s.81A(1) of the 1882 Act, this proviso is unlikely to apply much in practice.

## Extension of protection to other instruments

- 36-360 Section 1(2) of the Cheques Act 1957 gives a protection similar to that of subs.(1) to a banker who pays any such instruments as the following: (a) a document issued by a customer which, though not a bill of exchange, is intended to enable a person to obtain payment of a certain sum from a banker<sup>1183</sup>; and (b) a draft payable on demand drawn by the banker on himself.

## Reclaiming money from payee

- 36-361 In certain cases a bank, which paid money without a mandate or under some other mistake of fact, may wish to claim it back from the payee. Usually such an action is brought for the unjust enrichment of the payee, based on the fact that the money had been paid under a mistake of fact or in circumstances involving a total failure of consideration. The main authorities in point have been discussed in respect of actions in money had and received brought by the acceptor of a bill of exchange against the payee.<sup>1184</sup> *Westdeutsche Landesbank Girozentrale v Islington LBC*<sup>1185</sup> establishes that the same principle entitles a bank to recover an amount paid by it to a customer in pursuance of an unenforceable agreement. In the instant case the action was brought to recover the balance of an amount initially paid by the bank to the local authority in pursuance of an interest rate swap agreement which was ultra vires the authority’s powers.<sup>1186</sup> It is, however, clear that no amount would be recoverable in such an action if it was paid out by the bank after it had come to realise that the agreement was void, or at least took the risk that it was void.<sup>1187</sup>

## Footnotes

- 1133 SI 2009/209, as amended.
- 1134 SI 2017/752, as amended. See generally, above, paras 36-225 et seq. and, below, paras 36-411 et seq.
- 1135 PSRs 2017 Sch.1 Pt 2. The statutory protection relating to the payment and collection of cheques extends by virtue of the Cheques Act 1957 ss.1(2) and 4(2) to certain other instruments analogous to cheques. See below, paras 36-360 and 36-380.
- 1136 For the scope of the PSRs 2017, see above, paras 36-226 et seq. and, below, paras 36-412 et seq. The contractual terms and conditions upon which the bank supplies its services would also require consideration in such cases.
- 1137 But note, e.g., the express preservation of general common law rights in the context of the termination of a framework contract; see PSRs 2017 reg.51(7), and see also above, para.36-320. See also below, para.36-414, and E.P. Ellinger, E. Lomnicka and C.V.M. Hare, Ellinger's Modern Banking Law, 5th edn (2011), pp.618–619.
- 1138 PSRs 2017 regs 40(7), 63(5), and see above, para.36-229.
- 1139 s.59(1), discussed in para.36-123, above. (Note that a duty of care may be imposed on the banker where a fiduciary relationship between him and the customer comes into existence; above, paras 36-262 et seq.)
- 1140 *Chambers v Miller* (1862) 13 C.B.(N.S.) 125. cf. *Balmoral Supermarket Ltd v Bank of New Zealand* [1974] 2 N.Z.L.R. 155 (deposit held incomplete where bank robbery occurred while funds to be deposited were counted by teller). As to when payment by funds transfer is complete, see below, paras 36-432—36-440.
- 1141 *Brook v Hook* (1871) L.R. 6 Ex. 89, 99–100, and see above, para.36-051.
- 1142 [1933] A.C. 51. See also *Bank of New Zealand v Auckland Information Bureau Inc* [1996] 1 N.Z.L.R. 420 NZCA (principle extended to unauthorised direct credit instructions). As to wider application of the principle, see *Geniki Investments International Ltd v Ellis Stickbrokers Ltd* [2008] 1 B.C.L.C. 662 at [44]–[46] (client/stockbroker relationship; where also held that duty arises on awareness of unauthorised transaction and that it is not necessary for customer to have knowledge of possible fraud behind transaction); cf. *Banque Nationale de Paris v Hew Keong Chan Gary* [2001] 1 S.L.R. 300 (High Court of Singapore).
- 1143 *Price Meats Ltd v Barclays Bank Plc* [2000] 2 All E.R. (Comm) 346; *Patel v Standard Chartered Bank* [2001] Lloyd's Rep. Bank. 229. See also *Morison v London County and Westminster Bank Ltd* [1914] 3 K.B. 356; *Brown v Westminster Bank Ltd* [1964] 2 Lloyd's Rep. 187; *Tina Motors Pty Ltd v Australia and New Zealand Banking Group Ltd* [1977] V.R. 205.
- 1144 *B Liggett (Liverpool) Ltd v Barclays Bank Ltd* [1928] 1 K.B. 48; *Lloyds Bank Ltd v Chartered Bank of India, Australia and China* [1929] 1 K.B. 40, 61; cf. *Re Cleadon Trust Ltd* [1939] Ch. 286, 302–303, 315; *Crantrave Ltd v Lloyds TSB Bank Plc* [2000]

- Q.B.* 917, 924, 925; *Swotbooks.com Ltd v Royal Bank of Scotland Plc* [2011] EWHC 2025 (QB), [49]–[56]. See also *Associated Midlands Corp v Bank of New South Wales* [1983] 1 N.S.W.L.R. 533 Aust; *Limpgrave Ltd v BCCI SA* [1986] F.L.R. 36; *RCL Operators Ltd v National Bank of Canada* [1997] 6 Bank. L.R. 195, NB CA; *Majesty Restaurant Pty Ltd v Commonwealth Bank of Australia Ltd* (1999) 47 N.S.W.L.R. 593 Aust. For a detailed discussion, see *Ellinger and Lee* [1984] L.M.C.L.Q. 459; and see also E.P. Ellinger, E. Lomnicka and C.V.M. Hare, Ellinger's Modern Banking Law, 5th edn (2011), pp.500–501.
- 1145 [1980] 1 *Lloyd's Rep.* 241; applied in *HJ Symons & Co v Barclays Bank Plc* [2003] EWHC 1249 (Comm). See also *Izodia v Royal Bank of Scotland International Ltd* Unreported 1 August 2006, Royal Court of Jersey: noted (2007) 3 J.I.B.FL. 143.
- 1146 [1980] 1 *Lloyd's Rep.* 241 at 249. Applied in *Senex Holdings Ltd (In Liquidation) v National Westminster Bank Plc* [2012] EWHC 131 (Comm), [2012] 1 All E.R. (Comm) 1130 at [18]–[20] (director had actual authority despite it being arguable that he was in breach of duty to company's creditors at the time he gave instructions to the bank).
- 1147 [1986] F.L.R. 36; distinguished in *Swotbooks.com Ltd v Royal Bank of Scotland Plc* [2011] EWHC 2025 (QB) at [43]–[44], although held no ratification because account entries could not be considered in isolation (at [45]–[48]).
- 1148 *Commercial Bank of Scotland v Rhind* (1860) 3 Macq. H.L. 643; *British and North European Bank v Zalzstein* [1927] 2 K.B. 92.
- 1149 *Skyring v Greenwood* (1825) 4 B. & C. 281; *Holt v Markham* [1923] 1 K.B. 504; *Lloyds Bank v Brooks* (1951) 72 J.I.B. 114. See also *Holland v Manchester and Liverpool District Banking Co* (1909) 14 Com. Cas. 241.
- 1150 *United Overseas Bank v Jiwani* [1976] 1 W.L.R. 964.
- 1151 *Lewes Sanitary Steam Laundry Co Ltd v Barclay & Co Ltd* (1906) 95 L.T. 444; *Kepitigalla Rubber Estates Ltd v National Bank of India* [1909] 2 K.B. 1010; *Walker v Manchester and Liverpool District Banking Co* (1913) 108 L.T. 728; *Brewer v Westminster Bank* [1952] 2 All E.R. 650; *Wealden Woodlands (Kent) Ltd v National Westminster Bank Ltd* (1983) 133 New L.J. 719; *Royal Bank of Scotland Plc v Fielding* [2003] EWHC 986 (Ch); affirmed [2004] EWCA Civ 64. The principle is much criticised: *Pollock* (1910) 26 L.Q.R. 4; *Holden* (1954) 17 M.L.R. 41; Chorley, Gilbart Lectures (1954). For a detailed discussion, see E.P. Ellinger, E. Lomnicka and C.V.M. Hare, Ellinger's Modern Banking Law, 5th edn (2011), p.233.
- 1152 *Chatterton v London and County Bank*, *The Times*, 21 January 1891.
- 1153 *Mackenzie v Imperial Bank* [1938] 2 D.L.R. 764; *B & G Construction Co v Bank of Montreal* [1954] 2 D.L.R. 753; *Arrow Transfer Co v Royal Bank of Canada*, 19 D.L.R. (3d) 420 (1971); *Canadian Pacific Hotels Ltd v Bank of Montreal*, 40 D.L.R. (4th) 385 (1987); *Kelly Funeral Homes Ltd v Canadian Imperial Bank of Commerce*, 72 D.L.R. (4th) 276 (1990). See, generally, *K.W. Perrett* (1999) 14 B.F.L.R. 245.
- 1154 [1986] A.C. 80. See also *Financial Institutions Services Ltd v Negril Negril Holdings Ltd* [2004] UKPC 40 (conclusive evidence clause was not clear and unambiguous and so was construed narrowly against the bank). It may also be necessary to assess the

- clause in the light of the *Consumer Rights Act 2015 Pt 2* (for “consumer contracts”) or the *Unfair Contract Terms Act 1977*.
- 1155 [1918] A.C. 777. The rule has been established for a long time: see *Young v Grote* (1827) 4 Bing. 253.
- 1156 [1918] A.C. 777 at 789.
- 1157 As to whether the customer may be entitled to plead contributory negligence on the bank’s part, see below, para.36-381. As regards the bank’s right to recover an amount paid under a mistake of fact from the payee, see above, paras 36-125 et seq. *Scholfield v Londesborough* [1896] A.C. 514.
- 1158 [1931] 2 K.B. 588 (affirmed [1932] 1 K.B. 544); cf. *Lumsden & Co v London Trustee Savings Bank* [1971] 1 Lloyd’s Rep. 114, 121.
- 1159 (1855) 5 H.L. Cas. 389, 410–411. See also *Welch v Bank of England* [1955] Ch. 508. *Lewes Sanitary Steam Laundry Co Ltd v Barclays & Co Ltd* (1906) 95 L.T. 444. See also *Kepitigalla Rubber Estates Ltd v National Bank of India* [1909] 2 K.B. 1010.
- 1160 [1986] A.C. 80; applied in *Yorkshire Bank Plc v Lloyds Bank Plc* [1999] Lloyd’s Rep. Bank. 191. For recent criticism, see C. Hare (2012) 23 J.P.F.L.P. 182.
- 1161 [1986] A.C. 80 at 106. See also *Wealden (Woodlands) Kent Ltd v National Westminster Bank Ltd* (1983) 133 N.L.J. 719. For these purposes the customer must have actual knowledge of the forgery as opposed to constructive knowledge: *Price Meats Ltd v Barclays Bank Plc* [2000] 2 All E.R. (Comm) 346; *Patel v Standard Chartered Bank* [2001] Lloyd’s Rep. Bank. 229.
- 1162 But note E.P. Ellinger, E. Lomnicka and C.V.M. Hare, Ellinger’s Modern Banking Law, 5th edn (2011), p.496, n.330, which makes the point that whilst *Tai Hing* remains good law for cheques, “statutory developments have resulted in a potentially greater risk of liability for customers who pay by card or electronic funds transfer”. See the *Payment Services Regulations 2017* (SI 2017/752) as amended, regs 72(3), 77(3) (see, previously, the *Payment Services Regulations 2009* (SI 2009/209), as amended regs 57(2), 62(2)(a)).
- 1163 The point was pleaded but not pursued in the *Tai Hing* case. It gains support from dicta of Richmond J in *National Bank of New Zealand Ltd v Walpole and Patterson Ltd* [1975] 2 N.Z.L.R. 7, 14; and that of La Forest J (dissenting) in *Boma Manufacturing Ltd v Canadian Imperial Bank of Commerce*, 140 D.L.R. (4th) 463, 499 (1996). It does not matter for these purposes that the employee (or agent) is acting in furtherance of his own interests and not those of his employer (or principal), so long as he is acting within the course of his employment (or within the scope of his actual or apparent authority): *Lloyd v Grace, Smith & Co* [1912] A.C. 716, HL; *Crédit Lyonnais Bank Nederland NV v Export Credit Guarantee Department* [2000] 1 A.C. 486, HL; as explained in *Dubai Aluminium Co Ltd v Salaam* [2002] UKHL 48, [2003] 2 A.C. 366 at [39], [114]. See also E.P. Ellinger, E. Lomnicka and C.V.M. Hare, Ellinger’s Modern Banking Law, 5th edn (2011), pp.497–498, and C. Hare (2012) 23 J.B.F.L.P. 182 at 210–213.
- 1164 See above, para.36-054, discussing s.24 of the Act.
- 1165 s.60 applies only to cheques. As regards bills of exchange, see s.19 of the Stamp Act 1853, which gives a similar protection.

- 1168      *Australian Mutual Provident Society v Derham* (1979) 39 F.L.R. 167, 173.
- 1169      See also E.P. Ellinger, E. Lomnicka and C.V.M. Hare, Ellinger's Modern Banking Law, 5th edn (2011), pp.503–505.
- 1170      *Smith v Union Bank* (1875) L.R. 10 Q.B. 291; affirmed (1875) 1 Q.B.D. 31, 35.
- 1171      *Charles v Blackwell* (1877) 2 C.P.D. 151, 159–160; *Slingsby v District Bank* [1931] 2 K.B. 588; affirmed [1932] 1 K.B. 544. But note as regards protection in respect of cheques irregularly indorsed, below, para.36-358.
- 1172      [1938] 1 K.B. 511.
- 1173      Since the *Cheques Act 1992* introduced s.81A into the Bills of Exchange Act 1882, to the effect that crossed cheques marked “account payee” or “a/c payee”, with or without the word “only”, are not transferable, United Kingdom banks now almost invariably supply their customers with cheque forms which are crossed and pre-printed with the words “account payee”, so that the cheque is valid only as between the parties to it.
- 1174      Holden, History of Negotiable Instruments in English Law, p.229; Chalmers and Guest on Bills of Exchange, 18th edn (2017), para.14-027. A duty of care may be imposed on the banker where he owes his customer a fiduciary duty of care: above, paras 36-262 et seq.
- 1175      **Bills of Exchange Act 1882 s.81A(2).**
- 1176      Chalmers and Guest on Bills of Exchange, 18th edn (2017), para.14-028.
- 1177      As regards such a cheque’s effect as a receipt, see the *Cheques Act 1957* s.3 as amended by art.5 of the Deregulation (Bills of Exchange) Order 1996 (SI 1996/2993).
- 1178      Set out in Chalmers and Guest on Bills of Exchange, 18th edn (2017), para.17-003.
- 1179      **Bills of Exchange Act 1882 s.3(1).** By s.73 of the 1882 Act, a cheque is defined as “a bill of exchange drawn on a banker payable on demand”. See *Arrow Transfer Co Ltd v Royal Bank of Canada*, 27 D.L.R. (3d) 81, 104 (1972). See further, Chalmers and Guest on Bills of Exchange, 18th edn (2017), paras 2-013, 3-062, 17-063.
- 1180      See above, paras 36-348 et seq.
- 1181      [1932] 1 K.B. 544 at 559 (Scrutton LJ), 562 (Greer LJ). See also *Kulatilleke v Bank of India* (1958) 59 New L.R. (Ceylon) 190; *Kulatilleke v Bank of Ceylon* (1958) 59 New L.R. (Ceylon) 188; Chalmers and Guest on Bills of Exchange, 18th edn (2017), para.17-063.
- 1182      [2000] 2 All E.R. (Comm) 693, 703.
- 1183      This includes a cheque payable to “cash or order” which is not a bill of exchange; *Orbit Mining and Trading Co v Westminster Bank* [1963] 1 Q.B. 794.
- 1184      See above, paras 36-125 et seq.; generally on actions in restitution see Vol.I, Ch.32.
- 1185      [1996] A.C. 669, reversing as regards the interest claimable [1994] 1 W.L.R. 938. For the mistaken payer’s right to claim interest, see *Prudential Assurance Co Ltd v Commissioners for Her Majesty’s Revenue & Customs* [2018] UKSC 39, where the Supreme Court departed from the reasoning of the House of Lords in *Sempra Metals Ltd v Inland Revenue Commissioners* [2007] UKHL 34, [2007] 3 W.L.R. 354, so far as it concerned the award of interest in the exercise of the court’s jurisdiction to reverse unjust enrichment, although it was expressly stated at [79] that nothing in the Supreme

Court's judgment was intended to question the reasoning in *Sempra Metals* so far as it concerned the award of interest as damages.

1186 As held in *Hazell v Hammersmith and Fulham LBC [1992] 2 A.C. 1.*

1187 *Haugesund Kommune v Depfa ACS Bank [2010] EWCA Civ 579, [2011] 1 All E.R. 190* at [104] (Court of Appeal recognised that restitutionary remedies can be awarded to recover the value of void *loans*; putting “the final nail in the coffin of *Sinclair v Brougham [1914] A.C. 398*”, per *G. Virgo [2011] C.L.J. 445, 447*).

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## (iv) - Special Types of Current Accounts

Chitty on Contracts 34th Ed.

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Volume II - Specific Contracts

Chapter 36 - Bills of Exchange and Banking

Section 2. - Aspects of Banking Law

(c) - The Current Account

(iv) - Special Types of Current Accounts

### The joint account

36-362 An account opened in the names of two or more customers is known as a joint account. The customers, in the instructions given to the bank when the account is opened, may stipulate that cheques may be signed by any one of them, by two or more of them signing together or by all of them jointly. The last two types of instruction give rise to disputes when the bank honours a cheque bearing a forgery of one of the required signatures or a cheque on which one of the mandatory signatures is missing.<sup>1188</sup> In *Jackson v White and Midland Bank Ltd*<sup>1189</sup> the plaintiff entered into negotiations for a contract under which he was to become a partner in, or a joint owner of, the first defendant's business. An amount of £2,000 was paid by the plaintiff into a joint account opened by himself together with the first defendant at a branch of the defendant bank. Cheques drawn on this account required the signatures of both parties. The first defendant forged the plaintiff's signature on several cheques, which were honoured in due course by the bank. The business negotiations between the plaintiff and the first defendant broke off. As the first defendant did not refund the amounts drawn, the plaintiff applied for an injunction ordering the bank to reverse the debit entries arising from the payment of the forged cheques and an injunction ordering the first defendant to authorise the payment of these amounts by the bank to the plaintiff. Giving judgment for the plaintiff Park J said:

“... the Bank made an agreement with the plaintiff and the first defendant jointly that it would honour any cheques signed by them jointly, and also a separate agreement with the plaintiff and the first defendant severally that it would not honour any cheques unless he had signed them. It follows, therefore, as the Bank has honoured cheques not signed by the plaintiff, the plaintiff is entitled to sue for breach of that separate agreement.”<sup>1190</sup>

A similar conclusion was reached by Bingham J in *Catlin v Cyprus Finance Corp Ltd*.<sup>1191</sup> His Lordship pointed out that:

“... the only purpose of requiring two signatures was to obviate the possibility of independent action by one account holder to the detriment of the other”.<sup>1192</sup>

In both *Jackson* and *Catlin* the respective plaintiff was, in effect, allowed to recover the full amount paid out on cheques that ought to have been dishonoured by the Bank. But it is important to emphasise that it was established on the facts that the funds paid into the account were the plaintiff's property. Where such facts cannot be proved, the innocent joint owner of the account would appear to be entitled to recover an equal share of the amounts paid out wrongfully against cheques not signed by him.<sup>1193</sup>

## Where debt discharged

- 36-363 The innocent joint owner of an account is not entitled to recover payment of the amount of a cheque on which his signature has been forged, if the cheque is drawn in discharge of a debt that can be enforced against him. Thus, in *Jackson*'s case it was conceded that one of the cheques had been drawn in payment for goods in respect of which the plaintiff was liable to the seller for payment of the price. Park J thought that plaintiff's counsel was right in withdrawing the claim related to this item as the bank was entitled:

“... to take advantage of the equitable doctrine by which a person who had in fact paid the debts of another without authority was allowed the advantage of his payments”.<sup>1194</sup>

## Position when each party entitled to draw

- 36-364 Where two persons open a joint account at a bank on the terms that cheques may be drawn on the account by either of them, then, in the absence of facts or circumstances which indicate that the account has been opened for some specific purpose, each party can draw upon it not only for the benefit of both parties, but also for his own benefit. Thus, in *Re Bishop deceased, National Provincial Bank Ltd v Bishop*<sup>1195</sup> a husband and wife opened a joint account and each of them was authorised to draw on it. The husband drew several cheques for the payment of shares purchased

in his own name. It was held that these shares were the property of the husband, and were not held by him in trust for his wife and himself.

## Survivorship

- 36-365 As legal title to a chose in action cannot be held in common, a joint account must create joint legal co-ownership in the debt owed by the bank.<sup>1196</sup> Upon the death of a joint account holder, the legal title to the chose in action representing the joint account vests entirely in the remaining joint account holder(s) by virtue of a right of survivorship.<sup>1197</sup> The bank must meet the demands of that person and in doing so will thereby obtain a good discharge.<sup>1198</sup> Most modern standard-form joint account mandates contain a clause requiring the bank to honour payment instructions given by the surviving account holder(s).
- 36-366 Beneficial title to the chose in action representing the joint account determines whether the surviving account holder or the deceased account holder's estate is entitled to claim the deceased account holder's share of any balance standing to the credit of the joint account at the time of his death. In *Whitlock v Moree*,<sup>1199</sup> Lord Briggs, delivering the majority advice of the Privy Council, held that where documents relating to the opening of the joint account contained terms indicating on a true construction that the survivor was to be the sole owner,<sup>1200</sup> these terms applied to the legal and beneficial interest and no further investigation was necessary, unless there were special circumstances such as evidence of fraud, duress, undue influence, misrepresentation and the like. In such circumstances, the account-opening documents are themselves dispositive of the beneficial interests in the chose in action and not merely incontrovertible proof of the transferor's intentions.<sup>1201</sup>
- 36-367 Where, on their true construction, the account-opening documents are silent as to the disposition of the beneficial interests in the joint account,<sup>1202</sup> a resulting trust may be presumed to arise in favour of the account holder who has contributed the money in the account, or a presumption of advancement applied where the relationship between the joint account holders are husband and wife or parent and child.<sup>1203</sup> However, the presumptions are frequently displaced. All the relevant facts and circumstances are considered in order to ascertain the intentions of the contributing account holder with a view to rebutting the presumption.<sup>1204</sup>

## Partnership accounts

- 36-368

Unless otherwise agreed, each partner is entitled to open an account in the firm's name or to draw upon any existing partnership account.<sup>1205</sup> Although in a sense it is a joint account, each partner is in fact acting as agent of the firm. Usually, however, the articles of a partnership specify the manner in which cheques should be drawn, and the signatures of two of the partners are commonly required.<sup>1206</sup> As it is common knowledge that most partnerships have articles, it stands to reason that a banker must take reasonable steps to inform himself of the provisions concerning the rights of the partners as regards the opening of accounts and the drawing of cheques.<sup>1207</sup> A partner is not entitled to open a partnership account in his own name.<sup>1208</sup>

## Trust accounts

- 36-369 A cheque drawn on a trust account should bear the signature of all trustees, unless the trust instrument stipulates to the contrary.<sup>1209</sup> However, a trustee may, by power of attorney, delegate for a period not exceeding 12 months "all or any of the trusts, powers and discretions vested in him as trustee either alone or jointly with any other person or persons".<sup>1210</sup> Delegation to a sole trustee is permitted, but this cannot circumvent the rule requiring payment of capital money to at least two trustees.<sup>1211</sup> The banker is not, generally, concerned with the propriety of the acts of the trustees; he only has to satisfy himself that their acts are within the apparent scope of their powers. Usually, in the absence of actual knowledge on the part of the banker that a cheque is drawn by the trustee for improper purposes, he is not liable.<sup>1212</sup> However, certain acts of the trustee should constitute a red flag. Thus, a banker should be put on his guard if a trustee draws on trust funds and directs the banker to credit the cheque to his overdrawn personal account. In *Foxton v Manchester and Liverpool District Banking Co*,<sup>1213</sup> Fry, J held that the burden of proof in these circumstances is on the banker to show that the payment was legitimate and proper, and if he fails to prove this he must reimburse the funds. There is some authority<sup>1214</sup> for the view that before this principle may apply the banker must have already struck a balance and known of the overdraft, or perhaps even to have pressed for payment. The opinion of Fry J has since, however, been cited with approval by Farwell J,<sup>1215</sup> and is the more likely to prevail.<sup>1216</sup>

## Executors' accounts

- 36-370 An account opened by executors or administrators is to be regarded as that of the estate. Each executor has the power to open an account, but the other executors are entitled to countermand his actions and stop cheques drawn by him.<sup>1217</sup> To avoid difficulties bankers usually insist on a mandate given by all the executors or administrators before opening the account. While the executors have no power to carry on the deceased's business or to borrow money for this purpose,

they are nevertheless authorised to wind up the estate and can, for that purpose, pledge assets or give other securities over them.<sup>1218</sup> The banker can, thus, safely grant an overdraft or advance money against such a security and, provided the banker acts in good faith and without knowledge of a breach of trust on the part of the executor, can enforce the security against the estate.<sup>1219</sup>

## Footnotes

- 1188 See generally, *Welch v Bank of England* [1955] Ch. 508; *Baker v Barclays Bank Ltd* [1955] 1 W.L.R. 822. Contrast *Brewer v Westminster Bank* [1952] 2 All E.R. 650.
- 1189 [1967] 2 Lloyd's Rep. 68.
- 1190 [1967] 2 Lloyd's Rep. 68 at 79.
- 1191 [1983] Q.B. 759.
- 1192 [1983] Q.B. 759 at 771, applied in *Dar International FEF Co v Aon Ltd* [2004] EWCA Civ 921 at [30]–[32].
- 1193 *Twibell v London Suburban Bank* [1869] W.N. 127. See also *Ardern v Bank of New South Wales* [1956] V.L.R. 569; *Official Trustee in Bankruptcy v Alvaro* (1996) 138 A.L.R. 341; *Vella v Permanent Mortgages Pty Ltd* [2008] NSWSC 505 at [442] (“it is only the [claimant’s] proportionate interest that is being compensated for in damages”).
- 1194 [1967] 2 Lloyd's Rep. 68 at 80. The doctrine referred to is based on *B Liggett (Liverpool) Ltd v Barclays Bank Ltd* [1928] 1 K.B. 48. Later cases have explained, and limited the application of, the *Liggett* doctrine by requiring the bank’s payment to be in some way authorised or ratified by the customer despite being outside his mandate. See *Re Cleadon Trust Ltd* [1939] Ch. 286, CA; and *Crantrave Ltd v Lloyds TSB Bank Plc* [2000] Q.B. 917, CA. In *Crantrave v Lloyds TSB Bank Plc*, there was also support for the view that the bank might have a defence to a claim for breach of mandate where it could be established on the evidence that the customer had been “unjustly enriched” by the unauthorised payment ([2000] Q.B. 917 at 924, 925; see also *Majesty Restaurant Pty Ltd v Commonwealth Bank of Australia Ltd* (1999) 47 N.S.W.L.R. 593, for a case that might fall within this exceptional category). But no evidence of any “unjust factor” or “unconscionability” in *Swotbooks.com Ltd v Royal Bank of Scotland Plc* [2011] EWHC 2025 (QB), where S. Phillips QC, sitting as a Deputy High Court judge, stated (at [54]) that “the fact that a bank wrongfully debited its customers’ account by mistake and thereby paid a creditor of its customer without authority, does not of itself, in my judgment, make it unconscionable for the customer to recover the mistaken payment from the bank”.
- 1195 [1965] Ch. 450; followed in *Pettitt v Pettitt* [1970] A.C. 777, 815, HL. See also *Fielding v Royal Bank of Scotland Plc* [2004] EWCA Civ 64, where bank held entitled to follow express mandate and debit account on instructions of one of the joint account holders, but Jonathan Parker J suggesting (at [108]) (without deciding the point) that bank might breach its duty of care to one account holder if it continued to operate the account even

- though it “had some reason to suppose the mandate was being abused” by the other account holder, or (at [101]) had “notice that a fraud is being committed”.  
 1196 See E.P. Ellinger, E. Lomnicka and C. Hare, Ellinger’s Modern Banking Law, 5th edn (2011), pp.324 et seq., for detailed discussion of survivorship. See also D. Fox, Property Rights in Money (2008), para.7.52.
- 1197 *McEvoy v Belfast Banking Co* [1935] A.C. 24, 43 (Lord Atkin). See also *Russell v Scott* (1936) 55 C.L.R. 440, 451 (Aust. HC); *Pecore v Pecore* [2007] S.C.C. 17, [2007] 1 S.C.R. 795 at [4], Can SC.
- 1198 J. Odgers (ed.), *Paget’s Law of Banking*, 15th edn (2018), [5.21].
- 1199 [2017] UKPC 44 at [29]–[32] (on appeal from the Bahamas): Lady Hale and Lord Sumption agreeing with Lord Briggs. But note the strong dissent of Lord Carnwath (with whom Lord Wilson agreed).
- 1200 In this case, the account opening documents also contained an express assignment by each account holder to the two of them jointly of any money separately owned by that account holder. But Lord Briggs stressed at [29] that this was not necessary for the application of the principle set out in the main text.
- 1201 At [37], disagreeing with Lawrence Collins J only on this particular issue in *Aroso v Coutts & Co* [2002] 1 All E.R. (Comm) 241 at [22].
- 1202 In *Whitlock v Moree*, above, at [46]–[47], the Board agreed with the Bahamian Court of Appeal’s interpretation of the account opening documents, and of the relevant clause in particular, as “a pellucidly clear declaration” that the survivor was to have the beneficial interest in the joint account. Absence of such a clear declaration might allow a court to distinguish the Privy Council’s advice. Alternatively, an account opening document may expressly state that it only governs the relationship between the joint holder’s right of disposal vis-à-vis the bank, and not the relationship as between the account holders themselves and their legal successors: see, e.g. *Sillett v Meek* [2007] EWHC 1169 (Ch).  
 1203 *Aroso v Coutts & Co* [2002] 1 All E.R. (Comm) 241 at [22] (presumption of resulting trust). See *Niles v Lake* [1947] S.C.R. 294, Can SC; *Pecore v Pecore* [2007] S.C.C. 17, [2007] 1 S.C.R. 795, Can SC.
- 1204 *Aroso v Coutts & Co*, above, at [22] (rebuttal of presumption of resulting trust); *Marshal v Crutwell* (1875) L.R. 20 Eq. 328 (rebuttal of presumption of advancement), cf. *Re Harrison* (1920) 90 L.J. Ch. 186 (no rebuttal of presumption of advancement). See also *Purvis v Purvis* [2018] EWHC 1458 (Ch) at [34] (no presumption of advancement).
- 1205 Partnership Act 1890 ss.5, 6. As to whether a partner has authority to overdraw an account, see *Bank of Australasia v Breillat* (1847) 6 Moore P.C. 152, 193. See also *Kotak v Kotak* [2017] EWHC 1821 (Ch) at [118] et seq. (obiter) on whether a partner who signed a number of loan agreements had done “any act for carrying on in the usual way business of the kind carried on by the firm of which he is a member” within the second limb of s.5 of the 1890 Act. It was held in *Kotak v Kotak* that, on its true construction, a “one signature” mandate expressed to authorise payment by cheques or other written instructions and “for all other purposes” bound the partnership in respect of loan agreements signed by only one of the partners.

- 1206 As regards the position where a cheque payable to a partnership is paid into a partner's personal account, see *Souhrada v Bank of NSW [1976] 2 Lloyd's Rep. 444*.
- 1207 For an interesting case concerning an innocent partner's position where a dishonest partner has perpetrated irregularities respecting a trust account and, in consequence, caused loss to the bank, see *National Commercial Banking Corp of Australia Ltd v Batty (1986) 65 A.L.R. 385 Aust.*
- 1208 *Alliance Bank v Kearsley (1871) L.R. 6 C.P. 433*. For a detailed account, see E.P. Ellinger, E. Lomnicka and C.V.M. Hare, Ellinger's Modern Banking Law, 5th edn (2011), p.441.
- 1209 For the nature of a trust account, see *Mann v Coutts & Co [2003] EWHC 2138 (Comm), [2004] 1 All E.R. (Comm) 1* at [154]–[165].
- 1210 Trustee Act 1925, as amended by the Trustee Delegation Act 1999 s.5. Delegation may be to a trust corporation (Trustee Act 1925 s.25(3), as amended).
- 1211 Trustee Delegation Act 1999 ss.7, 8. Previously delegation to a sole trustee was not permitted. See generally, Hanbury and Martin's Modern Equity, 20th edn (2015), para.21-019.
- 1212 However, in *Chudley v Clydesdale Bank Plc [2019] EWCA Civ 344* at [77]–[80] a customer's instruction to its bank to set up an account for client monies was held to give rise to a contract enforceable by the clients under the Contracts (Rights of Third Parties) Act 1999. See above, Vol.I, paras 20-100—20-102.
- 1213 (1881) 44 L.T. 406, 408; and see *Space Investment Ltd v Canadian Imperial Bank of Commerce Trust Co (Bahamas) Ltd [1986] 1 W.L.R. 1072*.
- 1214 *Gray v Johnston (1868) L.R. 3 H.L. 1*; *Coleman v Bucks and Oxon Union Bank [1897] 2 Ch. 243*.
- 1215 *Att-Gen v De Winton [1906] 2 Ch. 106, 116*.
- 1216 As regards the position when the banker's duties as trustee conflict with his being a banker, see *Re Pauling's Settlement Trusts [1964] 1 Ch. 303, 339*. See also above, paras 36-262 et seq.
- 1217 *Gaunt v Taylor (1843) 2 Hare 413*; and see E.P. Ellinger, E. Lomnicka and C.V.M. Hare, Ellinger's Modern Banking Law, 5th edn (2011), pp.336–337.
- 1218 This appears to follow from *Farhall v Farhall (1871) L.R. 7 Ch. App. 123*.
- 1219 *Berry v Gibbons (1873) L.R. 8 Ch. App. 747*.

## **(d) - Discount and Collection**

**Chitty on Contracts 34th Ed.**

**Consolidated Mainwork Incorporating First Supplement**

**Volume II - Specific Contracts**

**Chapter 36 - Bills of Exchange and Banking**

**Section 2. - Aspects of Banking Law**

**(d) - Discount and Collection**

### **Discount and collection compared**

- 36-371 In the vast majority of cases, cheques are not presented by the payee directly to the drawee bank but are remitted by him to his own banker, who arranges for their clearance. In such cases the payee's banker assumes either the role of a collecting banker or that of a discounting banker. When the banker presents the cheque to the drawee on behalf of his customer, he acts as a collecting banker and in the capacity of an agent. If the banker gives his customer value for the cheque before clearance, he presents it, in point of fact, in order to obtain payment for himself. He is in such a case a discounter and holder of the cheque. Whether a banker acts, in a specific case, as a collecting banker or as a discounting banker is a question of fact. The mere crediting of the customer's account before clearance, does not, in itself, constitute him a discounter; but if he agrees to grant the customer an overdraft against the cheque, or actually allows him to draw against it before clearance, he becomes a discounter.<sup>1220</sup> The two roles, however, are not exclusive of one another. A banker may at one and the same time be an agent for collection and a discounter or holder of that cheque for value. Thus, a banker who grants his customer an overdraft of £5 against an uncleared cheque for £100 has given value for it; but it cannot be said that—as a result—he ceases to be the customer's agent for collection.<sup>1221</sup>

### **Non-transferable cheques**

- 36-372 It is almost invariably the case today that where a cheque is delivered to a bank for collection the bank receives the cheque as agent for the customer for the purposes of collecting it on the customer's behalf and not as discounter.<sup>1222</sup> For these purposes, the collecting bank's customer

may be another domestic or foreign bank using the collecting bank as its agent to gain access to the cheque clearing system.<sup>1223</sup> In theory, the collecting bank could give the customer value for the cheque and collect the cheque, to the extent of the value given, on its own behalf as a holder for value, but the fact that UK banks now almost invariably issue cheque forms to their customers which are crossed and pre-printed with the words “account payee”, thereby making the cheque non-transferable,<sup>1224</sup> means that this is very rare indeed, for a collecting bank cannot become the holder of a non-transferable cheque.<sup>1225</sup>

## Electronic presentation of cheques

- 36-373 The [Small Business, Enterprise and Employment Act 2015 s.13](#), amends the [Bills of Exchange Act 1882](#) to allow for the electronic presentation of cheques by the collecting bank to the drawee bank for payment.<sup>1226</sup> Under [s.89E\(1\) of the 1882 Act](#), the Treasury was given power by regulations to make provision for the “responsible banker” to compensate any person for any loss of a kind specified by the regulations which that person incurs in connection with electronic presentation or purported electronic presentation of a cheque or other relevant instrument. The term “responsible banker” is defined in subs.(3) to mean (a) the banker who is authorised to collect payment of the instrument on a customer’s behalf, or (b) if the holder of the instrument is a banker, that banker.
- 36-374 Made pursuant to the Treasury’s power contained in [s.89E\(1\) of the 1882 Act](#), [reg.5 of the Electronic Presentment of Instruments \(Evidence of Payment and Compensation for Loss\) Regulations 2018](#)<sup>1227</sup> ensures that if a customer of the bank which pays the cheque or the bank that pays the cheque (“the claimant”) incurs a loss<sup>1228</sup> in connection with the electronic presentment, or purported electronic presentment, of a cheque (and that loss did not result from gross negligence or fraudulent activity on their part), and they have not already received compensation, they can obtain compensation from the bank which presented the cheque. The regulation sets out conditions to be met in order for compensation to be payable, including that the claimant has made a claim in accordance with [reg.6](#), which sets out the procedure for such a claim. Importantly, a right to compensation can only arise where one of the following two criteria is met: (a) the electronic presentment or purported electronic presentment of the instrument was of a type described in [s.89E\(2\)\(c\), \(d\) or \(e\) of the Bills of Exchange Act 1882](#)<sup>1229</sup>; (b) the cheque was collected for or paid to a person other than its true owner.<sup>1230</sup> The claimant’s right to compensation may also be affected by two additional factors. First, the claimant is not entitled to compensation if they are protected by [s.80 of the Bills of Exchange Act 1882](#) (protection to banker and drawer where cheque is crossed).<sup>1231</sup> Secondly, the amount of compensation to be paid will be reduced where any act or omission of the claimant contributed to the loss.<sup>1232</sup>

## Causes of action

- 36-375 If the collecting bank collects a cheque for anyone other than the true owner, the bank may be liable to the true owner for conversion of the cheque.<sup>1233</sup> The value of the cheque is deemed to be its face value and the true owner can recover damages of that amount.<sup>1234</sup> However, where the cheque has been materially altered, the measure of damages is not the face value: the cheque is avoided under [s.64\(1\) of the Bills of Exchange Act 1882](#) and becomes a worthless piece of paper.<sup>1235</sup> The true owner is the person with an immediate right to possession of the cheque.<sup>1236</sup> In cases of misappropriation, the identity of the true owner depends on whether the cheque has been delivered by the drawer to the payee. Problems sometimes arise where a cheque is stolen in the post. Where a cheque is sent by post by a debtor to pay his creditor, the issue turns on whether the creditor expressly or impliedly requested or authorised payment through the post: if he did then he is the true owner.<sup>1237</sup> If it is uncertain whether a cheque was misappropriated whilst in the hands of the drawer or the payee, by [s.21\(3\) of the Bills of Exchange Act 1882](#) the payee will be deemed to have received a valid and unconditional delivery of the cheque, and hence be the true owner, until the contrary is proved.<sup>1238</sup> Alternatively, the amount received for the cheque may be recovered from the bank by the true owner as money had and received.<sup>1239</sup> In theory, the collecting bank may have a right of indemnity or recourse against its own customer who paid in the cheque for collection, but in practice this may prove worthless.<sup>1240</sup> As the collecting bank will have a defence to the restitutionary claim for money had and received if it has already paid the proceeds of the cheque over to its customer in good faith and in ignorance of the claim,<sup>1241</sup> the most common form of action brought by the true owner against the bank is an action in conversion.

## Protection of collecting banker

- 36-376 A defence available to a collecting banker against an action for the conversion of a cheque (or an action related thereto but brought under the law of unjust enrichment) is provided in [s.4 of the Cheques Act 1957](#), which has replaced and widened the scope of the protection previously afforded by [s.82 of the Bills of Exchange Act 1882](#). Under [s.4](#), a banker is not liable to the true owner of a cheque if he has received payment of it for a customer in good faith and without negligence despite any defects in the customer's title.<sup>1242</sup> To avail himself of this defence, the collecting banker must, thus, be able to prove, among other things, that he has acted without negligence. Where compliance with this standard is in issue, it is of primary importance to examine whether or not the banker has acted in conformity with prevailing banking practice. In *Lloyds Bank v Savory & Co*<sup>1243</sup> the required standard was described as based on:

“... the practice of *reasonable men* carrying on the business of bankers, and endeavouring to do so in such a manner as may be calculated to protect themselves and others against fraud”.

Emphasis is to be placed on the words “reasonable men”; they imply that the courts will be reluctant to be guided by, or give effect to, a banking practice which is unreasonably lax or which may exonerate bankers from liability where they fail to exercise the degree of skill expected of conscientious businessmen.<sup>1244</sup> Some support for this submission is to be found in the fact that mere exigencies of business will not excuse negligence.<sup>1245</sup> However, the banker is not required to play the amateur detective and is not expected to be abnormally suspicious.<sup>1246</sup>

## Instances of negligence

<sup>36-377</sup> Negligence in the collection of cheques, within the meaning of s.4, may occur either at the time the account is opened or when the banker accepts a specific cheque for collection. In the past, the banker has been held to be negligent if he opens an account without taking up references of the customer,<sup>1247</sup> or without ascertaining the occupation of his prospective customer and, if he turns out to be an employee, to ascertain the name of his employer.<sup>1248</sup> It has also been held that the banker’s failure to insist on an identification does not constitute negligence.<sup>1249</sup> There is, however, authority for the view that an immigrant, who wishes to open an account shortly after arriving from overseas and who is unable to provide a referee known to the banker or to one of his correspondents, should be asked to produce a passport or some other proof of identity.<sup>1250</sup> Today, failure to check the identity of a customer is more likely to amount to negligence. This is because banks must ensure that they have proper procedures for identifying their customers so as to comply with the stringent requirements of the money laundering and terrorist financing legislation.<sup>1251</sup>

**U** Banks must also comply with the rules laid down by the Financial Conduct Authority to combat money laundering (one of the regulatory objectives of the Authority under the **Financial Services and Markets Act 2000** is “protecting and enhancing the integrity of the UK financial system” which includes “its not being used for a purpose connected with financial crime”).<sup>1252</sup> Banks are now less likely to require references when a new account is opened, which is not surprising as satisfactory references are relatively easy for a thief to fabricate.<sup>1253</sup>

<sup>36-378</sup> Bankers have been held to have acted negligently in the actual collection of cheques in the following cases: where an employee, official or agent was allowed to place to his credit cheques

payable to or, in some cases, drawn by his employer or principal<sup>1254</sup>; where a cheque was collected and credited to the private account of an agent although the cheque indicated that he obtained it in his representative capacity<sup>1255</sup>; where a banker collected a cheque crossed “a/c payee only” for a person other than the specified payee<sup>1256</sup>; and where a banker collected for his customer, without inquiry, cheques to an amount clearly out of proportion to the known position in life of the customer.<sup>1257</sup> A banker is, however, not considered negligent merely because he fails to compare the signature of the drawer with an indorsement, and consequently fails to discover that the customer is not only the payee but also the drawer of a company’s cheque paid into his account.<sup>1258</sup>

## Absent or irregular indorsement

36-379 Before 1957 a banker, who collected a cheque bearing an irregular indorsement, was considered to have acted negligently and was therefore not protected by s.82 of the Bills of Exchange Act 1882.<sup>1259</sup> The law was changed by s.4(3) of the Cheques Act 1957, according to which a banker is not to be treated as having been negligent by reason only of his failure to concern himself with the absence of, or the irregularity in, indorsements. This provision must, however, be read in the light of the Circular of the Committee of London Clearing Bankers (namely the predecessors of the Committee of London and Scottish Banks) of 23 September 1957, which remains the basis of the prevailing banking practice in point. Just as this circular requires the paying banker to insist upon indorsements in certain circumstances, so also it gives detailed instructions for the guidance of the collecting banker. The effect of it is that as a matter of practice the collecting banker is expected to require indorsements of any cheque or other instrument:

- (i)which is tendered for an account other than that of the ostensible payee (in such a case the banker must look for the indorsement of the payee and of all subsequent indorsees other than that of the customer for whose account it is to be collected); or
- (ii)on which the payee’s name is misspelt, or the payee is incorrectly designated, and the surrounding circumstances are suspicious; or
- (iii)which is payable to joint payees and tendered for an account to which not all are parties.

It follows that if a banker collects one of the instruments mentioned in the circular despite its being unindorsed or bearing an irregular indorsement, he may be considered as having acted negligently by ignoring a requirement of common banking practice.

## Other documents

36-380 The statutory protection relates not only to the collection of cheques, but under s.4(2) applies also to the collection of:

- (a)any document issued by a customer of a banker which, though not a bill of exchange, is intended to enable a person to obtain payment from that banker of the sum mentioned in the document<sup>1260</sup>;
- (b)any document issued by a public officer which is intended to enable a person to obtain payment from the Paymaster-General or the Queen's and Lord Treasurer's Remembrancer of the sum mentioned in the document but is not a bill of exchange; and
- (c)any draft payable on demand drawn by a banker upon himself, whether payable at the head office or some other office of his bank.<sup>1261</sup>

It thus includes dividend and interest warrants, conditional orders and bankers' drafts. It does not include commercial bills of exchange or promissory notes.

## Contributory negligence

- 36-381 Can a plea of contributory negligence be raised as a partial defence to an action in conversion brought by the true owner of a cheque against a collecting banker? A positive answer to this question was given in *Lumsden & Co v London Trustee Savings Bank*.<sup>1262</sup> In that case a collecting banker failed to establish that he had acted without negligence in the collection of certain cheques and was therefore held not to be entitled to the protection of s.4 of the Cheques Act 1957. It was, however, held that the customer was guilty of contributory negligence to the extent of 10 per cent and the amount recoverable by him was reduced accordingly. Donaldson J's decision to allow this defence was based on the language of s.1 of the Law Reform (Contributory Negligence) Act 1945:

“Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons ... the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable ...”

The learned judge held that this provision does not confine the defence of contributory negligence to instances in which the claimant—against whom it is raised—owes a duty of care to the defendant. It is sufficient if the claimant's carelessness or fault has contributed to the occurrence of the loss. Whilst Australian authorities cast some doubts on the correctness of this decision,<sup>1263</sup> it has been affirmed in England by statute. Under s.47 of the Banking Act 1979 the defence of contributory negligence is available to a banker “in any circumstances in which proof of absence of negligence would be a defence in proceedings by reason of s.4 of the Cheques Act 1957”.<sup>1264</sup>

## Protection of discounting banker

- 36-382

A discounting banker may, on occasions, be able to plead two defences against an action in conversion by the true owner of a cheque. First, s.4(1)(b) protects the banker not only if he collects the cheque for a customer but also when “having credited a customer’s account with the amount of such an instrument, [he] receives payment thereof for himself”. Thus, it is arguable that a discounting banker may claim the defence of s.4 provided the cheque has been credited to the customer’s account: he cannot rely on this section if the cheque has not gone through the customer’s account, e.g. if the banker has paid cash against the cheque.<sup>1265</sup> The second defence which may, on occasions, be open to the discounting banker is to rely on his position as holder in due course of a cheque. If he can bring himself within the definition of a holder in due course, he is to be regarded as the owner of the instrument and an action in conversion against him will fail.<sup>1266</sup> However, in order to be considered a holder in due course, the banker must prove that he took the cheque in good faith and for value and that the cheque was, at that time, complete and regular on its face.<sup>1267</sup>

## Regularity

- 36-383 The last requirement proved, on occasions, a pitfall, as a cheque is considered regular on its face only insofar as, *inter alia*, it is regularly indorsed.<sup>1268</sup> However, it appears that this requirement has been mitigated by s.2 of the Cheques Act 1957, which confers on a banker who gives value for a cheque payable to order, which the holder delivers to him for collection without indorsing it, such rights as he would have had if it had been indorsed in blank. Two cases show that a discounting banker may rely on this section in order to establish that he is a holder in due course of an unindorsed cheque. In *Midland Bank Ltd v RV Harris Ltd*<sup>1269</sup> a customer of the plaintiffs paid into his account with them two cheques drawn by the defendant on Lloyds Bank and payable to the customer’s firm. The cheques were dishonoured by Lloyds Bank and the plaintiffs brought an action claiming to be holders in due course of the cheques. It was proved that the customer was allowed to draw against the cheques before their clearance. Although the cheques did not bear an indorsement, it was held that, by s.2, the plaintiffs could be treated as holders in due course of the cheques despite the absence of an indorsement. In *Westminster Bank v Zang*<sup>1270</sup> a customer of the plaintiffs paid into the account of a company of which he was a director an unindorsed cheque, drawn by the defendant and payable to the customer’s order. The defendant stopped the cheque and it was dishonoured by the drawee bank. The plaintiffs brought an action to enforce payment, claiming to be holders in due course. As it was proved that the plaintiffs did not give value for the cheque, it was held that they were not holders in due course or for value, and could not enforce payment. The House of Lords held, however, that if they had given value for the cheque, they would have been holders in due course despite the missing indorsement. It was further held that the fact that the cheque was not collected for the original payee was of no relevance.

## Comparison with non-bank holder

- 36-384 *Zang's* case demonstrates that a banker may be considered a holder in due course in circumstances in which an ordinary member of the public—who is less familiar with negotiable instruments than a banker—would not be so considered. It should be noted that a person may be a holder in due course although he has acted with negligence.<sup>1271</sup> Accordingly, a discounting banker may find it useful to rely on his being a holder in due course of a cheque if he is not able to prove that he has acted without negligence. If he cannot show that he is a holder in due course, e.g. where he discounts an order cheque bearing a forged indorsement,<sup>1272</sup> he may still escape liability for conversion by relying on s.4, provided the cheque has been credited to the account of a customer.

## Non-transferable cheques

- 36-385 As UK banks now almost invariably issue their customers with cheque forms which are crossed and pre-printed with the words “account payee”, thereby making the cheque non-transferable,<sup>1273</sup> the holder in due course defence will rarely be available to a collecting bank. The collecting bank cannot become a holder in due course, or indeed any other type of holder, of a non-transferable cheque when it is not the named payee.<sup>1274</sup> In consequence, the holder in due course defence need only be considered in those relatively rare cases where a cheque is uncrossed, or where the words “account payee” are absent or have been deleted by the drawer of the cheque.

## Protection in cases of forgery

- 36-386 It has been indicated that the true owner of a forged cheque, e.g. a company whose cheque has been forged by a director, may recover the face value of the cheque from the collecting banker, provided the latter cannot claim to be protected under s.4.<sup>1275</sup> Insofar as the action of the true owner against the collecting banker is one in conversion, it is submitted that the true owner should be allowed to recover only the true value of the instrument. Whilst the value of a genuine cheque or bill is the amount for which it is drawn, it should be observed that by alleging the forgery of the instrument, the owner, or claimant, claims that it is null and void.<sup>1276</sup> Why then should he be allowed to claim its face value? In *Mathew and Cousins v Sherwell*<sup>1277</sup> a person drew a cheque and delivered it, after his being declared a bankrupt, to the defendant. Sir James Mansfield dismissed an action by the assignee in bankruptcy for the conversion of the cheque, holding that even if the action succeeded the assignee could, at most, recover the value of the paper on which the cheque was written. The assignee was not allowed to claim that whilst the cheque was a nullity, it had the value of £300.

This reasoning has been followed in modern cases decided in Australia and in Canada.<sup>1278</sup> Most recently, in *Smith v Lloyds TSB Group Plc*,<sup>1279</sup> the English Court of Appeal has rejected the face value rule where a cheque had been “materially altered” by an unauthorised person so as to fall within s.64(1) of the Bills of Exchange Act 1882. The Court of Appeal held that such a cheque was a “worthless piece of paper”.<sup>1280</sup> It may be that the true owner of the cheque could overcome such a result by relying on the law of unjust enrichment and suing the collecting banker for money had and received. Whilst there is authority indicating that the claimant, the true owner of the cheque, may do so,<sup>1281</sup> it is to be doubted if he would usually be able to succeed. It should be noted that the collecting banker receives the amount of the cheque as the agent of his customer, and it is doubtful whether an action for money had and received would succeed against such an agent once he has paid the amount of the collected cheque to his principal, the customer.<sup>1282</sup>

## Duty to customer

- 36-387 Quite regardless of whether the bank has accepted a cheque for collection or on the basis of a discount arrangement, it owes its customer the duty to present the instrument for payment with ordinary diligence.<sup>1283</sup> Basically, the bank has a “reasonable time” to present the cheque for payment.<sup>1284</sup> In practice, the position is governed by the Clearing House Rules. Under the traditional banking procedure, cheques had to be presented for payment through the clearing house to the branch on which they were drawn.<sup>1285</sup> In 1996, the Bills of Exchange Act 1882 was amended to allow for cheque truncation.<sup>1286</sup> Under a fully truncated system only essential information about the cheque is sent electronically from the collecting bank to the drawee bank and not the cheque itself, which remains with the collecting bank. The declining use of cheques, coupled with high development costs, meant that a fully truncated cheque-clearing system was never developed in the UK. In fact those provisions introduced in 1996 to allow for cheque truncation (ss.74B and 74C of the Bills of Exchange Act 1882) have now been repealed by s.13 of the Small Business, Enterprise and Employment Act 2015, which introduces fresh amendments to the 1882 Act that allow for cheques to be cleared through presentation of an electronic image of the cheque (known as “cheque imaging”) in place of presentation of the cheque itself.<sup>1287</sup>

## Footnotes

- 1220 *Re Farrow's Bank* [1923] 1 Ch. 41; *AL Underwood Ltd v Barclays Bank* [1924] 1 K.B. 775; *Westminster Bank Ltd v Zang* [1966] A.C. 182; *Barclays Bank Ltd v Astley Industrial Trust* [1970] 2 Q.B. 527, 539. The same is true where the banker accepts a cheque in reduction of an overdraft: *McLean v Clydesdale Bank* (1883) 9 App. Cas. 95. For a detailed analysis, see *National Australia Bank Ltd v KDS Construction Services*

- Pty Ltd (1988) 76 A.L.R. 27 Aust.* See also *Taylor v Australia and New Zealand Banking Group Ltd Unreported 26 May 1988*, Vic SC (both Australian authorities consider also whether the transaction constituted an undue preference). A Canadian authority suggests that the bank becomes a discounter even if the overdraft is granted by error: *Bank of Nova Scotia v Taylor (1979) 60 A.P.R. 14*.
- 1221     *Barclays Bank Ltd v Astley Industrial Trust*, above, at 538.
- 1222     But the proceeds are not held on trust for the customer; the bank merely incurs a commitment to credit the customer's account with an equivalent amount: *Emerald Meats (London) Ltd v AIB Group (UK) Ltd [2002] EWCA Civ 460*.
- 1223     See *Importers Co Ltd v Westminster Bank Ltd [1927] 2 K.B. 297*; *Honourable Society of the Middle Temple v Lloyds Bank Plc [1999] 1 All E.R. (Comm) 193*; *Linklaters (a firm) v HSBC Bank Plc [2003] EWHC 1113 (Comm)*, [2003] 2 Lloyd's Rep. 545 (Comm), noted by Ellinger (2004) 120 L.Q.R. 226.
- 1224     *Bills of Exchange Act 1882 s.81A(1)*.
- 1225     See *R. Hooley [1992] C.L.J. 432*.
- 1226     See above, paras 36-153—36-155 (especially for commencement dates).
- 1227     SI 2018/832, made on 10 July 2018 and coming into force on the 21st day after that date (reg.1).
- 1228     Meaning loss arising directly from the debiting of funds from the claimant's account and not further consequential loss (reg.5(4)).
- 1229     s.89E(2)(c) covers “purported presentment for payment by any means involving provision of an electronic image of an instrument that may not be presented for payment in that way”; (d) covers “provision, in purported presentment for payment, of (i) an electronic image that purports to be, but is not, an image of a physical instrument (including an image that has been altered electronically), or (ii) an electronic image of an instrument which has no legal effect”; (e) covers “provision, in presentment or purported presentment for payment of an electronic image which has been stolen”.
- 1230     reg.5(1)(e), (2).
- 1231     reg.7. For *Bills of Exchange Act 1882 s.80*, see below, para.36-357.
- 1232     reg.8.
- 1233     *Morison v London County and Westminster Bank Ltd [1914] 3 K.B. 356*; *AL Underwood Ltd v Barclays Bank [1924] 1 K.B. 775*; *Lloyds Bank Ltd v Savory & Co [1933] A.C. 201*; *Marquess of Bute v Barclays Bank [1955] 1 Q.B. 202* (which shows that the claimant need not be the owner of the cheque, but may be a person entitled to immediate possession).
- 1234     *Marquess of Bute v Barclays Bank [1955] 1 Q.B. 202*. For criticism of the face value rule, see E.P. Ellinger, E. Lomnicka and C.V.M. Hare, Ellinger's Modern Banking Law, 5th edn (2011), pp.683–685. The rule was described as a “legal fiction” by Lord Nicholls in *OBG Ltd v Allan [2007] UKHL 21, [2007] 2 W.L.R. 920* at [227]–[228].
- 1235     *Smith v Lloyds TSB Plc [2000] 2 All E.R. (Comm) 693, CA*. The proviso to s.64(1) cannot apply where the cheque is non-transferable: see above, para.36-359.
- 1236     *Marquess of Bute v Barclays Bank Ltd [1955] 1 Q.B. 202*.

- 1237 *Norman v Ricketts* (1886) 3 T.L.R. 182; and see also Chalmers and Guest on Bills of Exchange, 18th edn (2017), para.2-151.
- 1238 *Surrey Asset Finance Ltd v National Westminster Bank Plc*, *The Times*, 30 November 2000; permission to appeal refused [2001] EWCA Civ 60.
- 1239 *Bavins Jnr & Sims v London and South Western Bank* [1900] 1 Q.B. 270; *Morison v London County and Westminster Bank Ltd*, above; *United Australia Ltd v Barclays Bank Ltd* [1941] A.C. 1 (waiver of tort); cf. *John v Dodwell & Co* [1918] A.C. 563, 570. But this restitutive claim may fail if the money is paid over to the principal. The collecting bank does not owe a duty of care to the drawee: *Yorkshire Bank Plc v Lloyd's Bank Plc* [1999] *Lloyd's Rep. Bank.* 191.
- 1240 But see *Honourable Society of the Middle Temple v Lloyds Bank Plc*, above, where an English clearing bank was held entitled to claim a full indemnity from the overseas bank that had instructed it to act as the collecting agent of the overseas bank, applied in *Linklaters (a firm) v HSBC Bank Plc*, above, where Gross J held that the fact the collecting agent was also the paying bank was of no significance to its claim for a complete indemnity and that there was no room for just and equitable apportionment between the two banks under the Civil Liability (Contribution) Act 1978 as this solution was inherently uncertain and carried with it a much increased risk of litigation. See also *Ellinger* (2004) 120 L.Q.R. 226.
- 1241 See Vol.I, paras 32-199 et seq.
- 1242 As regards the protection afforded by this section to a discounting banker, see para.36-382, below. As regards the meaning of the word “customer”, see above, para.36-255. See generally, E.P. Ellinger, E. Lomnicka and C.V.M. Hare, *Ellinger's Modern Banking Law*, 5th edn (2011), Ch.15.
- 1243 [1933] A.C. 201, 221; see *Megrah* (1956) 77 J.I.B. 256. In *Marfani & Co Ltd v Midland Bank Ltd* [1968] 1 W.L.R. 956, 957, Diplock LJ observed that current banking practice provided a better guide for determining the absence or presence of negligence than cases decided 30 years earlier, when banking facilities were far less widespread.
- 1244 See implied warning to this effect by Cairns J in *Marfani & Co Ltd v Midland Bank Ltd*, above, at 981–982. And see *Thackwell v Barclays Bank Plc* [1986] 1 All E.R. 676, which also supports the view that a failure to make an enquiry is not excused by the fact that an answer would have allayed fears of fraud.
- 1245 *Ross v London County and Westminster Bank* [1919] 1 K.B. 678.
- 1246 *Penmount Estate Ltd v National Provincial Bank* (1945) 173 L.T. 344, 346. See also *Smith and Baldwin v Barclays Bank* (1944) 65 J.I.B. 171.
- 1247 *Ladbroke v Todd* (1914) 30 T.L.R. 433; *Hampstead Guardians v Barclays Bank* (1923) 39 T.L.R. 229. cf. *Commissioners of Taxation v English, Scottish and Australian Bank* [1920] A.C. 683.
- 1248 *Lloyds Bank v Savory & Co* [1933] A.C. 201.
- 1249 *Marfani & Co Ltd v Midland Bank Ltd* [1968] 1 W.L.R. 956.
- 1250 *Lumsden & Co v London Trustee Savings Bank* [1971] 1 *Lloyd's Rep.* 114.
- 1251

The main EU legislation on anti-money laundering and counter terrorist financing is the Fourth Anti-Money Laundering Directive 2015/849/EU (AMLD4), as amended by the Fifth Anti-Money Laundering Directive 2018/843/EU (AMLD5), and the Second Wire Transfer Regulation (EU) 2015/847 (WTR2). AMLD4 was transposed into UK law by the [Money Laundering, Terrorist Financing and Transfer of Funds \(Information on the Payer\) Regulation 2017 \(SI 2017/692\) \(MLRs\)](#). Most of AMLD5 was implemented in the UK through amendment of the [MLRs](#) by way of statutory instruments ([SI 2018/1337](#) and [SI 2019/1511](#)). WTR2 had direct effect in UK law. Brexit has required amendment of the [MLRs](#) and the onshoring of WTR2 through a number of statutory instruments: the [Money Laundering and Terrorist Financing \(Amendment\) \(EU Exit\) Regulations 2020 \(SI 2020/991\)](#); the [Financial Services \(Miscellaneous Amendments\) \(EU Exit\) Regulations 2020 \(SI 2020/628\)](#); and the [Money Laundering and Transfer of Funds \(Information\) \(Amendment\) \(EU Exit\) Regulations 2019 \(SI 2019/253\)](#). The UK opted out of the Sixth Anti-Money Laundering Directive (2018/1673/EU), which had to be transposed into the national law of Member States by 3 December 2020 (i.e. during the Brexit implementation period). Amendments will be made to the MLRs through the [Money Laundering and Terrorist Financing \(Amendment\) \(No. 2\) Regulations 2022 \(SI 2002/860\)](#), which come into force partly 21 days after the day on which the Regulations are made, partly on 1 September 2022, partly on 1 April 2023 and fully on 1 September 2023.

- 1252      [Financial Services and Markets Act 2000 s.1D](#).
- 1253      E.P. Ellinger, E. Lomnicka and C.V.M. Hare, [Ellinger's Modern Banking Law](#), 5th edn (2011), pp.695–698.
- 1254      [Morison v London County and Westminster Bank Ltd \[1914\] 3 K.B. 356](#); [Ross v London County and Westminster Bank \[1919\] 1 K.B. 678](#); [Souchette v London County and Westminster Bank \(1920\) 36 T.L.R. 195](#); [AL Underwood Ltd v Bank of Liverpool \[1924\] 1 K.B. 775](#); [Lloyds Bank v Savory & Co \[1933\] A.C. 201](#). However, if business efficacy requires that certain cheques payable to a drawer be collected through the account of the agent and this procedure is adopted with the drawer's knowledge, he is estopped from suing the collector's banker: [Australia and New Zealand Bank Ltd v Ateliers de Constructions Electriques de Charleroi \[1967\] 1 A.C. 86](#).
- 1255      [Marquess of Bute v Barclays Bank \[1955\] 1 Q.B. 202](#). cf. [Moser v Commercial Banking Co of Sydney Ltd \(1974\) 22 F.L.R. 123 Aust](#): cheque payable jointly to husband and wife collected for husband's personal account; held to involve negligence.
- 1256      [Bevan v National Bank \(1906\) 23 T.L.R. 65](#); [House Property Co of London v London County and Westminster Bank \(1915\) 31 T.L.R. 479](#); [Rhostar \(Pvt\) Ltd v Netherlands Bank of Rhodesia Ltd \[1972\] 2 S.A.L.R. 703](#), especially 717; [National Commercial Banking Corp of Australia Ltd v Robert Bushby Ltd \(1984\) 1 N.S.W.L.R. 559](#), affirmed sub. nom. [National Commercial Banking Corp of Australia Ltd v Batty \(1986\) 65 A.L.R. 385](#). But note that if the payee authorises the collection of the cheque for the credit of an account other than his own, there is no conversion involved: [Souhrada v Bank of NSW \[1976\] 2 Lloyd's Rep. 444, 452](#). Note further that there is no negligence in the collection for an account other than the ostensible payee's of a cheque crossed with the

mere addition of the words “not negotiable”: *Day v Bank of NSW* (1978) 19 A.L.R. 32 Aust. Following the passing of the *Cheques Act 1992* (discussed above, para.36-166), in the absence of special circumstances, it would generally be negligent to collect payment of an “a/c payee” cheque for someone other than the named payee without further inquiry. But in each case the enquiry is fact sensitive and current banking practice is highly relevant to the issue of negligence (*Architects of Wine Ltd v Barclays Bank Plc* [2007] EWCA Civ 239, [2007] 2 All E.R. 285 at [12], per Rix LJ, who added that “[a] bank’s evidence about its practice is, especially if unchallenged, relevant evidence of the current practice of bankers”). As regards the collection of an “a/c payee” cheque on the instructions of a non-clearing bank, see *Hon Society of the Middle Temple v Lloyds Bank* [1999] 1 All E.R. (Comm) 193; *Linklaters (a firm) v HSBC Bank Plc* [2003] EWHC 1113, [2003] 2 Lloyd’s Rep. 545 (Comm), noted by *Ellinger* (2004) 120 L.Q.R. 226.

- 1257     *Lloyds Bank v Chartered Bank of India* [1929] 1 K.B. 40; *Motor Traders Guarantee Corp v Midland Bank* [1937] 4 All E.R. 90; *Nu-Stilo Footwear v Lloyds Bank* (1956) 77 J.I.B. 239; *Day v Bank of NSW* [1976] 2 Lloyd’s Rep. 444, which also concerned the question of negligence arising from the bank’s failure to inquire as regards the authority of an indorser who paid a cheque into his own account having indorsed it per pro the payee.
- 1258     *Orbit Mining and Trading Co v Westminster Bank* [1963] 1 Q.B. 794.
- 1259     *Bavins Jnr & Sims v London and South Western Bank Ltd* [1900] 1 Q.B. 270.
- 1260     Such a document includes a cheque payable to “cash or order”: *Orbit Mining and Trading Co v Westminster Bank* [1963] 1 Q.B. 794.
- 1261     As regards the legal nature of such a draft, see *Commercial Banking Co of Sydney Ltd v Mann* [1961] A.C. 1, 7. See generally as regards bankers’ drafts: Chalmers and Guest on Bills of Exchange, 18th edn (2017), paras 2-003, 2-012 and 2-040.
- 1262     [1971] 1 Lloyd’s Rep. 114; following *Helson v McKenzies (Cuba Street) Ltd* [1950] N.Z.L.R. 878.
- 1263     *Wilton v Commonwealth Trading Bank* [1973] 2 N.S.W.R. 644; *Tina Motors Pty Ltd v ANZ Banking Group Ltd* [1977] V.R. 205, 208–209; *Day v Bank of NSW* (1978) 19 A.L.R. 32, 42 et seq.; *Grantham Homes Pty Ltd v Interstate Permanent Building Society Ltd* (1979) 37 F.L.R. 191; *Oxland Enterprises Pty Ltd v Gierke* (1980) 91 L.S.J.S. 276. See also dictum of Lord Wright in *Lloyds Bank v Savory & Co* [1933] A.C. 201, 229. cf. *Varker v Commercial Banking Co of Sydney Ltd* [1972] 2 N.S.W.R. 967.
- 1264     The object of this provision was to ensure that the application to actions of this type of the plea of contributory negligence was not affected by *s.11(1) of the Torts (Interference with Goods) Act 1977*. Note that contributory negligence also constitutes a defence to an action for the breach of a contractual duty of care where the defendant is also liable in the tort of negligence for the same default: Vol.I, para.29-094. Note also that under *reg.8 of the Electronic Presentment of Instruments (Evidence of Payment and Compensation for Loss) Regulations 2018* (SI 2018/832), compensation to be paid by a “responsible banker” under *reg.5* is reduced if the claimant’s behaviour contributed to the loss (see above, paras 36-153—36-155).

- 1265 Under s.82 of the Bills of Exchange Act 1882 a banker was not protected if he credited the customer's account before clearance: *Capital and Counties Bank v Gordon [1903] A.C. 240*. This difficulty was removed by s.1 of the Bills of Exchange (Crossed Cheques) Act 1906, which provided that a banker collected a cheque within the meaning of s.82 notwithstanding that he credited his customer's account with the amount of the cheque before clearance. Under that section a discounting banker would not have been protected, as such a banker collects the cheque for himself and not for a customer. Section 4(1)(b), it should be noted, explicitly protects a banker who, having credited the customer's account, receives payment for himself.
- 1266 See s.38(2) of the Act discussed in para.36-093, above.
- 1267 See s.29 of the Act, discussed in para.36-072, above.
- 1268 *Arab Bank Ltd v Ross [1952] 2 Q.B. 216.*
- 1269 [1963] 1 W.L.R. 1021.
- 1270 [1966] A.C. 182.
- 1271 See above, para.36-075.
- 1272 See above, para.36-053.
- 1273 Bills of Exchange Act 1882 s.81A(1).
- 1274 The requirements for holder in due course status are set out in s.29(1) of the Bills of Exchange Act 1882, and are considered in para.36-072 above.
- 1275 *Orbit Mining and Trading Co v Westminster Bank [1963] 1 Q.B. 794*. See also *Stoney Stanton Supplies (Coventry) Ltd v Midland Bank Ltd [1966] 2 Lloyd's Rep. 373, 385*.
- 1276 See ss.24 and 64 of the Act. And see above, para.36-359, considering the argument in respect of ss.60 and 80 of the Bills of Exchange Act 1882.
- 1277 (1810) 2 Taunt. 439. cf. *Building and Civil Engineering Holidays Scheme Management Ltd v Post Office [1964] 2 Q.B. 430, 444–447*.
- 1278 *Arrow Transfer Co Ltd v Royal Bank of Canada*, 19 D.L.R. (3rd) 420 (1971), affirmed 27 D.L.R. (3rd) 81 (1972) Can; *Number 10 Management Ltd v Royal Bank of Canada*, 69 D.L.R. (3d) 99, 105 (1977); *Koster's Premier Pottery Pty Ltd v Bank of Adelaide (1981) 28 S.A.S.R. 355 Aust.*
- 1279 [2000] 2 All E.R. (Comm) 693.
- 1280 At 703.
- 1281 *Morison v London County and Westminster Bank Ltd [1914] 3 K.B. 356, 365–366*; *United Australia Ltd v Barclays Bank Ltd [1941] A.C. 1*, above, para.36-375.
- 1282 *Morison v London County and Westminster Bank Ltd*, above, at 386; above, para.36-125; for the same reason he would lose on an action in money had and received based on the ratio in *Lipkin Gorman v Karpnale Ltd [1991] 2 A.C. 548*, above, para.36-131.
- 1283 By contrast, where a collecting bank collects an instrument for a remitting bank, there is no privity of contract between the collecting bank and the customer of the remitting bank either at common law or under the Uniform Rules for Collections, 1995 revision (URC 522): *Grosvenor Casinos Ltd v National Bank of Abu Dhabi [2008] EWHC 511 (Comm)*, [2008] 2 All E.R. (Comm) 112 at [157], Flaux J, distinguishing *Bastone &*

- 1284      *Firminger Ltd v Nasima Enterprises (Nigeria) Ltd [1996] C.L.C. 1902* at 1908, Rix J, who thought the URC point arguable. See further, *H. Bennett (2008) 124 L.Q.R. 532*. Note that as a collecting bank does not become a holder the position is not governed by **s.45(2) of the Bills of Exchange Act 1882**, although this provision furnishes a guideline. For a detailed discussion of the collecting bank's duties, see E.P. Ellinger, E. Lomnicka and C.V.M. Hare, Ellinger's Modern Banking Law, 5th edn (2011), pp.715 et seq.; the clearing house rules are discussed at pp.390 et seq.
- 1285      *Barclays Bank v Bank of England [1985] 1 All E.R. 385*.
- 1286      Bills of Exchange Act 1882 ss.74B–C, inserted by the **Deregulation (Bills of Exchange) Order 1996 (SI 1996/2993)**. See Chalmers and Guest on Bills of Exchange and Cheques, 18th edn (2017), paras 13-021 et seq.; and, on cheque truncation generally, see also *Vroegop [1990] L.M.C.L.Q. 244*. See above, para.**36-152**.
- 1287      See **Pt 4A of the Bills of Exchange Act 1882** (as inserted by **s.13**). See above, paras **36-153—36-155**.

## (e) - Funds Transfer

Chitty on Contracts 34th Ed.

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Volume II - Specific Contracts

Chapter 36 - Bills of Exchange and Banking

Section 2. - Aspects of Banking Law

(e) - Funds Transfer <sup>1288</sup>

### Nature of a funds transfer

- 36-388 The common thread that runs through all funds transfer operations is that they involve the movement of a credit balance from one account to another brought about through adjustment of the balances of the payer's and the payee's accounts.<sup>1289</sup> The payer's account is debited and the payee's account is credited. This results in the debt owed to the payer by his bank being extinguished or reduced pro tanto (or, where his account is overdrawn, his liability to the bank increased) by the amount of the transfer to the payee, whilst the debt owed to the payee by his own bank is increased (or, where his account is overdrawn, his liability reduced) by the same amount.

### Transfer of value

- 36-389 A funds transfer operation does not involve the transfer of property, simply the adjustment of separate property rights (i.e. choses in action) of the payer and the payee against their own banks.<sup>1290</sup> It is, therefore, something of a misnomer to speak of the "transfer" of funds as there is no actual transfer of coins and bank notes from the payer to the payee.<sup>1291</sup> Moreover, there is no assignment of any debt that may be owed to the payer by his own bank.<sup>1292</sup> As Staughton J observed in *Libyan Arab Foreign Bank v Bankers Trust Co*<sup>1293</sup>:

“‘Transfer’ may be a somewhat misleading word, since the original obligation is not assigned (notwithstanding dicta in one American case which speaks of assignment)<sup>1294</sup>; a new obligation by a new debtor is created.”

Transfer of *value*, rather than the transfer of funds, is probably a more accurate description of the giro process.

## Credit and debit transfers

- 36-390 Funds transfer operations can be classified as either credit transfers or debit transfers according to the way the payment order is communicated to the payer's bank.

### Credit transfers

- 36-391 A credit transfer represents a “push” of funds by the payer to the payee. The payer instructs his bank to cause the account of the payee, at the same or another bank, to be credited. The payer’s payment order may be for an individual credit transfer, e.g. by bank giro credit or CHAPS payment, or for a recurring transfer of funds under a standing order (standing orders are instructions given by a customer to his bank to make regular payments of a fixed amount to a particular payee).<sup>1295</sup> On receipt of the payer’s payment order, the payer’s bank will debit the payer’s account, unless the payer has provided his bank with some other means of reimbursement, and credit the payee’s account where it is held at the same bank, or, where the payee’s account is held at another bank, forward a payment order to the payee’s bank, which will credit the payee’s account.

### Debit transfers

- 36-392 A debit transfer represents a “pull” of funds by the payee from the payer. The payee conveys instructions to his bank to collect funds from the payer. These instructions may be initiated by the payer and passed on to the payee, e.g. as happens with the collection of cheques; alternatively, they may be initiated by the payee himself pursuant to the payer’s authority, as happens with direct debits (where the payer signs a mandate authorising his bank to pay amounts demanded by the payee).<sup>1296</sup> On receipt of instructions from the payee, the payee’s bank usually provisionally credits the payee’s account with the amount to be collected and forwards instructions to the payer’s bank, which will debit the payer’s account. The credit to the payee’s account becomes final when the debit to the payer’s account becomes irreversible.

## Clearing

- 36-393 Payment effected through a funds transfer system is initiated by a payment order given by the payer, or someone else acting with his authority, to his own bank. In cases where the payment is not “in-house” (i.e. the payer and the payee hold accounts at the same bank), the payer’s payment order will lead to a further payment order passing between the payer’s bank and the payee’s bank, sometimes through the intermediation of other banks. The process of exchanging payment orders between participating banks is known as clearing. Clearing may take place through a series of bilateral exchanges of payment orders between banks, but in the United Kingdom it is more common for clearing to take place multilaterally through a centralised clearing house.

## Paper-based and electronic system

- 36-394 Funds transfer systems are classified as either paper-based or electronic depending on the medium used for inter-bank communication of payment instructions.<sup>1297</sup> In a paper-based funds transfer system the paper embodying the payment instruction is physically transferred from one bank to another, e.g. by direct courier or at a centralised clearing house. By contrast, with an electronic funds transfer system the inter-bank communication of payment instructions is by electronic means, e.g. by magnetic tape, disc or, more usually, telecommunication link. All the main funds transfer systems in the UK operate on the basis of inter-bank communication of payment instructions via electronic means. Even the credit clearing system, which, like cheque clearing, traditionally operated as a paper-based clearing system, now requires paper bank giro credits to be cleared by electronic means through the image-clearing system.<sup>1298</sup> The other main inter-bank electronic funds transfer systems operating in the UK are CHAPS, BACS and the Faster Payments System.<sup>1299</sup> The presentation of cheques through the new cheque imaging system involves the communication of images by electronic means, but the system otherwise continues to treat cheques as paper instructions to pay.<sup>1300</sup> Cheques are not considered in this section of the chapter.<sup>1301</sup>

## Settlement

- 36-395 Where the payer and the payee hold accounts at the same bank, the transfer of funds between the two accounts will usually involve a simple internal accounting exercise at the bank, known as an “in-house” transfer.<sup>1302</sup> The payer’s account is debited and the payee’s account is credited. The position will be different where the payer’s account and the payee’s account are held at different

banks, known as an “inter-bank” transfer. In such cases an inter-bank payment order will pass from bank to bank, sometimes from the payer’s bank directly to the payee’s bank, otherwise via intermediary banks which each issue their own payment order to the next bank down the chain, until a payment order finally reaches the payee’s bank. Each inter-bank payment order must be paid by the bank sending the instruction to the bank receiving it. It is this process whereby payment is made between the banks themselves of their obligations *inter se* which is known as settlement.

## Bilateral and multilateral settlement

- 36-396 Settlement can occur on either a bilateral or multilateral basis. Bilateral settlement occurs where the bank sending the payment order and the bank receiving it are “correspondents”, meaning that each holds an account with the other. Settlement is effected through an adjustment of those accounts. Multilateral settlement involves the settlement of accounts of the sending bank and the receiving bank held at a third bank. The third bank could be a common correspondent of the two banks, i.e. one where they both have accounts; alternatively, and more typically, the third bank could be a central bank.

## Gross and net settlement

- 36-397 Settlement may be either gross or net. With gross settlement the sending and receiving banks settle each payment order separately without regard to any other payment obligations arising between them. This is usually done on a real-time basis, with settlement across the accounts of participating banks held at the central bank as each payment order is processed. With net settlement the mutual payment obligations of the parties are set off against each other and only the net balance is paid. This process occurs periodically with net balances being settled either at the end of the day (“same-day” funds) or on the following day (“next-day” funds). Net settlement may be either bilateral or multilateral.<sup>1303</sup> In a bilateral net settlement system, a participant’s exposure is measured by reference to its net position with regard to each individual counterparty and not by reference to the system as a whole. In a multilateral net settlement system, a participant’s position is measured by reference to its net position with regard to all other participants in the system as a whole. As a result, each participant will end up as a net net debtor or a net net creditor in relation to all other participants in the system. Multilateral netting may arise through direct determination of multilateral net positions, or indirectly by netting the net bilateral positions and thereby obtaining net net positions. In each case, settlement follows the multilateral netting process.

## Clearing systems

- 36-398 The very nature of funds transfer operations anticipates the existence of a suitable clearing system. Geva has identified two senses in which the term “clearing system” can be used.<sup>1304</sup> First, in its narrow sense, the term refers to a mechanism for the calculation of mutual positions within a group of participants with a view to facilitating the settlement of their mutual obligations on a net basis. Secondly, in its broad sense, the term also extends to the settlement of those obligations.

## Clearing house rules

- 36-399 The banks and building societies which are members of the various clearing systems must have settlement accounts at the Bank of England. Other banks and building societies may gain access to these systems through agency agreements with those members. Members are bound by the rules of the clearing system through a multilateral contract.<sup>1305</sup> The rules must be interpreted against the background of the manner and operation of the particular clearing system. Any interpretation of the rules must also be in accordance with the nature of the rules themselves.<sup>1306</sup> A customer of a clearing bank may be bound by, and able to rely on, the clearing system rules against his own bank through an implied term of the banker–customer contract (it is always open for the clearing house rules to be expressly incorporated into a bank’s contract with its customer but this is unlikely in practice). The customer is taken to have contracted with reference to the reasonable usage of bankers, including those clearing system rules which represent such reasonable usage.<sup>1307</sup> However, where clearing house rules derogate from the customer’s existing rights, the usage codified in the rules will be deemed unreasonable and will not bind the customer without his full knowledge and consent.<sup>1308</sup> In order to rely on the clearing house rules against a member bank other than his own bank, the customer would have to bring himself within the ambit of the **Contracts (Rights of Third Parties) Act 1999**, which may prove difficult, not least because the member banks may have “contracted out” of the Act.<sup>1309</sup> Agency arguments are likely to prove equally problematical.

## UK clearing systems

- 36-400 There are four major clearing systems for funds transfers in the United Kingdom. First, the credit clearing system, a credit transfer system used for the exchange of high-volume, low-value, credit collections such as bank giro credits using the new image clearing system.<sup>1310</sup> Secondly, BACS (Bankers’ Automated Clearing System), a high-volume, low-value, bulk electronic clearing

service for credit and debit transfers, including standing orders and direct debits. Thirdly, CHAPS (Clearing House Automated Payment System), an electronic sterling credit transfer system, normally used for high-value transfers. Fourthly, the Faster Payments System, which offers a near real-time facility for mobile, internet and telephone transfers between bank accounts, with standing orders being processed on a same-day basis. Save for CHAPS, which is a real-time gross settlement system, the other clearing systems are multilateral net settlement systems with settlement of balances across the participants' accounts held at the Bank of England at the end of each day, or several times each day for the Faster Payments System.<sup>1311</sup> In 2015, BACS introduced pre-funding to reduce the risk of settlement failure between participants.<sup>1312</sup> The Faster Payments System also has pre-funding requirements.<sup>1313</sup>

## **Individual money transfer forms (bank giro credit transfers)**

- 36-401 The bank giro credit, or the individual credit transfer form, is used by the banks in money transfer operations. Prior to 1 January 1998, bank giro credit transfers were made using standard credit forms which left blank spaces for the payer to insert details concerning the transfer: the name of the payee's account and the other details concerning it; and the amount involved. However, many of these forms were completed inaccurately, which led to unacceptable delays in payment being made. Thus, since January 1998 inter-bank bank giro credits must be made using pre-printed credit forms, such as those found at the back of cheque books, or provided with utility bills.
- 36-402 The bank giro credit form sets out neither the payer's express request that the bank execute the transfer nor his authorisation for the debiting of his account. The payer is, however, required to sign the form; his mandate to the bank as regards the remittance of the funds is based on his executing, in this manner, a standard bank giro credit. But the bank giro credit does not, even by implication, confer on the bank the authority to reimburse itself. The payer has to remit to the bank the required cash, a personal cheque, or cheques of third parties payable to himself. Bank giro credits are cleared using the new image clearing system.<sup>1314</sup> It operates on the same timescale as image-based cheque clearing with cleared funds available at the latest by midnight of the next working day.<sup>1315</sup> However, the increased use of automated payments and of online and mobile banking in recent years, as well as the fact that banks no longer accept non-customer transactions (i.e. those where the bank has no relationship with either the beneficiary of the bank giro credit payment or the paying customer), has led to a decline in the use of credit clearing generally.<sup>1316</sup>

## **Standing orders**

- 36-403

Standing orders are used to arrange for periodic payments of fixed amounts, such as monthly rents, instalments due under hire-purchase agreements, and annual subscriptions. The clearing banks have their own pro forma standing order forms with the payer supplying the same information as he used to provide on blank inter-bank credit forms before pre-printed credit forms became the norm. The form also enables the payer to provide the bank with a direction concerning the frequency and dates of payments. No specific funds are earmarked by the bank at the time it receives the instructions in order to enable it to reimburse itself. But the current form used by banks includes a clause, which authorises the bank to debit his account with the amount of each payment when it is made.<sup>1317</sup> The standing order is thus a self-contained instruction which need not be accompanied by the customer's cheque or by cash. Obviously, it can be used only by persons who maintain an account with the transferring bank.

- 36-404 In practice, organisations, such as charitable bodies, arrange for the printing of standard forms which set out the details of their account. The payer completes this form by inserting the details concerning his account with the transferring bank. The order is transmitted to this bank by the payee. From a legal point of view, the practice does not lead to a departure from the principles to be discussed subsequently. The payee transmits the form as the payer's agent.

## Direct debiting

- 36-405 The direct debiting scheme was introduced in 1967.<sup>1318</sup> It facilitates the prompt payment of amounts due under commercial and consumer contracts by enabling the supplier, dealer, or other creditor to obtain payment of amounts due to him by issuing a direct demand for payment to the debtor's bank. The procedure involves some extra paperwork at the initial stages but saves time thereafter. The creditor asks the debtor to sign a mandate executed on a standard form.<sup>1319</sup> The form is returned to the creditor, which either sends it to the debtor's bank or, where the Automated Direct Debit Instruction Service (AUDDIS) is used, kept by the creditor and details of the mandate are transmitted electronically to the debtor's bank.<sup>1320</sup> The form authorises the debtor's bank to pay amounts demanded by the creditor; there is no need to require on each occasion the confirmation of the indebtedness by the debtor. Although intimation of the sum payable is in the hands of the creditor, the mandate remains that of the debtor and the direct debit does not operate so as to vest in the creditor any rights of the debtor against its own bank.<sup>1321</sup>

- 36-406 All mandate forms used under the scheme must be variable in terms of amount, date and frequency; as such, neither the amount of the debit, its date or its frequency is specified on the form. However, the creditor must give the debtor at least 10 working days' notice (unless a shorter period of notice has been agreed) of the amount and date of the first direct debit and of any subsequent change to the amount and date of the direct debit. The creditor must then collect the direct debit payment

on or within three working days after the specified due date as advised to the debtor; failure to do so results in the creditor having to give the debtor further notice of the new collection date. Conceptually direct debiting can be used for the settlement of any type of payment. In the majority of cases, however, direct debiting is used to arrange for the payment of varying amounts falling due at regular or irregular intervals, such as amounts payable in respect of electricity bills or for the supply of different quantities of a commodity ordered by a purchaser from a supplier from time to time as old stock is used up.

- 36-407 It is obvious that direct debiting is open to abuse. There are, however, control measures in operation which reduce this risk.<sup>1322</sup> First, a firm that wants to collect payment by direct debit must be sponsored by one of the banks and building societies which operate the scheme. Sponsorship is dependent on the sponsor being satisfied as to a number of factors, including the financial status and administrative capability of the firm. Secondly, before being accepted into the scheme, the firm must provide all banks and building societies operating the scheme with an indemnity against any loss, including consequential loss, that may be caused to them, unless the loss was due to the bank or building society's own fault. Under the terms of the direct debit scheme, the debtor is guaranteed a full and immediate refund from his bank should there be an error in the direct debiting process by the creditor or the debtor's own bank, e.g. where a payment was made after the debtor cancelled his authority, where more than the notified sum was debited from the account, or the debit was made on the wrong date. Where the error is due to the fault of the creditor, the debtor's bank can claim a refund from the creditor under the terms of its indemnity.

## Cancellation of a direct debit

- 36-408 Where the creditor and the debtor have agreed that payment shall be by direct debit, subsequent cancellation of the direct debit mandate by the debtor gives the creditor a claim for breach of contract against him. In *Esso Petroleum Co Ltd v Milton*,<sup>1323</sup> the Court of Appeal treated such a claim as being similar to one that a creditor would have on a dishonoured cheque. In this case, the claimants owned two garages operated and managed by the defendant under licence. Under the terms of two licence agreements, one for each garage, the defendant was obliged to purchase all his petrol supplies from the claimants and pay for them on or before delivery by direct debit. The defendant was also forbidden from selling petrol at prices greater than those notified to him by the claimants. Towards the end of 1995, the claimants instructed the defendant to cut petrol prices in the face of stiff pricing competition and increased his site rentals. The defendant complained that this made his operations unprofitable and, in order to put pressure on the claimants, he cancelled his direct debit mandate when almost £170,000 was owing to the claimants for petrol supplied. The claimants applied for summary judgment against him. The defendant admitted the claim, but alleged that the increasingly stringent financial terms that the claimants had imposed amounted to a repudiatory breach of contract, and he counterclaimed damages which he sought to set off in equity in extinction of his debt to the claimants. The first instance judge dismissed the claimants'

application for summary judgment, but the claimants successfully appealed on two grounds. The first was that the defendant's counterclaim, even if good, would not give rise to an equitable set-off. The second was that no set off or counterclaim is available where payment was made, or agreed to be made, by direct debit. On the second issue, the Court of Appeal held, by a majority, that the payment arrangements of the parties by direct debit were to be treated as assimilated to those of payment by cheque, and so applied the rule, well established in the case of cheques, that there can be no set-off or counterclaim arising from the underlying contract unless there is fraud or failure of consideration. This was, according to Thorpe LJ,<sup>1324</sup> "a natural evolution" of the rule which applies to bills of exchange and cheques, and reflected, according to Sir John Balcombe,<sup>1325</sup> the modern commercial practice of treating a direct debit in the same way as a payment by cheque. By contrast, Simon Brown LJ, dissenting, held that there were insufficient similarities between cheques and direct debit arrangements to treat the two as equivalent.

- 36-409 It is respectfully submitted that Simon Brown LJ was right, and the majority were wrong, on this issue.<sup>1326</sup> The analogy with a dishonoured cheque is flawed. Where a cheque is dishonoured, the payee obtains a cause of action through breach of the drawer's payment obligation embodied in the cheque itself.<sup>1327</sup> There is no similar promise embodied in a direct debit mandate, revocation of which does not of itself create a separate cause of action.<sup>1328</sup> Where a direct debit mandate is revoked, the creditor is left only with his claim for the debt due on the underlying contract. Why should the debtor lose his right of set-off when sued on the underlying contract? The mere fact that the payment was to be by direct debit should not of itself be enough to imply an exclusion clause into the contract. Such a term is neither obvious, nor necessary for business efficacy. If the debtor's right of set-off is to be excluded, this should be done through an express term of the underlying contract.<sup>1329</sup> The best explanation for applying the no set-off rule to bills of exchange and cheques is that it facilitates the free negotiation of such instruments for cash.<sup>1330</sup> However, direct debits are not transferable and do not require the same protection. It does not answer this point simply to assert, as the claimants did, that as most cheques are now non-transferable, being crossed "account payee only", no distinction should be drawn between such cheques and direct debits. Perhaps it would show greater consistency if non-transferable cheques were also kept outside the no set-off rule. There is, after all, a strong case to be made that "account payee only" cheques fall outside the Bills of Exchange Act 1882.<sup>1331</sup>

## Legal nature of the relationships between the parties

- 36-410 The legal relationships between the parties to a funds transfer transaction are governed by the law of contract in general and by the principles concerning agency in particular. Thus, for example, the instructions given to the paying banker in one of the bank giro forms constitutes a mandate reminiscent of the authority conferred on the drawee bank by a cheque.

## Statutory controls

- 36-411 There is no comprehensive statutory regime within the United Kingdom governing all money transfer operations.<sup>1332</sup> Neither the law of negotiable instruments nor the principles of assignment are applicable. Limited statutory provision was made for “cross-border credit transfers” within the EEA through the [Cross-Border Credit Transfer Regulations 1999](#),<sup>1333</sup> which implemented EC Directive 97/5. As from 1 November 2009, this regime was replaced by the [Payment Services Regulations 2009 \(“PSRs 2009”\)](#),<sup>1334</sup> implementing the EC Payment Services Directive.<sup>1335</sup> The PSRs 2009 introduced new conduct of business rules for payment services (incorporating both payment transactions and the operation of payment accounts) that fell within their scope.<sup>1336</sup>

**U** The conduct of business rules specified the information to be provided to the payment service user ([Pt 5](#)) and set out the rights and obligations of payment service users and providers ([Pt 6](#)). However, the [PSRs 2009](#) focused only on electronic means of payment: paper-based payment transactions, such as cheques, were expressly excluded from the regime.<sup>1337</sup> The [PSRs 2009](#) have since been revoked and replaced by the [Payment Services Regulations 2017 \(“PSRs 2017”\)](#),<sup>1338</sup> which implement in part the EU’s Revised Payment Services Directive (“PSD2”) in the UK.<sup>1339</sup> With certain exceptions as set out in reg. 1, which include where the implementation period is linked to the coming into force of the secure communication and authentication requirements adopted under art.98 of PSD2, the [PSRs 2017](#) came into force on 13 January 2018.<sup>1340</sup> The [PSRs 2017](#) were amended in order to ensure legal continuity on the UK’s exit from the European Union.<sup>1341</sup>

## Payment Services Regulations 2017

- 36-412 The [PSRs 2017](#) build on the [PSRs 2009](#). The main differences between them, which relate to matters considered in this section of Chitty, include the following.

(1) The [PSRs 2017](#) are of wider scope than the [PSRs 2009](#). [Pts 5 and 6 of the PSRs 2009](#), with some exceptions, only applied if the service was provided from an establishment maintained by a payment service provider or its agent in the UK, the payment service providers of both the payer and the payee were within the EEA, and the transaction was in euros, sterling or another non-euro Member State currency.<sup>1342</sup> This changed with the [PSRs 2017](#), which have themselves recently been subject to Brexit-related amendments.<sup>1343</sup> So long as the payment services are provided from an establishment maintained by a service provider or its agent in the UK,<sup>1344</sup> [Pts 6](#) (informational requirements) and [7 \(rights and obligations\)](#) of the PSRs

**2017** extend, with some exceptions, to (i) services relating to transactions in sterling where the payment service providers of both the payer and the payee are located within the UK,<sup>1345</sup> (ia) services relating to transactions in euro executed under a payment scheme which operates across a “qualifying area” (which means the area of the UK and the EEA States) where the payment service providers of both the payer and the payee are located within the qualifying area,<sup>1346</sup> (ii) services relating to transactions in a currency other than sterling or euros where the payment service providers of both the payer and the payee are located in the UK,<sup>1347</sup> and (iii) services relating to transactions where the payment service provider of either the payer or the payee, but not both, is in the UK (and the case does not fall within (ia) above).<sup>1348</sup> In the case of (ii) and (iii), Pts 6 and 7 apply only in respect of those parts of the transaction which are carried out in the UK,<sup>1349</sup> and when they apply they do so in a more restricted manner than in the case of (i) or (ia).<sup>1350</sup> Payment service providers are still able to opt out of all the informational requirements in Pt 6, and certain conduct requirements in Pt 7, when dealing with business customers, unless they are “micro-enterprises”.<sup>1351</sup>

(2) The PSRs 2017 retain most of the exemptions contained in the PSRs 2009. For example, cheques and other paper-based transactions are outside the scope of the new regulations,<sup>1352</sup> as are payment transactions contained within a payment or a securities settlement system.<sup>1353</sup> A number of the exemptions have been clarified, such as where specific payment instruments can only be used in a limited way,<sup>1354</sup> and where providers of electronic communication networks provide additional services and those services are the purchase of digital content and voice-based services, or the purchase of tickets and donations to charities, within certain monetary limits.<sup>1355</sup>

(3) The PSRs 2017 extend to the activities of “payment initiation services” and “account information services”,<sup>1356</sup> although in a much more limited way than with other payment services providers.<sup>1357</sup> A payment initiation service is an online service to initiate a payment order at the request of the payment service user with respect to a payment account held at another payment service provider.<sup>1358</sup> An account information service is an online service to provide consolidated information on one or more payment accounts held by a payment service user with another payment service provider or with more than one payment service provider, and includes such a service whether the information is provided (a) in its original form or after processing; and (b) only to the payment service user or to the payment service user and to another person in accordance with the payment service user’s instructions.<sup>1359</sup> This would cover account aggregation services which provide customers with a consolidated view of their bank accounts and enable them to access their accounts online. The PSRs 2017 allow for access to payment accounts which are accessible online by payment initiation service providers<sup>1360</sup> and by account information services,<sup>1361</sup> although access may be denied by an account servicing payment service provider (i.e. a payment service provider providing and maintaining a payment account for a payer) in certain circumstances (i.e. “reasonably justified and duly evidenced reasons relating to unauthorised or fraudulent access to the payment account”).<sup>1362</sup> This extension has encouraged the development of Open Banking whereby bank customers can open up their banking data and accounts to trusted third parties, allowing for increased innovation, greater competition and customer choice, as well as increased financial inclusion.

<sup>1363</sup>

**U**

(4) The **PSRs 2017** introduce changes to the way payment service providers authenticate payments. Save for exceptions permitted by the European Banking Authority (EBA), PSD2 requires all payment service providers to use “strong customer authentication” when a payer: (a) accesses a payment account online, (b) initiates an electronic payment transaction, and (c) carries out any action through a remote channel that may imply a risk of payment fraud or other abuses.<sup>1364</sup> In addition, where a payer initiates an electronic remote payment transaction, payment service providers must apply strong customer authentication that includes elements which dynamically link the transaction to a specific amount and a specific payee.<sup>1365</sup> Strong customer authentication means authentication based on two or more elements categorised as knowledge (i.e. something only the user knows, e.g. a password, code or PIN), possession (i.e. something only the user possesses, e.g. a token, smartcard or mobile phone) and inherence (i.e. something the user is, e.g. a biometric characteristic like a fingerprint or retina scan) that are independent in that breach of one does not compromise the reliability of the others.<sup>1366</sup> **Regulations 68(3)(c), 69(2)(a) and (3)(d), 70(2)(a) and (3)(c) and 100 of PSRs 2017**, which deal with secure communication and authentication, came into force on 14 September 2019.<sup>1367</sup> New **reg.106A of the PSRs 2017** gives the Financial Conduct Authority power to make technical standards relating to strong customer authentication.<sup>1368</sup>

- 36-413 The **PSRs 2017** contain similar (but not identical) conduct of business requirements to those found in **Pts 5 and 6 of the PSRs 2009**. Pt 6 of the **PSRs 2017** sets out information requirements for payment services, and Pt 7 of the **PSRs 2017** sets out rights and obligations in relation to payment services. Like **reg.120(1) of the PSRs 2009**, **reg.148(1) of the PSRs 2017** makes any breach of the requirements of Pts 6 or 7 actionable by a “private person” who suffers loss as a result of the contravention, subject to defences and other incidents applying to actions for breach of statutory duty.<sup>1369</sup> However, and new to the **PSRs 2017**, it is provided, in **reg.148(4)**, that where there is a contravention of a requirement under **regs 76(5)(b), 77(6), 93(4) or 95** for a payment service provider to compensate another service provider, the payment service provider to which compensation is required to be paid is to be treated for the purposes of **reg.148** as if it were a “private person”.
- 36-414 The wide scope of the **PSRs 2017** mean that they are likely to apply to most domestic electronic funds transfers within the UK,<sup>1370</sup> and to a large number of international funds transfers from the UK to other states, whether or not those states are within the EEA. In so far as a money transfer falls outside the scope of the **PSRs 2017**, it will be necessary to consider the position at common law. In respect of funds transfers falling within their scope, the **PSRs 2017** do not expressly preserve the remedies that the parties might otherwise have had at common law.<sup>1371</sup> Whether this means that the **PSRs 2017** establish an exclusive remedial regime when applicable must await determination by the courts.<sup>1372</sup>

## Position of payer's bank under the Payment Services Regulations 2017 <sup>1373</sup>

- 36-415 The payer's bank is placed under certain minimum requirements as to information which it must provide to its customer. These requirements differ according to whether the payment transaction takes place under a "single payment service contract" or a "framework contract". <sup>1374</sup> Part 7 of the PSRs 2017 governs the authorisation and execution of a payment instruction and creates a regime governing the rights and obligations of parties to a payment transaction. In this regard special provision is made for the use of a "payment instrument" in order to initiate a payment transaction. A payment instrument is any device, password or procedure used by the payer in order to initiate a payment transaction. <sup>1375</sup>

### Non-execution or defective execution

- 36-416 An important difference from the position at common law is that under the PSRs the payer's bank is subjected to a regime of strict liability for non-execution or defective execution of the payer's instructions, whereas the bank's liability at common law turns on its failure to exercise reasonable care and skill in and about the execution of the payer's payment instructions. <sup>1376</sup> In the case of a payment order initiated by the payer, as with a CHAPS transfer or a standing order, the payer's bank is liable to the payer for the correct execution of the payment transaction unless it can prove to the payer that the correct amount was received by the payee's bank on time.

<sup>1377</sup>

- U If the payer's bank is liable, it must refund the amount of the defective or non-executed transaction to the payer without undue delay, and, where applicable, restore the debited payment account to the state it would have been in had the transaction not occurred at all. <sup>1378</sup> Where the payment order is initiated by the payee, as with direct debits, the payer's bank will be liable to refund the payer the amount of the direct debit payment, and if necessary re-credit the payer's account, if the payee's bank has been able to prove that it carried out its end of the payment transaction properly, i.e. it has sent the payment instruction (in the correct amount and within the correct timescale), and the correct payee's details, to the payer's bank, so that failure to receive the correct amount of funds within the correct timescale lies with the payer's bank rather than with the payee's bank. <sup>1379</sup> The payer can also claim for any charges and any interest incurred as a result of the non-execution or defective execution of the payment transaction. <sup>1380</sup> However, in order to obtain the redress stated above, the payer must notify the payer's bank without delay, and in any event no later than 13 months after the debit date, on becoming aware of any unauthorised or

incorrectly executed payment transactions.<sup>1381</sup> The payer's bank is given a right of recourse, which applies where the non-execution or defective execution of a payment transaction is "attributable" to the payee's bank or an intermediary bank.<sup>1382</sup>

## Unauthorised transactions

- 36-417 For a payment transaction to be authorised, the payer must have given his consent to the execution of the payment transaction or to the execution of a series of payment transactions of which the payment transaction forms part.<sup>1383</sup> The payer may give his consent before or, if agreed, after the execution of the payment transaction, which must be in the form, and in accordance with the procedure, agreed between the payer and the payer's bank, and may be given via the payee or a payment initiation service provider.<sup>1384</sup> The payer's bank is liable to the payer for execution of an unauthorised payment transaction and it must refund the amount of the unauthorised payment to him.<sup>1385</sup> If the unauthorised payment has been debited from the payer's account, the payer's bank must restore the debit to that account.<sup>1386</sup> In order to claim a refund or restoration of his account following an unauthorised payment transaction, the payer must notify his bank without delay on becoming aware of the unauthorised nature of the transaction and, in any event, this must be done no later than 13 months after the debit date.<sup>1387</sup> In cases where the payer denies having authorised an executed payment transaction or claims that a payment transaction has not been correctly executed, it is for the payer's bank to prove that the payment transaction was authenticated, accurately recorded, entered in the bank's accounts and not affected by a technical breakdown or some other deficiency.<sup>1388</sup> For these purposes, "authenticated" means the use of any procedure which allows a payment service provider to verify the identity of a payment service user or the validity of the use of a specific payment instrument, including the use of the user's personalised security credentials.<sup>1389</sup> Use of a "payment instrument" recorded by the bank is not in itself necessarily sufficient to prove either that the payment transaction was authorised by the payer or that the payer acted fraudulently or failed with intent or gross negligence to comply with PSRs 2017 reg.72.<sup>1390</sup> The payer's obligations in relation to payment instruments and personalised security credentials are set out in PSRs 2017 reg.72: the payer must only use the instrument in accordance with its terms and conditions (so long as those terms and conditions are "objective, non-discriminatory and proportionate"), he must notify the payment service provider in the agreed manner and without undue delay on becoming aware of the loss, theft, misappropriation or unauthorised use of the payment instrument, and he must take all reasonable steps to keep safe personalised security credentials relating to the payment instrument or an account information service.<sup>1391</sup> If a payment service provider, including a payment initiation service provider, claims that a payer acted fraudulently or failed with intent or gross negligence to comply with reg.72, the payment service provider must provide supporting evidence to the payer.<sup>1392</sup> Under PSRs 2017 reg.77(3), the payer is liable for all losses incurred in respect of an unauthorised payment transaction where the payer has (a) acted fraudulently, or (b) has with intent or gross negligence

failed to comply with reg.72, otherwise the payer's liability is restricted to £35 at most.<sup>1393</sup> However, in certain circumstances, a non-fraudulent payer will not be liable for any losses incurred in respect of an unauthorised payment transaction, namely where the losses arose after notification of the loss, theft, misappropriation or unauthorised use of the payment instrument to the payer's bank,<sup>1394</sup> where the bank failed to provide him with the appropriate means for notification,<sup>1395</sup> and where the payment instrument was used in connection with a "distance contract" (other than an excepted contract).<sup>1396</sup> The non-fraudulent payer will also not be liable for any losses where PSRs 2017 reg.100 requires the application of "strong customer authentication",<sup>1397</sup> but the payer's payment service provider did not require strong customer authentication.<sup>1398</sup> Where the payer's payment service provider had to make a refund to the payer/restore the debited payment account as the result of an unauthorised payment transaction,<sup>1399</sup> the payer's payment service provider would be entitled to compensation from the payee or the payee's payment service provider (or both) where reg.100 required the application of strong customer authentication, but the payee or the payee's payment service provider did not accept strong customer authentication.<sup>1400</sup> The payer may also be entitled to a refund from the payer's bank where an authorised payment transaction is initiated by or through the payee, as with a direct debit. This will occur where the payer did not specify the exact amount of the payment when initially authorising the direct debit and the amount of the payment "exceeded the amount that the payer could reasonably have expected taking into account the payer's previous spending pattern, the conditions of the framework contract and the circumstances of the case".<sup>1401</sup>

## Position of the paying banker at common law

**36-418** It is clear that the paying banker is under a duty to adhere to the terms of his authority. Presumably, he will be liable to compensate the customer for loss resulting from undue delay or from negligence in the execution of an order to make a funds transfer.

**1402**

**U** He may, likewise, be precluded from debiting the customer's account with a wrongfully made payment.<sup>1403</sup> It is, at the same time, accepted that the contract between the customer and the paying banker is not governed by the doctrine of strict compliance encountered in documentary credit cases.<sup>1404</sup> In *Royal Products Ltd v Midland Bank Ltd*,<sup>1405</sup> which concerned the construction of a money transfer order given by a customer to his bank, Webster J rejected the submission that in construing those instructions, the court should, as a matter of law or banking practice, give a legal implication to each detail of them, for it seemed to his Lordship that the doctrine which would lead to that result had little application to cases involving funds transfer instructions.<sup>1406</sup> The main duty of the customer is to give unambiguous instructions and to exercise reasonable care in making out the funds transfer forms. His liability is in all probability similar to that of a customer who gives an

ambiguous notice countermanding payment of a cheque or who facilitates a fraudulent alteration by negligently leaving blank spaces when the cheque is drawn.<sup>1407</sup>

## Position of the payee's bank under the Payment Services Regulations 2017<sup>1408</sup>

- 36-419 Statutory duties are imposed on the payee's bank by the *Payment Services Regulations 2017* ("PSRs 2017").<sup>1409</sup> Like the payer's bank, Pt 6 of the PSRs 2017 imposes information disclosure requirements on the payee's bank.<sup>1410</sup> Part 7 of the PSRs 2017 contains provisions relating to the rights and obligations of the payee's bank in the provision of payment services.<sup>1411</sup>
- 36-420 First, a number of provisions deal with the transmission of payment instructions and the receipt of funds by the payee's bank. In the case of a direct debit, the payee's bank must transmit the payment order to the payer's bank within the time limits it has agreed with the payee.<sup>1412</sup> The payee's bank must then credit the amount of the payment to the payee's account following its receipt of the funds.<sup>1413</sup> The payee's bank must ensure that the amount of the payment is at the payee's disposal immediately after that amount has been credited to the payee bank's account.<sup>1414</sup> The transferred funds must start to earn interest by the end of the business day upon which the payee's bank received those funds.<sup>1415</sup>
- 36-421 Secondly, several provisions deal with the right to levy charges on the payee. The starting point is that the payee's bank must ensure that the full amount of the payment is transferred to the payee and that no charges are deducted from that amount.<sup>1416</sup> However, the payee and the payee's bank may agree to the deduction of the bank's charges before the funds are credited to the payee's account,<sup>1417</sup> so long as the payee is given information as to the full amount of the payment transaction and the amount of the charges.<sup>1418</sup> In the case of a direct debit, the payee's bank is liable to reimburse the payee for any unauthorised charges deducted from the amount transferred.<sup>1419</sup>
- 36-422 Thirdly, a number of provisions deal with the payee bank's liability for the non-execution or defective execution of a payment transaction. In the case of a payment order initiated by the payer, as with a CHAPS transfer or a standing order, the payer's bank is liable to the payer for the correct execution of the payment transaction unless it can prove that the funds were received by the payee's bank on time.<sup>1420</sup> However, if the payer's bank can prove that the funds were transferred to the payee's bank within the relevant time-limits, responsibility for the non-execution or defective execution of the payment transaction shifts to the payee's bank, which must then immediately

make available to the payee a sum equivalent to the amount of the transfer and, were applicable, credit the corresponding amount to the payee's account.<sup>1421</sup> Where the payment transaction is initiated by the payee, as with direct debits, the payee's bank is liable to the payee for the correct transmission of the payment order to the payer's bank within the relevant time-limits.<sup>1422</sup> Where the payee's bank is so liable, it must immediately re-transmit the payment order to the payer's bank.<sup>1423</sup> The payee's bank must also ensure that the transaction is handled in accordance with PSRs 2017 reg.89, such that the amount of the transaction (a) is at the payee's disposal immediately after it is credited to the payee's bank, and (b) is value dated on the payee's payment account no later than the date the amount would have been value dated if the transaction had been executed properly.<sup>1424</sup> The payee's bank must, on request, make immediate efforts to trace the payment transaction and notify the payee of the outcome.<sup>1425</sup> It remains open to the payee's bank to prove that it correctly transmitted the payment order to the payer's bank in time, and in such a case liability for the non-execution or defective execution of the payment transaction shifts to the payer's bank, which must refund the amount of the payment to the payer and, where necessary, re-credit his account.<sup>1426</sup> The payee can also claim for any charges and any interest incurred as a result of the non-execution or defective execution of the payment transaction.<sup>1427</sup> However, in order to obtain the redress stated above, the payee must notify the payee's bank without delay, and in any event no later than 13 months after the debit date, on becoming aware of any incorrectly executed payment transactions.<sup>1428</sup> The payee's bank will not be liable for an incorrectly executed transfer where the unique identifier (e.g. the payer's account number, sort code or bank details) provided by the payee is incorrect, although the bank must make reasonable efforts to recover the funds involved in the transaction.<sup>1429</sup> The payee's bank can also avoid liability in cases of force majeure.<sup>1430</sup> It should also be noted that the payee's bank is given a right of recourse, which applies where the non-execution or defective execution of a payment transaction is "attributable" to the payer's bank or an intermediary bank.<sup>1431</sup>

## Position of recipient (payee's) banker at common law

<sup>36-423</sup> That the recipient banker—like the paying banker—is engaged as an agent is indisputable<sup>1432</sup>; it is less certain who is to be regarded as his principal. Is the principal the person or bank that remits the amount or is it the customer for whose credit the amount is received? It will be convenient to discuss separately the position prevailing in the different types of funds transfer operation.

## Credit transfers

<sup>36-424</sup>

In an ordinary credit transfer the transferor issues his instructions to the paying banker on the basis of the details concerning the payee's account, supplied in the payee's invoice or emerging from correspondence. When the payee furnishes these details to the transferor, he manifests his willingness to receive payment through funds transfer. Thus, the payee's banker is to be treated as having the authority to receive on the payee's behalf any amount remitted for the credit of the designated account.<sup>1433</sup> It follows that the recipient banker is the payee's agent and that any amount remitted to him by a paying banker is tendered to him in that capacity.<sup>1434</sup> The same analysis would appear to be applicable also to standing orders.

- 36-425 Where a debtor makes a cash payment into a bank account, it is necessary to distinguish between a payment made directly to the bank at which the account is maintained and a payment to some other bank coupled with a request that the amount involved be remitted to the payee's bank. In the former case a single bank combines the roles of the paying banker and of the recipient banker; it seems clear that this bank receives payment from a stranger on behalf of its customer, the payee. In the latter case, just as in all other funds transfer operations, the debtor effects payment by use of a funds transfer in reliance on the information supplied by the payee in an invoice or in correspondence. Presumably, the debtor makes payment to a bank other than the payee's for reasons of convenience. In such a case payment is accepted by that bank in compliance with its arrangement with other banks, as in the absence of such an agreement the bank would almost certainly refuse to act for a stranger. This reasoning suggests that a banker who receives a cash payment from a stranger for the credit of an account maintained with another bank, is to be regarded that other bank's agent. The bank which receives the cash payment does not enter into a contract with the debtor, or payer, and manifests no intention of acting on his behalf. Moreover, it is difficult to attribute to such a bank an intention to act on behalf of the payee, who—just like the payer—remains a stranger.<sup>1435</sup>

## In direct debits

- 36-426 In direct debiting arrangements, the authority signed by the debtor is addressed to his own bank, i.e. the paying banker, who is, thus, engaged by the debtor. The fact that the document which contains the authority is delivered by the debtor to the payee, who delivers it to his own bankers (the recipient bankers), who in turn deliver or post it to the paying banker, has no bearing on the legal nature of the transaction. The ensuing presentation of direct debiting forms by the payee to the paying banker (usually through the recipient banker) is effected in reliance on the authority to pay, conferred by the debtor on the paying banker. In essence, the procedure involved in direct debiting resembles the presentation to the drawee bank of a cheque drawn by the payee to his own order on behalf of the owner of the cheque book. A cheque drawn by an agent on his principal's account for the payment of commission due to the agent and a cheque drawn by a firm's book-keeper on this firm's account for the payment of his own monthly wages, constitute illustrations in point. Moreover, when a direct debiting form is presented to the paying banker by a recipient banker engaged by the payee, the recipient banker acts on the payee's behalf in a manner resembling the

presentation of a cheque by a collecting banker. However, a contractual relationship between the payee of the direct debiting form and the paying banker—who is acting on the debtor's behalf—is created by the indemnity furnished by the payee. It will be recollected that this indemnity is addressed to all bankers participating in the system.

## Relationship between transferor and recipient (payee's) banker

- <sup>36-427</sup> The recipient (payee's) bank does not owe a duty of care to a non-customer transferor of a funds transfer to pay money received only to the recipient identified in the transferor's instructions, or to clarify any discrepancies in those instructions as to the recipient's identity with the transferor.

<sup>1436</sup>

**U** The manner in which an international bank transfer is made may prevent the recipient bank from being held liable in unjust enrichment to a mistaken (non-customer) transferor, who was tricked into making the transfer as a result of the fraud of a third party, because the recipient bank was not enriched "at the expense of" the transferor.

<sup>1437</sup>

**U**

## Position of correspondent (intermediary) bank under the Payment Services Regulations 2017 <sup>1438</sup>

- <sup>36-428</sup> Where a funds transfer falls within the scope of the [Payment Services Regulations 2017 \("PSRs 2017"\)](#), <sup>1439</sup> the potential liability of the correspondent or intermediary bank differs from that at common law. In a case where there has been a failure to execute a payment order at all or on time, and this is "attributable" to the actions of a correspondent or intermediary bank, that bank must compensate the payer's bank (or payee's bank in the case of a direct debit) for any losses incurred as a result of the defective execution or non-execution of the payment order. <sup>1440</sup> Liability may be avoided where the payer originally provided an incorrect unique identifier (identifying the payee and his account), <sup>1441</sup> or in a case of force majeure. <sup>1442</sup> The position under the [PSRs](#) appears to differ from that at common law in two ways. <sup>1443</sup> First, whereas at common law the correspondent or intermediary bank's liability turns on its negligence, under the [PSRs](#) the bank's liability appears to be strict. <sup>1444</sup> Secondly, the common law appears to limit the payer's bank to recoupment of losses from the correspondent bank that it actually instructed, whereas the [PSRs](#) appear to offer the

payer's bank a right of action against the correspondent bank responsible for the loss (or to which the loss is "attributable"), even though there is no direct contractual link between the two banks.

## Position of correspondent (intermediary) bank at common law

- 36-429 Where there is no correspondent banking relationship between the paying bank and the payee's bank (i.e. the banks do not hold accounts with each other), the paying bank effects the transfer by giving an appropriate instruction to a correspondent (or intermediary) bank.<sup>1445</sup> A bank may use a correspondent bank, in particular, to service transactions originating in a foreign country in which it does not have a physical presence.<sup>1446</sup> An international funds transfer will require the services of at least one correspondent bank unless the payer's bank and the payee's bank are themselves correspondents (i.e. hold accounts with each other).<sup>1447</sup> In English law there is, of course, no privity of contract between such a "correspondent bank" and the paying bank's customer. This principle, which is based on cases establishing that there is no privity of contract between the principal and his agent's sub-agents,<sup>1448</sup> has been applied to international money transfers in *Royal Products Ltd v Midland Bank Ltd*.<sup>1449</sup> The same authority further shows that the paying bank may be liable for its correspondent's negligence or default. In this case, a Maltese merchant, who maintained a current account with the defendant bank, instructed it to transfer an amount of £13,000 to the credit of his account with the B Bank in Malta. The N Bank in Malta, which was instructed by the defendant bank to effect the necessary transfer, executed it despite the fact that strong rumours about the B Bank's imminent collapse were circulating at the relevant time. The merchant claimed that the N Bank, with which he had his other account in Malta and with which he had accordingly a relationship of customer and banker, ought to have warned him about the position. He sought to hold the defendant bank responsible for the default and negligence alleged. Dismissing the action, Webster J held that, on the facts, no negligence was attributable to the N Bank. But his Lordship observed that the paying bank owed its customer, the payer, a duty of care and skill in selecting its correspondent and added that, in the absence of a clause to the contrary, the paying bank could be vicariously liable for the negligence and default of its correspondent.<sup>1450</sup> It is, however, important to note that most modern banking forms include a clause under which a correspondent is engaged at the customer's risk and expense. As the paying bank is not in a position to exercise any control over its correspondent, such a clause appears reasonable.

## Revocation of payment order under the Payment Services Regulations 2017<sup>1451</sup>

- 36-430 Regulation 67(3) of the Payment Services Regulations 2017 ("PSRs 2017"),<sup>1452</sup> provides that the payer's consent to a payment transaction can be withdrawn at any time before the point at

which the payment order can no longer be revoked under reg.83.<sup>1453</sup> PSRs 2017 reg.83(1) restricts the ability of a payment service user to revoke a payment order by providing that, subject to certain exceptions, the payment service user may not revoke a payment order after it has been received by the payer's payment service provider.<sup>1454</sup> In the case of a payment transaction initiated by a payment initiation service provider, or by or through the payee, the payer may not revoke the payment order after giving consent to the payment initiation service provider to initiate the payment transaction or giving consent to execute the payment transaction to the payee.<sup>1455</sup> In the case of a direct debit, the payer may not revoke the payment order after the end of the business day preceding the day agreed for the debiting of funds.<sup>1456</sup>

## Countermand of order at common law

- 36-431 In order to avoid uncertainty as to the payer's right of countermand, the payer's bank may include in its contract with the payer an express provision stipulating that the payer may not countermand his payment instruction after a certain point in the payment process. Alternatively, the payer may be bound by the express rules of the payment system used to make the transfer.<sup>1457</sup> Where there are no such express rules, the courts will apply the (less certain) principles of common law. Under those common law principles, as the payer is the paying banker's principal, he is entitled to countermand or revoke an instruction before it has been executed.<sup>1458</sup> The exact point of time at which the transfer is complete has to be discussed separately as regards two situations. The first is the "in house" payment, where a customer instructs his bank to credit the account of another customer who maintains his account with the same branch. The second type of case, involving "out house" payments, includes transfers made at the instruction of a customer for the credit of another customer's account with a different branch of the same bank. Such a transfer is effected by computer entries made by means of a process similar to the one used where the transferor and the transferee maintain their respective accounts with different banks.

## In-house transfers

- 36-432 The question of when is payment complete in the case of an in house transfer is covered by two conflicting authorities. In the first case—*Rekstin v Severo Sibirsko Gosudarstvennoe Akcinerneoe*<sup>1459</sup>—the facts were unusual. A customer instructed his bank to transfer his total balance to the credit of another customer's account. After the bank had effected the transfer by making the necessary ledger entries but before notification was given to the payee, a judgment creditor served a garnishee order nisi (now called an "interim third party debt order") attaching the transferor's balance. It was held that at the time the order was served the amount transferred was still accruing to the transferor. It is important to emphasise that this conclusion was largely based

on the fact that no debt was owed by the transferor to the transferee and that there was nothing to indicate that the transferee had anticipated payment. Thus, there was no evidence establishing the transferee's assent to the transfer of the amount involved. The bank, therefore, could not be regarded as having the authority to hold the amount transferred on the transferee's behalf.

## Momm's case

- <sup>36-433</sup> A more flexible approach was adopted in *Momm v Barclays Bank International Ltd.*<sup>1460</sup> On 26 June 1974 the defendant bank received an instruction from a customer, H, to credit the account of the plaintiff, another customer banking with the same branch, with an amount of £120,000. The payment instruction was given in execution of a currency exchange contract between H and the plaintiff. Although H's account did not have a sufficient credit balance, the assistant manager decided to credit the plaintiff's account. The necessary forms were prepared and processed forthwith by the defendant bank's computer. Later in the day, H suspended payment. On the next day the defendant bank reversed the credit entry which had appeared in the plaintiff's account. When the plaintiff, who was not notified of the credit entry and of its reversal, discovered the facts through a perusal of H's books, he brought an action for a declaration that his account had been wrongfully debited on 27 June. Giving judgment for the plaintiff, Kerr J observed:

“The issue is whether or not a completed payment had been made by the defendants to the plaintiffs on June 26. This is a question of law. If the answer is ‘Yes,’ it is not contested that the plaintiffs have a good cause of action. If there were no authorities on this point, I think that the reaction, both of a lawyer and a banker, would be to answer this question in the affirmative. I think that both would say two things. First, that in such circumstances a payment has been made if the payee's account is credited with the payment at the close of business on the value date, at any rate if it was credited intentionally and in good faith and not by error or fraud. Secondly, I think that they would say that if a payment requires to be made on a certain day by debiting a payor customer's account and crediting a payee customer's account, then the position at the end of that day in fact and in law must be that this has either happened or not happened, but that the position cannot be left in the air. In my view both these propositions are correct in law.”<sup>1461</sup>

His Lordship distinguished *Rekstin's* case as having been decided on its special facts. Unlike the transferee in *Rekstin's* case, the plaintiff transferee in *Momm's* case was aware that a payment would be received at some point in execution of the currency exchange contract and had specified that it should be made into its account held at the defendant bank.

## Out-house transfers

- 36-434 The difficulty in determining the exact point of time at which an outhouse funds transfer is complete stems from the fact that the actual crediting of the payee's account can often precede the time at which his bank makes its actual decision to receive payment on his behalf. This is so because the crediting of the payee's account can be effected by the computer entry before the bank's officer makes his conscious decision to accept the money. It is clear that the payee's attitude to the problem may depend on the practical situation in which it arises. In cases in which the paying bank wishes to reverse the credit entry for its own purposes, e.g. because the transferor has countermanded payment or has become insolvent, the payee is likely to maintain that his consent to payment has been given in advance. On this basis, he would be able to argue that any countermand received after the execution of the credit entry in his account was ineffective. A reversal of entries would be ruled out altogether. The payee is likely to take a different stand where the amount involved is transferred under a contract which entitles him, in the event that an instalment due is not paid on time, to invoke an attractive forfeiture clause. If in such a case the computer credits the payee's account before the stipulated deadline but the voucher is presented thereafter, the payee has an interest in maintaining that payment has been completed only insofar as payment has been validly received on his behalf by the bank within the stipulated period.

## Cases where payee claims payment is complete

- 36-435 In *Royal Products Ltd v Midland Bank Ltd*<sup>1462</sup> Webster J proceeded on the basis that a money transfer was complete and, accordingly, no longer subject to a countermand when the funds were made available to the payee's bank and accepted by it, intentionally, on the payee's behalf. This view derives further support from an observation made by Hirst J in *Libyan Arab Foreign Bank v Manufacturers Hanover Trust Co (No.2)*<sup>1463</sup> in respect of a money transfer effected as between accounts maintained by two separate branches of a single bank. His Lordship concluded that the transfer was complete when the transferring branch debited the recipient branch's account with itself and the latter branch effected a matching "intentional bona fide" credit entry in the payee's account. Effectively, this meant that the transfer was complete, and hence irreversible, when the funds were made available to the payee. Similarly, in *Tayeb v HSBC Bank Plc*,<sup>1464</sup> where the payee's bank became suspicious of the origins of funds transferred into the payee's account using the CHAPS electronic transfer system and returned those funds to the payer's bank, Colman J held that a CHAPS transfer was ordinarily irreversible once the payee's bank had authenticated the transfer, sent an acknowledgement message informing the payer's bank that the transfer had been received and credited the funds to the payee's account.<sup>1465</sup>

## US authority

- 36-436 A more detailed analysis is to be found in the decision of the United States Second Circuit Court of Appeals in *Delbrueck & Co v Manufacturers Hanover Trust Co*,<sup>1466</sup> which involved another dispute arising out of the collapse of the Herstatt Bank on 26 June 1974. Here the plaintiff bank, which maintained an account with the defendant bank in New York, had entered into exchange contracts with Herstatt. On 25 June, the plaintiff bank sent a telex to the defendant bank, instructing it to credit Herstatt's account with the C Bank with the amount due under these contracts. About one hour after Herstatt's closure (which under Eastern Standard Time took place at 10.30am on 26 June) the defendant bank executed the transfer by means of the American automated clearing system known as CHIPS. Within the next 30 minutes the plaintiff bank countermanded payment by a telephone call and immediately thereafter confirmed this instruction by telex. However, as the CHIPS agreement precluded the countermand of a payment instruction after its release by the paying bank, the defendant bank did not order the C Bank to stop payment. Herstatt's account with the C Bank was actually credited with the amount involved at 9.00pm. Affirming the District Court's decision, Moore J pointed out that a CHIPS message was received by the payee's bank almost as soon as it was released by the paying bank's computer terminal. Furthermore, it was common ground that funds transferred by means of CHIPS could be drawn upon by the payee as soon as the electronic message was received by the recipient bank. On this basis and taking into account the terms of the CHIPS agreement, Moore J held that the payment became irrevocable and hence complete as soon as the message was received by the C Bank. The actual crediting of Herstatt's account by the C Bank was a mere matter of book-keeping and, accordingly, inconclusive.

## Cases in which payee refuses funds

- 36-437 Obviously, *Delbrueck*'s case is of persuasive authority only. But it is significant that the Second Circuit effectively held that payment was complete at the time the funds became available to the drawee. This conclusion is in accord with the principles laid down in English authorities involving cases in which the payee asserted that an amount was "paid" out of the time specified in a charterparty or, in other words, argued that payment had not been completed when due. In the leading case of *Mardorf Peach Co Ltd v Attica Sea Carriers Corp of Liberia (The "Laconia")*<sup>1467</sup> the issue was whether an amount paid after the stipulated date was received by the bank in circumstances which indicated that the payee had waived the delay. It was established that the bank had commenced the steps required for the crediting of the payee's account but, on receiving his instruction to return the amount involved, remitted it back forthwith. One of the questions involved was whether the transfer of the funds to the payee had been executed before he issued his orders. Giving judgment for the payee, the shipowner, the House of Lords held inter alia that

the transfer had not been executed before the amount was refunded as the bank had not made a conscious decision to accept payment. The steps taken by it for the processing of the telegraphic transfer order were purely provisional and procedural.<sup>1468</sup>

- 36-438 If this reasoning were applied to funds transfers, it would appear that the payee's bank must be given an opportunity to reject payment if ordered to do so by the payee within a reasonable time. At the same time, it seems unlikely that the payer has the right to countermand payment once the amount has been credited to the payee's account. *Momm*'s case, discussed above, shows that notice to the payee is not required to effect transfer. It is arguable that the funds transfer should be regarded as executed as soon as the entries are made by the computer but that the recipient has the right to reject the payment made to him within a reasonable time.<sup>1469</sup>

## Availability as if cash

- 36-439 *The Laconia* was explained by the House of Lords in *The Chikuma*.<sup>1470</sup> In this case an amount due under a charterparty was credited by the payee's bank in Rome to the payee's account as of the due date, which was Thursday, 22 January 1976, but coupled with an indication that the "value date" was to be 26 January, which fell on the Monday of the following week. Under Italian law, the funds were apparently available to the payee as from 22 January but interest on this deposit was to commence running on the 26th, namely the value date. Furthermore, if the payee had chosen to withdraw the funds on the 22nd, he would have incurred a liability to pay interest up to the 26th. Lord Bridge pointed out that, on this basis, the amount involved was not available to the payee on 22 January in the same way as cash. In reality, the arrangement was akin to an overdraft facility granted for the four days involved. To constitute payment, the amount involved would have had to be available for the payee's unconditional use on the due date.
- 36-440 This decision has been forcefully criticised<sup>1471</sup> on the basis that the position should have been regarded as governed by English law, under which the funds would have been treated as unequivocally available to the payee when the amount was credited to his account on 22 January. It is believed that this criticism is questionable. Under prevailing English practice the amount involved would in all probability not have been credited to the payee's account before the due date although he might have been given preliminary notification of its receipt. Alternatively, if his account had been credited forthwith, the payee would have been specifically advised that the funds were not available for drawings until the 26th. It is clear that, in either case, payment would not have been complete on 22 January.

## Payment accompanied by incorrect destination account details

36-441 *The Laconia* and *The Chikuma* concerned the moment at which hire transferred to shipowners' banks could be said to have been paid to the shipowners themselves within the meaning of the hire payment clause in the relevant charterparty. In both cases the transfer had been accompanied by the correct account details. The position would be different where the transfer was accompanied by incorrect destination account details. In *K v A*,<sup>1472</sup> a sale contract on GAFTA terms provided that payment was to be "100% net cash within two banking days to the seller's bank" on presentation of an invoice. The seller emailed an invoice with its correct bank account details to an intermediary broker which, according to the broker's email account records, the broker forwarded to the buyer.<sup>1473</sup> However, a fraudster intercepted the email and changed the account details to a different account held at a different branch of the same bank. The buyer sent payment to the (incorrect) bank account specified on the invoice it received. Popplewell J made several pertinent observations on the law relating to payment by funds transfer.<sup>1474</sup> First, he noted that "[a]n obligation to pay in cash, against the background of modern banking practice, permits any commercially recognised method of transferring funds, providing it is equivalent to cash, that is to say that it gives the payee the unconditional and unfettered right to the immediate use of the funds".<sup>1475</sup> Secondly, he held that the contract in this case clearly contemplated that in order to enable the buyer to pay the price "in cash" the seller would not only notify the identity and branch of their bank, which was not identified in the contract itself, but would nominate the destination account details which the buyer would need in order to be able to make a payment which was equivalent to cash. Thirdly, he held that it was "obviously right" that the payment obligation was not fulfilled unless transfer instructions from the buyer were accompanied by the destination account details notified by the seller, because without such details there could be no question of a transfer which was equivalent to net cash. The contractual obligation of the buyer was to make payment to the seller's bank for the account of the seller, in the sense that it had to be accompanied by the account details which the seller had notified. Therefore, much turned on whether the broker, which had received the correct account details from the seller, acted as agent for the buyer for this purpose under GAFTA terms. The judge remitted the point back to the GAFTA Board of Appeal for decision.

## Footnotes

- 1288 This section of the chapter draws heavily on Ch.13 of E.P. Ellinger, E. Lomnicka and C.V.M. Hare, Ellinger's Modern Banking Law, 5th edn (2011).
- 1289 Usually the payer instructs his bank to debit his account with the amount of the transfer, but it is possible for a non-customer to instruct a bank to make a funds transfer simply by paying cash over the counter; much turns on the practice of individual banks as to whether they will accept funds transfer instructions from non-customers. Where the

- payee does not have a bank account, the funds are usually deposited into a general account at the receiving bank, and left at the payee's disposal.
- 1290     *R. v Preddy [1996] A.C. 815, 834, HL; First City Monument Bank Plc v Zumax Nigeria Ltd [2019] EWCA Civ 294* at [27], [76].
- 1291     See *Foskett v McKeown [2001] 1 A.C. 102, 128*, per Lord Millett: "No money passes from paying bank to receiving bank or through the clearing system (where the money flows may be in the opposite direction) there is simply a series of credits and debits which are causally and transactionally linked". See also *Customs and Excise Commissioners v FDR Ltd [2000] S.T.C. 672* at [37]; and *Dovey v Bank of New Zealand [2000] 3 N.Z.L.R. 641, 648 NZCA; European Bank Ltd v Citibank Ltd [2004] NSWCA 76* at [57]–[62]; *Darkinjung Pty Ltd v Darkinjung Local Aboriginal Land Council [2006] NSWSC 1217* at [13]; *Scottish Exhibition Centre Ltd v Commissioners for Revenue and Customs [2008] S.T.C. 967* at [19], Ct of Sess. IH; *First City Monument Bank Plc v Zumax Nigeria Ltd [2019] EWCA Civ 294* at [27], [73]–[85].
- 1292     *R. v Preddy*, above (credit transfer); *Mercedes-Benz Finance Ltd v Clydesdale Bank Plc [1997] C.L.C. 81*, Ct of Sess. OH (debit transfer).
- 1293     *[1989] Q.B. 728, 750*.
- 1294     Presumably, Staughton J was referring to *Delbrueck & Co v Manufacturers Hanover Trust Co*, 609 F. 2d. 1047 at 1051 (1979) (see below, para.36-436).
- 1295     See below, para.36-403.
- 1296     See below, para.36-405.
- 1297     B. Geva, The Law of Electronic Funds Transfers (1992–2002, looseleaf), s.1.03[4].
- 1298     See above, paras 36-153—36-155.
- 1299     See below, para.36-400.
- 1300     M. Brindle and R. Cox (eds), Law of Bank Payments, 5th edn (2018), para.3-002. For reasons why traditional cheque clearing was not regarded as a funds transfer (or giro) system, see *B. Geva (1991) 19 Can. B.L.J. 138*.
- 1301     For cheques, see above, paras 36-148 et seq.
- 1302     *Libyan Arab Foreign Bank v Bankers Trust Co [1989] Q.B. 728, 750–751*.
- 1303     The text which follows is only concerned with payment netting and not with the netting of contractual commitments, e.g. as carried out in a variety of contracts such as foreign exchange contracts, repurchase agreements, securities trades and derivatives.
- 1304     *B. Geva (1991) 19 Can. B.L.J. 138*.
- 1305     Probably on the same principle as applied in *Clarke v Dunraven (The Satanita) [1897] A.C. 59*.
- 1306     R. Cranston, E. Avgouleas, K. van Zwieten, C. Hare and T. van Sante, Principles of Banking Law, 3rd edn (2018), p.353.
- 1307     *Hare v Henty (1861) 10 C.B.N.S. 65; Re Farrow's Bank Ltd [1923] 1 Ch. 41; Parr's Bank Ltd v Thomas Ashby & Co (1898) 14 T.L.R. 563; Tayeb v HSBC Bank Plc [2004] EWHC 1529 (Comm), [2004] 4 All E.R. 1024* at [57]. See also *Tidal Energy Ltd v Bank of Scotland Plc [2014] EWCA Civ 1107, [2014] 2 Lloyd's Rep. 549*, where the Court of Appeal, by a majority (Tomlinson LJ at [48]–[49] and Lord Dyson MR at [59], Floyd LJ dissenting at [23]), held that banking practice could be relied on in order to construe

a CHAPS transfer form (the judgments, even of the majority, are not easy to reconcile, but all three Lord Justices appear to agree that there can be reliance on banking practice for the purposes of interpretation where the practice is known or reasonably available to both the bank and its customer).

- 1308     *Barclays Bank Plc v Bank of England [1985] 1 All E.R. 385, 394*; see also *Turner v Royal Bank of Scotland Plc [1999] Lloyd's Rep. Bank. 231, CA*.
- 1309     See, e.g. CHAPS Reference Manual (version: 5 January 2018), p.19.
- 1310     See above, paras 36-153—36-155.
- 1311     See *E. Katz [2014] B.J.I.B.FL. 462* on the elimination of settlement risk associated with net settlement in BACS and the Faster Payment Service.
- 1312     R. Cranston, E. Avgouleas, K. van Zwieten, C. Hare and T. van Sante, *Principles of Banking Law*, 3rd edn (2018), p.351.
- 1313     R. Cranston, E. Avgouleas, K. van Zwieten, C. Hare and T. van Sante, *Principles of Banking Law*, 3rd edn (2018), p.351.
- 1314     See above, paras 36-153—36-155.
- 1315     See above, para.36-153.
- 1316     Cheque & Credit Clearing Company, Credit Clearing (<http://www.chequeandcredit.co.uk> [Accessed 1 September 2021]).
- 1317     But the bank is under no obligation to make the transfer if there are insufficient funds in the account to cover it, nor is it obliged to monitor the account subsequently to see whether sufficient funds have been credited to the account to cover the standing order: *Whitehead v National Westminster Bank Ltd, The Times, 9 June 1982*.
- 1318     The system is currently administered by BACS and is governed by its own set of rules: The Service User's Guide and Rules to the Direct Debit Scheme.
- 1319     There is also a Paperless Direct Debit service.
- 1320     The creditor's failure properly to implement a correctly completed direct debit mandate might constitute a breach of an implied term of the underlying contract between them, or even a breach of a duty of care in tort owed by the creditor to the debtor: *Weldon v GRE Linked Life Assurance Ltd [2000] 2 All E.R. (Comm) 914*, Nelson J. With effect from 1 January 2008, the use of AUDDIS to submit direct debit instructions became mandatory for all new service users that submit direct to BACS (The Service User's Guide and Rules to the Direct Debit Scheme).
- 1321     *Mercedes-Benz Finance Ltd v Clydesdale Bank Plc [1997] C.L.C. 81, Ct of Sess. OH*.
- 1322     Payment Services Regulations 2017 (SI 2017/752) (as amended) reg.79 provides for refunds of payment transactions initiated by or through a payee, and reg.80 provides for requests for refunds for payment transactions initiated by or through a payee. For application of the PSRs 2017, see paras 36-225—36-226 above, and para.36-412 below.
- 1323     [1997] 1 W.L.R. 938, applied in *Gibbs Mew Plc v Gemmell [1999] 1 E.G.L.R. 43, CA*; *Courage Ltd v Crehan [1999] 2 E.G.L.R. 145, CA*; *Esso Petroleum Co Ltd v Ilanchelian Unreported 19 March 2001*; *Geldof Metaalconstructie NV v Simon Carves Ltd [2010] EWCA Civ 667* at [43].
- 1324     *Esso Petroleum Co Ltd v Milton [1997] 1 W.L.R. 938* at 606f.
- 1325     *Esso Petroleum Co Ltd v Milton [1997] 1 W.L.R. 938* at 607j.

- 1326 See criticisms of *R. Hooley [1997] C.L.J. 500* and *A. Tettenborn (1997) 113 L.Q.R. 374*.  
 1327 *Bills of Exchange Act 1882 s.55(1)(a)*.
- 1328 See, by analogy, *The Brimnes [1975] 1 Q.B. 929, 949, 964–965, 969, CA*.
- 1329 In fact, the claimants in this case did attempt to rely on an express term of the licence agreements which purported to exclude any right of set-off, but the Court of Appeal held the term to be unreasonable under the *Unfair Contract Terms Act 1977* (applying *Stewart Gill Ltd v Horatio Myer & Co Ltd [1992] Q.B. 600, CA*). In some cases there may be an issue as to whether the 1977 Act is engaged in the first place; see *African Export-Import Bank v Shebah Exploration and Production Co Ltd [2017] EWCA Civ 845* (no set-off clause in facilities agreement based on industry standard form).
- 1330 *Nova (Jersey) Knit Ltd v Kammgarn Spinnerei GmbH [1977] 1 W.L.R. 713, 721, HL*.  
 1331 See *J.K. MacLeod (1997) 113 L.Q.R. 133, 156*.
- 1332 But note that on 25 November 1992, by Resolution 47/34, the United Nations General Assembly approved the Report of the United Nations Commission on International Trade Law (UNCITRAL) and the Model Law on International Credit Transfers finalised at UNCITRAL's 25th Session of 4–22 May 1992; see UN: General Assembly, Official Records, 4th Session, Supp. No.17, A/47/17. The General Assembly recommended that all States enact legislation based on the Model Law. In the United States two statutory regimes are in force: the Electronic Fund Transfer Act 1978, applicable to consumer transactions, and art.4A of the Uniform Commercial Code, which applies to wholesale transfers.
- 1333 SI 1999/1876.
- 1334 SI 2009/209, as amended. For detailed analysis, see the 31st edition of Chitty on Contracts, Vol.II, Ch.34, Sect.2(e); E.P. Ellinger, E. Lomnicka and C.V.M. Hare, Ellinger's Modern Banking Law, 5th edn (2011), pp.601 et seq.
- 1335 Directive 2007/64 of the European Parliament and of the Council on payment systems in the internal market ([2007] O.J. L319/1).
- 1336 The PSRs 2009 also introduced an authorisation regime for providers of payment services which are neither credit institutions nor e-money institutions. There is a separate regulatory regime for issuers of e-money (see the *Electronic Money Regulations 2011 (SI 2011/99) (EMRs)*, which implements the EU's revised Electronic Money Directive 2009/110/EC). There is uncertainty as to the (probably limited) application of the PSRs (now PSRs 2017) and the EMRs to the issuing and processing of payments in cryptocurrency (see C. Proctor, "Cryptocurrencies in International and Public Law Conceptions of Money", in D. Fox and S. Green (eds), Cryptocurrencies in Public and Private Law (2019), Ch.3; FCA's "Guidance on Cryptoassets", PS19/22, July 2019). The safeguarding and insolvency regimes under the PSRs 2017 and the EMRs are not as detailed as those that apply in the banking and investment services sectors. In *Re Supercapital Ltd [2020] EWHC 1685 (Ch)* at [10], after an uncontested hearing, the High Court held that the safeguarding arrangements under the PSRs 2017 created a statutory trust in favour of payment service users. In *Re Premier FX [2021] EWHC 1321 (Ch)* it was common ground that the PSRs 2017 gave rise to a statutory

trust. In *Re Ipago LLP [2021] EWHC 2163 (Ch)* at [41], the deputy High Court judge held at [49]–[51] that the safeguarding provisions in the EMRs did not create a statutory trust but gave electronic money holders a statutory right to be paid out of “relevant funds” in priority to all other creditors on the terms set out in reg.24. In *Re Allied Wallet Ltd [2022] EWHC 402 (Ch)*, the ICC judge decided that the EMRs established a trust over “relevant funds”, but felt bound to follow the deputy High Court judge’s decision in *Re Ipago*. The Court of Appeal has since delivered judgment in *Re Ipago [2022] EWCA Civ 302*, upholding the deputy High Court judge’s decision, and held that (i) the EMRs do not create a statutory trust over “relevant funds”, and (ii) where “relevant funds” should have been safeguarded, but were not, they should form part of the priority asset pool for distribution to e-money holders.

- 1337 PSRs 2009 Sch.1 Pt 2(g).
- 1338 SI 2017/752, as amended. See also, para.36-225 above.
- 1339 Revised Payment Services Directive 2015/2366/EU.
- 1340 PSRs 2017 reg.1(6).
- 1341 On the effects of Brexit, see Vol.I, paras 1-016 et seq. See also the Electronic Money, Payment Services and Payment Systems (Amendment and Transitional Provisions) (EU Exit) Regulations 2018 (SI 2018/1201) and the Financial Services (Electronic Money, Payment Services and Miscellaneous Amendments) (EU Exit) Regulations 2019 (SI 2019/1212).
- 1342 PSRs 2009 regs 33(1), 51(1), (2): reg.73 (value date and availability of funds) applied whether or not the payment service providers of both the payer and the payee were located within the EEA.
- 1343 See above, para.36-411.
- 1344 PSRs 2017 regs 40(1)(a), 63(1)(a).
- 1345 PSRs 2017 regs 40(1)(b)(i), 63(1)(b)(ii).
- 1346 PSRs 2017 regs 40(1)(b)(ia), 63(1)(b)(ia). “Payment service provider” includes any person who is a PSP as defined in art.2(8B) of the Single European Payments Area Regulation (Regulation (EU) 260/2012). PSRs 2017 reg.148A has been inserted by SI 2018/1201 so that if the SEPA Regulation is revoked under reg.15 of the Credit Transfers and Direct Debits in Euro (Amendment) (EU Exit) Regulations 2018 (SI 2018/1199), the Treasury may by regulations make such amendments to regs 40, 63, 66 and 85 of the PSRs 2017 as appear to be appropriate in connection with that revocation.
- 1347 PSRs 2017 regs 40(1)(b)(ii), 63(1)(b)(ii).
- 1348 PSRs 2017 regs 40(1)(b)(iii), 63(1)(b)(iii).
- 1349 PSRs 2017 regs 40(2)(a),(3)(a), 63(2)(a), (3)(a).
- 1350 PSRs 2017 regs 40(2)(b), (3)(b), 63(2)(b), (3)(b). Significantly, for a transfer in a currency other than sterling or euros that falls within (ii), regs 84 to 88 (amounts transferred and received and execution times) do not apply (reg.63(2)(b)).
- 1351 PSRs 2017 regs 40(7), 63(5). There can be no contractual opt out if the payment service user is a consumer, a micro-enterprise or a charity as defined in reg.2.
- 1352 PSRs 2017 Sch.1 Pt 2(g).
- 1353 PSRs 2017 Sch.1 Pt 2(h).

- 1354 PSRs 2017 Sch.1 Pt 2(k).
- 1355 PSRs 2017 Sch.1 Pt 2(l).
- 1356 PSRs 2017 Sch.1 Pt 1(g), (h).
- 1357 PSRs 2017 regs 40(4), 63(4): Pts 6 and 7 do not apply to registered account information service providers, except for, in the case of Pt 6 regs 59 and 60, and, in the case of Pt 7 regs 70, 71(7) to (10), 72(3) and 98 to 100.
- 1358 PSRs 2017 reg.2.
- 1359 PSRs 2017 reg.2.
- 1360 PSRs 2017 reg.69.
- 1361 PSRs reg.70.
- 1362 PSRs reg.71(7)—(10).
- 1363 See also the Competition and Markets Authority's Retail Banking Market Investigation Order 2017. On Open Banking generally, see J Black, "Open banking: an emerging technology grows to maturity" [2019] P.L.C. 19; J Black, "In Open Banking's brave new world could using a third party to initiate payments weaken consumer protection?" [2019] J.I.B.F.L. 25; E Leong and J Gardner, "Open banking in the UK and Singapore: open possibilities for enhancing financial inclusion" [2021] J.B.L. 424. On the related, broader, topic of Open Finance, see R. Keating, "*Opening innovation or opening up to risk? The potential liability framework for Open Finance*" [2021] J.I.B.F.L. 31.
- 1364 2015/2366/EU ("PSD2") art.97(1).
- 1365 PSD2 art.97(2).
- 1366 PSD2 art.4(30); PSRs 2017 reg.2.
- 1367 PSRs 2017 reg.1(6).
- 1368 Inserted by the Electronic Money, Payment Services and Payment Systems (Amendment and Transitional Provisions) (EU Exit) Regulations 2018 (SI 2018/1201) Sch.2(2) para.51. EU regulatory technical standards for strong customer authentication (EU SCA-RTS) came into force on 14 March 2018 and applied (in full) as from 14 September 2019. EU SCA-RTS became part of UK law under the European Union (Withdrawal) Act 2018, as amended (see Vol.I, paras 1-016 et seq.). However, Brexit-related amendments to the PSRs 2017 require compliance with the Financial Conduct Authority's version of SCA-RTS (UK SCA-ATS): see FCA Handbook Notice No.82 (27 November 2020) and, for proposed amendments, FCA Consultation Paper CP21/3 (28 January 2021).
- 1369 In PSR 2017 reg.148, a "private person" means (a) any individual, except where the individual suffers the loss in question in the course of providing payment services; and (b) any person who is not an individual, except where that person suffers the loss in question in the course of carrying on business of any kind (reg.148(3)). A fiduciary or representative may also, generally, bring the action on behalf of a private person: reg.148(2). In the context of the similarly worded definition of "private person" in the FSMA 2000 (Rights of Action) Regulations 2001, "in the course of carrying on business of any kind" has been interpreted broadly by the courts so that a company carrying

- on business of any kind, irrespective of whether this related to financial services, falls outside the definition of “private person”: for cases on the definition, see para.[36-222](#) above.
- 1370 But payment transactions based on paper instruments, such as cheques or bank giro credits, do not fall within the scope of the [PSRs 2017](#) even though they are cleared by electronic means ([PSRs 2017 Sch.1 Pt 2\(g\)](#): see above, para.[36-411](#)).
- 1371 But note, e.g., the express preservation of general common law rights in the context of termination of a framework contract, see [PSRs 2017 reg.51\(7\)](#), and see also above, para.[36-320](#).
- 1372 E.P. Ellinger, E. Lomnicka and C.V.M. Hare, Ellinger’s Modern Banking Law, 5th edn (2011), pp.618–619. It seems to be arguable that the common law continues to apply in those cases where the payment service provider has exercised the “corporate opt-out” and contracted out of the [PSRs 2017](#) conduct of business requirements (see above, para.[36-412](#)).
- 1373 This paragraph, and those that follow, should be read in conjunction with para.[36-412](#) (Payment Services Regulations 2017) above.
- 1374 For a “single payment service contract” (defined in [reg.2\(1\) of PSRs 2017](#) as, essentially, a one-off transaction) information requirements of payer’s bank and payee’s bank are to be found in [PSRs 2017 regs 43–47](#) and [Sch.4](#). For a “framework contract” (defined in para.[36-320](#) above) information requirements relating to both banks are contained in [PSRs 2017 regs 48–54](#) and [Sch.4](#). For provisions common to both types of contract, see [PSRs 2017 regs 55–59](#). For other information requirements, see [PSRs 2017 regs 60](#) (information requirements for account information service providers), [61](#) (information on ATM withdrawal charges) and [62](#) (provision of information leaflet). Note also disapplications in relation to regulated contracts falling within the scope of the [Consumer Credit Act 1974](#) ([PSRs 2017 reg.41](#)), and for low-value payment instruments ([PSRs 2017 reg.42](#)). [Pt 6 of the PSRs 2017](#) does not apply to registered account information service providers, except for [regs 59](#) and [60](#) ([PSRs 2017 reg.40\(4\)](#)). The “corporate opt-out” (see above, para.[36-412](#)) to the information requirements of [Pt 6 of the PSRs 2017](#) is found in [reg.40\(7\) of those Regulations](#).
- 1375 Key terms are defined in [reg.2\(1\) of PSRs 2017](#): ““payment instrument’ means any (a) personalised device; or (b) personalised set of procedures agreed between the payment service user and the payment service provider, used by the payment service user in order to initiate a payment order”; ““payment order’ means any instruction by a payer or a payee to their respective payment service provider requesting the execution of a payment transaction”; ““payment transaction’ means an act, initiated by the payer or payee, or on behalf of the payer, of placing, transferring or withdrawing funds, irrespective of any underlying obligations between the payer and payee”.
- 1376 See below, para.[36-418](#).
- 1377 [PSRs 2017 reg.91\(2\)](#), but note that [reg.91](#) only applies where a payment order is initiated *directly* by the payer ([PSRs 2017 reg.91\(1\)](#)): for non-execution or defective execution of a payment order initiated by the payer through a payment initiation

service, see PSRs 2017 reg.93, which includes, in reg.93(2), (4), a requirement that a payment initiation service provider, on request, must immediately compensate an account servicing payment service provider for losses incurred or sums paid as a result of the refund to the payer. The general rule is that the payer's bank must ensure that the amount of the payment transaction is credited to the account of the payee's bank by the end of the business day following receipt of the payment order (PSRs 2017 reg.86(1)); but subject to exceptions in the case of payment instructions initiated by way of a paper payment order, and certain payment transactions (e.g. not in euro or sterling) executed wholly within the UK (PSRs 2017 reg.86(2), (3)). See also *Tidal Energy Ltd v Bank of Scotland Plc [2013] EWHC 2780 (QB), [2013] 2 Lloyd's Rep. 605* at [22] (affirmed [2014] EWCA Civ 1107 without reference to this point), where HH Judge Havelock-Allan QC said (obiter) that if PSRs 2009 reg.75 had applied to the transfer (it did not because the PSRs had been expressly excluded by the bank's terms and conditions), the unique identifier given by the payer would have been incorrect because there was a mismatch between the payee's name, on the one hand, and the account number and sort code, on the other, in which case reg.74(2) would have applied. PSRs 2009 reg.74(2) provides: "Where the unique identifier provided by the payment service user is incorrect, the payment service provider is not liable under regulation 75 or 76 for non-execution or defective execution of the payment transaction, but the payment service provider—(a) must make reasonable efforts to recover the funds involved in the payment transaction; and (b) may, if agreed in the framework contract, charge the payment service user for any such recovery". See also *Technoservice Int Srl v Poste Italiane SpA (C-245/18) EU:C:2019:242*, where the European Court of Justice held that the limitation of liability provided for in the Payment Services Directive 2007/64 art.74(2) applies to both the payer's and the payee's payment service provider. For equivalent provision to PSRs 2009 reg.74(2), see PSRs 2017 reg.90(2). For what constitutes "reasonable efforts" on the part of both the payer's and the payee's payment service provider, see R. Leow, "Recovering mistaken payments before the financial ombudsman" [2019] L.M.C.L.Q. 215, 226–230. The UK banking industry has introduced several initiatives to combat payment fraud including the Mule Insights Tactical Solutions (2019), which traces the money from a confirmed fraud between financial institutions to identify suspect "mule" accounts, and the Confirmation of Payee system (2020 for Phase 1; 2022 for Phase 2), which enables a payment service provider, when setting up a new payment, to check the name of the payee identified in the payment instruction against the actual name of the payee of the account identified in the payment instruction. A Contingent Reimbursement Model Code for Authorised Push Payment Scams was published in May 2019, which is a voluntary industry code for reimbursement of consumers, micro-enterprises and charities, as defined in the code, who are victims of domestic authorised push payment (APP) fraud (exceptions include cases of "gross negligence" by the customer). In the case of APP fraud, the payer has a claim in restitution against a payee who has received the funds with knowledge of the fraud (on the basis of *Westdeutsche Landesbank Girozentrale v Islington LBC [1996] A.C. 669*, 709 et seq.: see above, para.36-136). The payer is likely to be able to obtain

a freezing injunction, and even a declaratory order for return of the funds, against such a payee (*World Proteins KFT v Mateen [2019] EWHC 2030 (QB) and [2019] EWHC 1146 (QB)*). The payer might be entitled to bring a derivative action on behalf of the payee company used as a vehicle for fraud, against the bank or payment service provider holding the payee's account, where the payee holds the transferred funds as trustee for the payer and commits a breach of trust or in other exceptional circumstances, including fraud (*Hamblin v World First Ltd [2020] EWHC 2383 (Comm)* at [35]–[38]). The *Quincecare* duty of care (from *Barclays Bank Plc v Quincecare [1992] 4 All E.R. 363*) has been held to be capable of applying to an individual customer who is the victim of APP fraud and is not confined to cases where the payment instruction is given by an agent of the customer who is attempting to misappropriate the customer's funds (*Philipp v Barclays Bank UK Plc [2022] EWCA Civ 318* at [30], and also [78], Birss LJ; see further above, para.36-265). It has been held to be arguable that a bank owes a duty to exercise reasonable care and skill in dealing with communications with its customer prior to the authorisation of payment when the customer contacts the bank to check whether a third party, who requested the transfer of funds, was a genuine member of the bank's staff (*Sekers Fabrics Ltd v Clydesdale Bank Plc [2021] CSOH 89* at [23]). However, a victim of APP fraud was held unable to recover in unjust enrichment from the receiving bank because the bank was not enriched “at the expense” of the mistaken payer in an international foreign currency transfer because of the way such payments operated (*Tecnimont Arabia Ltd v National Westminster Bank Plc [2022] EWHC 1172 (Comm)* at [101]–[151]: see below, para.36-427). In *IFT SAL Offshore v Barclays Bank Plc [2020] EWHC 3125 (Comm)*, the victim of APP fraud was granted permission to use documents obtained from the bank holding the fraudster's account under the *Norwich Pharmacal* jurisdiction in order to bring claims for breach of duty of care, breach of statutory duty and dishonest assistance against the bank itself, although the judge added at [13] that “there are or may be difficulties ... both with regard to the victim establishing even an arguable case of dishonesty, and in relation to the existence of a duty of care, or of a breach of statutory duty on the part of the bank, the need probably to take the existing authorities to the Supreme Court”.

- 1378 PSRs 2017 reg.91(3). Liability under reg.91 does not apply if reg.96 (force majeure) applies. The “corporate opt-out” (see above, para.36-412) applies to PSRs 2017 reg.91 (PSRs 2017 reg.63(5)(a)).
- 1379 PSRs 2017 reg.92(6). Liability under reg.92 does not apply if reg.96 (force majeure) applies. The “corporate opt-out” (see above, para.36-412) applies to PSRs 2017 reg.92 (PSRs 2017 reg.63(5)(a)).
- 1380 PSRs 2017 reg.94. For “corporate opt-out”, see PSRs 2017, reg.63(5)(a).
- 1381 PSRs 2017 reg.74(1), which makes the payment service user's reporting obligation a condition for redress under regs 76, 91, 92, 93 or 94. PSRs 2017 reg.74(2) relieves the payment service user of this obligation if his bank has failed to comply with various information requirements in Pt 6 of the PSRs 2017.
- 1382 PSRs 2017 reg.95. Arguably, this allows the payer's bank to short-circuit the contractual chain of banks and claim against a remote correspondent bank to whom the liability

- in question is attributable: see E.P. Ellinger, E. Lomnicka and C.V.M. Hare, Ellinger's Modern Banking Law, 5th edn (2011), pp.607 and 618.
- 1383 PSRs 2017 reg.67(1).
- 1384 PSRs 2017 reg.67(2) (PSRs 2009 reg.55(2) did not include consent given via the payee or a payment initiation service provider). For withdrawal of consent, see PSRs 2017 reg.67(3)–(4) (and above, para.36-338). A framework contract may give the payment service provider the right to stop the use of the payment instrument on reasonable grounds relating to (a) security of the payment instrument; (b) the suspected unauthorised or fraudulent use of the payment instrument or (c) in the case of a payment instrument with a credit line, a significantly increased risk that the payer may be unable to fulfil its liability to pay (PSRs 2017 reg.71(2)).
- 1385 PSRs 2017 reg.76(1)(a).
- 1386 PSRs 2017 reg.76(1)(b).
- 1387 PSRs 2017 reg.74(1), which makes the payment service user's reporting obligation a condition for redress under regs 76, 91, 92, 93 or 94. PSRs 2017 reg.74(2) relieves the payment service user of this obligation if his bank has failed to comply with various information requirements in Pt 6 of the PSRs 2017.
- 1388 For PSRs 2017, see reg.75(1), and also PSRs 2017 reg.75(2) which deals with the burden of proof where a transaction is initiated through a payment initiation service provider (if liable for an unauthorised transaction, the payment initiation service provider must compensate the account servicing payment service provider that has had to refund the payer or restore his account: PSRs 2017 reg.76(5)).
- 1389 PSRs 2017 reg.2(1). "Personalised security credentials" are defined in reg.2(1) to mean "personalised features provided by a payment service provider to a payment service user for the purposes of authentication".
- 1390 PSRs 2017 reg.75(3).
- 1391 PSRs 2017 reg.73 sets out obligations of the payment service provider in relation to payment instruments.
- 1392 PSRs 2017 reg.75(4).
- 1393 PSRs 2017 reg.77(1) (PSRs 2009 reg.62(1): £50). However, under PSRs 2017 reg.77(2), the payer will not be liable for any losses if (a) the loss theft or misappropriation of the payment instrument was not detectable by the payer prior to the payment, unless the payer acted fraudulently, or (b) the loss was caused by acts or omissions of an employee, agent or branch of a payment service provider or of an entity which carried out activities on behalf of the payment service provider.
- 1394 PSRs 2017 reg.77(4)(a).
- 1395 PSRs 2017 reg.77(4)(b).
- 1396 PSRs 2017 reg.77(4)(d).
- 1397 See para.36-412 above.
- 1398 PSRs 2017 reg.77(4)(c).
- 1399 PSRs 2017 reg.76(1).
- 1400 PSRs 2017 reg.77(6).

- 1401 PSRs 2017 reg.79(1), (2), but note restrictions in paras (5), (6). PSRs 2017 reg.79(3), sets out the payer's entitlement to an unconditional refund of the full amount of any direct debit transactions denominated in euro which comply with art.1 of Regulation (EU) 260/2012. The payer must make the request for a refund to his bank within eight weeks from the date on which the funds were debited (PSRs 2017 reg.80(1)). The bank then has 10 business days in which to make the refund or justify its refusal to do so (PSRs 2017 reg.80(4)).
- 1402 But see *Dovey v Bank of New Zealand* [2000] 3 N.Z.L.R. 641, 651–652 (the Court of Appeal of New Zealand held that where the payer's bank had been instructed to make a transfer of funds by tested telex the bank was not in breach of contract by using an even faster method of transfer). See also *Philipp v Barclays Bank UK Plc* [2022] EWCA Civ 318 at [43]–[47] (CA did not have to decide issue whether payment made only after a delay, or not made at all, was outside mandate).
- 1403 See *Tidal Energy Ltd v Bank of Scotland Plc* [2014] EWCA Civ 1107, [2014] 2 Lloyd's Rep. 549, where the Court of Appeal, by a majority, construing a CHAPS transfer order in accordance with banking practice, held that a CHAPS transfer was within mandate when the payment was made to an account matching the sort code and account number—but not the name of the payee/beneficiary customer—provided by the payer. For casenotes, see *G. McMeel* [2015] L.M.C.L.Q. 1; *T.K.C. Ng* (2015) 131 L.Q.R. 202; *S. Booyens* [2018] J.I.B.F.L. 405. For the new Confirmation of Payee system, see above, para.36-416. An attempt by the bank to draft its terms and conditions of use of online facilities widely so as to impose liability on a consumer customer for unauthorised debits to his account, regardless of the circumstances, is likely to be held to be “unfair” under the Unfair Terms in Consumer Contracts Regulations 1999 or, for contracts made on or after 1 October 2015, Pt 2 of the Consumer Rights Act 2015 (which revokes and replaces the 1999 Regulations): see *Spreadex Ltd v Cochrane* [2012] EWHC 1290 (Comm) (consumer opened spread betting account via bookmaker's website).
- 1404 See below, paras 36-535 et seq.
- 1405 [1981] 2 Lloyd's Rep. 194, 199.
- 1406 But the bank must, of course, exercise care and skill in its operation and is under a duty to adhere to its instructions: see, e.g. the American case of *Mellon Bank v Securities Settlement Corp*, 710 F. Supp. 991 (N.J. 1989). In the normal course of events, the payer's bank will not owe the payee a duty of care in tort: *Wells v First National Commercial Bank* [1998] P.N.L.R. 552, CA; *National Westminster Bank Ltd v Barclays International Ltd* [1975] Q.B. 654; cf. *TE Potterton Ltd v Northern Bank Ltd* [1995] 4 Bank. L.R. 179 Irish HC. See also *Grosvenor Casinos Ltd v National Bank of Abu Dhabi* [2008] EWHC 511 (Comm), [2008] 2 All E.R. (Comm) 112 (held no privity of contract between drawee bank and payee of a bearer cheque when that bank was employed as collecting bank by payee's own bank—remitting bank—under Uniform Rules for Collections, 1995 revision, No.522); noted by *H. Bennett* (2008) 124 L.Q.R. 532.
- 1407 See above, paras 36-332, 36-352. As regards the paying banker's right to reclaim an amount paid to the credit of the wrong account as money paid under a mistake of fact,

- see *Continental Caoutchouc and Gutta Percha Co v Kleinwort Sons & Co (1904)* 90 L.T. 474.
- 1408 This paragraph, and those that follow, should be read in conjunction with para.[36-412](#) (Payment Services Regulations 2017) above.
- 1409 [SI 2017/752](#), as amended. See also above, paras [36-225](#) et seq. and [36-411](#).
- 1410 Again a distinction is made between “framework contracts” and “single payment service contracts”. See para.[36-415](#) above.
- 1411 See E.P. Ellinger, E. Lomnicka and C.V.M. Hare, Ellinger’s Modern Banking Law, 5th edn (2011), pp.621 et seq. for detailed analysis.
- 1412 [PSRs 2017 reg.86\(5\)](#).
- 1413 [PSRs 2017 reg.86\(4\)](#), which is not restricted only to payment orders initiate by or through the payee.
- 1414 [PSRs 2017 reg.89\(2\), \(3\)](#), which is not restricted only to payments received as a result of direct debits; and see also [PSRs 2017 reg.87\(2\)](#), which applies where the payee has no account at the bank ([PSRs 2017 reg.87\(1\)](#)).
- 1415 [PSRs 2017, reg.89\(1\)](#) and, with specific reference to payment orders initiated by the payee, [reg.92\(4\)](#). See also [PSRs 2017 reg.73\(1\)](#).
- 1416 [PSRs 2017 reg.84\(1\)](#).
- 1417 For controls on the level of charges, see [PSRs 2017 reg.66](#).
- 1418 [PSRs 2017 reg.84\(2\)](#).
- 1419 [PSRs 2017 reg.84\(3\)\(b\)](#). The payer’s bank is responsible for reimbursing the payee for unauthorised deductions where the payer initiates the payment transaction ([PSRs 2017 reg.84\(3\)\(a\)](#)).
- 1420 See also [PSRs 2017 reg.91\(2\)](#); and for relevant time limits, see [PSRs 2017 reg.86](#) and above, para.[36-416](#). [PSRs 2017 reg.91](#) only applies where a payment order is initiated *directly* by the payer ([reg.91\(1\)](#)). For non-execution or defective execution of a payment order initiated by the payer through a payment initiation service, see [reg.93](#).
- 1421 See also [PSRs 2017 reg.91\(5\), \(6\)](#) and, for late execution, (7). [PSRs 2017 reg.91](#) only applies where a payment order is initiated *directly* by the payer ([reg.91\(1\)](#)). For non-execution or defective execution of a payment order initiated by the payer through a payment initiation service, see [PSRs 2017 reg.93](#).
- 1422 [PSRs 2017 reg.92\(2\)](#). The payee’s bank must transmit the relevant payment order within the time-limits agreed between the payee and his bank ([PSRs 2017 reg.86\(5\)](#)).
- 1423 [PSRs 2017 reg.92\(3\)](#).
- 1424 [PSRs 2017 reg.92\(4\)](#).
- 1425 [PSRs 2017 reg.92\(5\)](#), and note that the payee’s payment service provider must act free of charge.
- 1426 [PSRs 2017 reg.92\(6\), \(7\)](#), but if the payer’s payment service provider proves that the payee’s service provider has received the amount of the payment transaction, para.(6) does not apply and the payee’s payment service provider must value date the amount on the payee’s payment account no later than the date the amount would have been value dated if the transaction had been executed correctly ([reg.92\(8\)](#)).

- 1427 PSRs 2017 reg.94, which includes charges and interest incurred as a result of late execution of the payment transaction.
- 1428 PSRs 2017 reg.74(1), which makes the payment service user's reporting obligation a condition for redress under regs 76, 91, 92, 93 or 94. PSRs 2017 reg.74(2) relieves the payment service user of this obligation if his bank has failed to comply with various information requirements in Pt 6 of the PSRs.
- 1429 PSRs 2017 reg.90(2). See above, para.36-416. In *Tecnoservice Int Srl v Poste Italiane SpA (C-245/18) EU:C:2019:24*, the European Court of Justice held that the limitation of liability provided for in the Payment Services Directive 2007/64 art.74(2) applies to both the payer's and the payee's payment service provider. This includes the situation where, as in *Tecnoservice* itself, an incorrect unique identifier is provided by the payer together with the correct name of the intended recipient of the transfer. For the new Confirmation of Payee system (which does not currently cover direct debits), see above, para.36-416.
- 1430 PSRs 2017 reg.96.
- 1431 PSRs 2017 reg.95. See also para.36-416 above.
- 1432 But the recipient (payee's) bank does not hold funds received from the payer's bank on trust for the payee; it is merely under a personal obligation to credit the payee's account: *First City Monument Bank Plc v Zumax Nigeria Ltd [2019] EWCA Civ 294* at [32]–[37], [47], [80]–[82] (international funds transfer received by correspondent bank and credited to account of payee's bank).
- 1433 See *Dovey v Bank of New Zealand [2000] 3 N.Z.L.R. 641, 650* (the Court of Appeal of New Zealand held that by nominating the bank to which funds were to be transferred, the claimant gave that bank authority to accept funds on his behalf, even though the bank had yet to open an account for him). But a transfer of funds to a bank account of the creditor (or a release of funds to such an account), which is not the account stipulated in the underlying contract, is not payment, nor is it even a valid tender of payment (*PT Berlian Laju Tanker TBK v Nuse Shipping Ltd [2008] EWHC 1330 (Comm), [2008] 1 C.L.C. 967* at [67]). Note that payment by a debtor into a third party's bank account identified in an email sent from the hacked email account of the creditor does not constitute payment to the creditor (*J Brazil Road Contractors v Belectric Solar Ltd* Unreported 22 January 2018, Canterbury CC).
- 1434 But see *Customs and Excise Commissioners v National Westminster Bank Plc [2002] EWHC 2204 (Ch), [2003] 1 All E.R. (Comm) 327* (held bank was not authorised to receive payment on its customer's behalf simply because he had a current account with it).
- 1435 That there is no privity of contract between the payee and an agent of his own bank: see *Calico Printers' Association Ltd v Barclays Bank Ltd (1931) 36 Com. Cas. 71 (affirmed 1931) 36 Com. Cas. 197*). That such a single transaction does not constitute the payer a "customer", see *Great Western Ry Co v London and County Banking Co [1901] A.C. 414*.
- 1436

*Abou-Rahman v Abacha [2005] EWHC 2662 (QB), [2006] 1 All E.R. (Comm) 247*, where Treacy J refused to follow *Royal Bank of Canada v Stangl*, 32 A.C.W.S. (3d) 17 (1992), a Canadian decision to the opposite effect. The Court of Appeal affirmed Treacy J's decision but there was no appeal on this issue: *[2006] EWCA Civ 1492, [2007] 1 Lloyd's Rep. 115*. See R. Leow, "Recovering mistaken payments before the financial ombudsman" [2019] L.M.C.L.Q. 215, 230–234 (on liability of receiving/payee's bank in unjust enrichment); A. Lintner and P. Kuhn, "Quincecare and the liability of receiving banks: the Canadian story" (2022) 4 J.I.B.F.L. 259.

1437 *Tecnimont Arabia Ltd v National Westminster Bank Plc [2022] EWHC 1172 (Comm)* at [101]–[151], applying *Investment Trust Companies v Revenue and Customs Commissioners [2017] UKSC 29* (held that the individual international inter-bank transactions in the present case were not to be treated as a single scheme or transaction, the agency exception to direct transfer rule did not apply and it was not possible to trace at common law through mixed funds, which included those created by international banking transfers of the type present in this case).

1438 This paragraph, and those that follow, should be read in conjunction with para.36-412 (Payment Services Regulations 2017) above.

1439 SI 2017/752, as amended. See also above, paras 36-225 et seq. and 36-411.

1440 PSRs 2017 reg.95, and note that this also extends to non-execution or defective or late execution of payment transactions initiated through a payment initiation service. Compare PSRs 2009 reg.78.

1441 PSRs 2017 reg.90.

1442 PSRs 2017 reg.96.

1443 Ellinger's Modern Banking Law, 5th edn (2011), pp.618–619, which also raises the question whether PSRs 2009 reg.78 is intended to be the only claim available to the payer's bank or whether it still allows the payer's bank to recoup its losses from the bank that it has instructed directly.

1444 Subject to issues of causation.

1445 Where an intermediary bank incurs liability as a result of carrying out the instructions of the payer's bank, it will usually be entitled to an indemnity or contribution from the payer's bank: *Hon Soc of the Middle Temple v Lloyds Bank Plc [1999] 1 All E.R. (Comm) 193*.

1446 *First City Monument Bank Plc v Zumax Nigeria Ltd [2019] EWCA Civ 294* at [26].

1447 *First City Monument Bank Plc v Zumax Nigeria Ltd [2019] EWCA Civ 294* at [26] (held that an international funds transfer received by a correspondent bank, and credited to an account of the payee's bank, was not held by the payee's bank on trust for the intended payee; the payee's bank was under a personal obligation to credit the account of the payee).

1448 *Calico Printers' Association Ltd v Barclays Bank Ltd*, above. Note that the converse is true in other legal systems, such as in the United States: *Evra Corp v Swiss Bank Corp, 522 F. Supp. 820 (1981)* (reversed on another point *673 F. 2d 1982 (1982)*): see also Uniform Commercial Code s.4A-305. A problem of conflict of laws arises

therefore in certain cases involving international money transfers. And see *Vroegop [1990] L.M.C.L.Q.* 540, especially 550 et seq. Where a collecting bank collects an instrument for a remitting bank, there is no privity of contract between the collecting bank and the customer of the remitting bank either at common law or under the Uniform Rules for Collections, 1995 revision (URC 522): *Grosvenor Casinos Ltd v National Bank of Abu Dhabi* [2008] EWHC 511 (Comm), [2008] 2 All E.R. (Comm) 112 at [157], Flaux J, distinguishing *Bastone & Firminger Ltd v Nasima Enterprises (Nigeria) Ltd* [1996] C.L.C. 1902 at 1908, Rix J, who thought the URC point arguable. See further, *H. Bennett* (2008) 124 L.Q.R. 532.

1449 [1981] 2 Lloyd's Rep. 194, 198.

1450 This view derives support from the House of Lord's decision in *Equitable Trust Co of New York Ltd v Dawson Partners* (1927) 27 Ll.L. Rep. 49.

1451 This paragraph, and those that follow, should be read in conjunction with para.36-412 (Payment Services Regulations 2017) above.

1452 SI 2017/752, as amended.

1453 For withdrawal of consent to the execution of a series of payment transactions, see PSRs 2017 reg.67(4).

1454 For time of receipt of a payment order, see PSRs 2017 reg.81.

1455 PSRs 2017 reg.83(2).

1456 PSRs 2017 reg.83(3). For further provisions relating to revocation, see PSRs 2017 reg.83(4)–(6).

1457 *Tidal Energy Ltd v Bank of Scotland Plc* [2014] EWCA Civ 1107, [2014] 2 Lloyd's Rep. 549; *Tayeb v HSBC Bank Plc* [2004] EWHC 1529 (Comm), [2004] 4 All E.R. 1024.

1458 On revocation of an agent's authority, see generally, Vol.I, paras 21-182 et seq.

1459 [1933] 1 K.B. 47.

1460 [1977] Q.B. 790, sub. nom. *Delbrueck & Co v Barclays Bank International Ltd* [1976] 2 Lloyd's Rep. 341.

1461 [1977] Q.B. 790 at 799–800. cf. *Libyan Arab Foreign Bank v Bankers Trust Co* [1988] 1 Lloyd's Rep. 259, 273–274, where Staughton J inclined to the view that an in-house payment was complete when the bank set the transferring procedure into motion. The point was, though, obiter.

1462 [1981] 2 Lloyd's Rep. 194.

1463 [1989] 1 Lloyd's Rep. 608, 631–632.

1464 [2004] EWHC 1529 (Comm), [2004] 4 All E.R. 1024 (noted by *Ellinger* (2005) 121 L.Q.R. 48).

1465 At [60] and [85]. However, that judge stated (at [60]) that there was an appropriate analogy with the practice in relation to documentary credits where, at the time of presentation of documents, a bank with cogent evidence of fraud can decline to make payment (*United Trading Corp v Allied Arab Bank Ltd* [1985] 2 Lloyd's Rep. 554). He added (at [61]) that the same exception was likely in respect of illegal transactions (see *Mahonia Ltd v JP Morgan Chase Bank* [2003] 2 Lloyd's Rep. 911). See also *Tidal Energy Ltd v Bank of Scotland Plc* [2013] EWHC 2780 (QB), [2013] 2 Lloyd's Rep. 605 at [49] (affirmed [2014] EWCA Civ 1107, [2014] 2 Lloyd's Rep. 549), where held

- CHAPS payment complete where payee's bank, that is able to match account number and sort code to one of its accounts, credits that account with the money and sends an acknowledgement back to the payer's bank to indicate acceptance of the payment.
- 1466     *609 F.2d 1047 (1979) (affirming 464 F. Supp. 989 (1979)). cf. Mellon Bank v Securities Settlement Corp, 710 F. Supp. 991 (1989)*, suggesting that where the clearing rules do not preclude countermand, payment is complete upon the crediting of the payee's account.
- 1467     *[1977] A.C. 850* (reversing *[1976] Q.B. 835*; questioning on this point *Astro Amo Compania Naviera SA v Elf Union SA (The Zographia M)* *[1976] 2 Lloyd's Rep. 382*; and overruling *Empresa Cubana de Fletes v Lagonisi Shipping Co Ltd (The Georgios C)* *[1971] 1 Q.B. 488*). See also *Tenax Steamship Co Ltd v The Brimnes (Owners) (The Brimnes)* *[1975] Q.B. 929*.
- 1468     *[1977] A.C.*, per Lord Wilberforce at 871–872. And see Lord Fraser of Tullybelton at 884.
- 1469     But delay may not be fatal to the payee's right to reject where he was unaware of the payment being made to his account: *HMV Fields Properties Ltd v Bracken Self Selection Fabrics Ltd, 1991 S.L.T. 31*. Contrast *TSB Bank of Scotland Plc v Welwyn Hatfield DC and Brent LBC* *[1993] 2 Bank. L.R. 267*, where the payee was fully aware that funds had been transferred into the account.
- 1470     *A/S Awilco of Oslo v Fulvia Spa di Navigazione of Cagliari (The Chikuma)* *[1981] 1 W.L.R. 314*. And see *Royal Products Ltd v Midland Bank Ltd* *[1981] 2 Lloyd's Rep. 194, 209–210*. See also *Tayeb v HSBC Bank Plc* *[2004] EWHC 1529 (Comm)*, *[2004] 4 All E.R. 1024* at [88].
- 1471     *F.A. Mann (1981) 97 L.Q.R. 379*.
- 1472     *[2019] EWHC 1118 (Comm)*.
- 1473     The buyer denied receiving the email with the correct account details.
- 1474     At [26]–[29].
- 1475     Applying *The Brimnes* *[1973] 1 W.L.R. 386*, 400, per Brandon J, endorsed by the Court of Appeal *[1975] Q.B. 929*, 948, 963. On tender of payment through unconditional offer to pay by means of bank transfer, see *St Vincent European General Partners Ltd v Robinson* *[2018] EWHC 1230 (Comm)* at [61] (Males J).

## (f) - The Deposit Account

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 36 - Bills of Exchange and Banking

Section 2. - Aspects of Banking Law

### (f) - The Deposit Account

#### Its nature

- 36-442 Sums paid by a customer into a deposit account may be payable on demand, but in most cases are payable either after notice or at a fixed date, e.g. three months after the date of deposit.<sup>1476</sup> The customer is not, as a rule, entitled to draw cheques on such an account.<sup>1477</sup> The advantage that the customer gains by opening a deposit account is that the banker pays interest—at a rate determined by him<sup>1478</sup>—on sums paid into such an account. If the customer is entitled to demand payment by giving notice, the rate of interest is usually rather low. If the amount is repayable at a fixed date, i.e. is a “fixed deposit”, interest at a higher rate may be granted. In practice payment of amounts standing to the credit of deposit accounts will be granted on demand; but if the customer requests payment before the agreed date he stands to lose the interest.

#### Deposit receipts

- 36-443 Banks do not now issue deposit receipts or deposit books. It used to be the case that a deposit receipt or deposit book was given to the customer at the time of the deposit. These documents were not negotiable instruments.<sup>1479</sup> If the banker paid the amount standing to the credit of the deposit account to a third party, against the deposit receipt, he did so at his peril<sup>1480</sup> and was liable to pay again to the depositor. A delivery of the deposit receipt by the customer, with the intention of giving the transferee a right to the proceeds, amounted, however, to an equitable assignment.<sup>1481</sup> The transfer of a deposit receipt could also constitute a donatio mortis causa.<sup>1482</sup>

## Third party debt orders

- <sup>36-444</sup> Section 40 of the Senior Courts Act 1981, as amended by SI 2001/3649,<sup>1483</sup> makes the usual deposit account subject to attachment by way of third party debt order (formerly called “garnishee”) proceedings: the sum in the deposit account is now to be deemed “due or accruing” notwithstanding that the withdrawal of money from the account is ordinarily subject to certain conditions.

## Footnotes

- 1476 The Banking Conduct of Business Sourcebook (BCOBS) and/or the Payment Services Regulations 2017 (SI 2017/752), as amended (previously, the Payment Services Regulations 2009 (SI 2009/209), as amended), place banks under various statutory requirements when opening certain types of savings accounts: see E.P. Ellinger, E. Lomnicka and C.V.M. Hare, Ellinger’s Modern Banking Law, 5th edn (2011), Ch.9, s.1; and also para.36-321 above.
- 1477 In *Hopkins v Abbott (1875) L.R. 19 Eq. 222* Malins VC thought that cheques may be drawn on a deposit account stipulating for payment on demand. This view does not reflect modern practice: see E.P. Ellinger, E. Lomnicka and C.V.M. Hare, Ellinger’s Modern Banking Law, 5th edn (2011), p.361.
- 1478 The bank’s right to fix its interest rate remains intact even if the bank is being wound up: *Bank of Credit and Commerce International v Malik [1996] B.C.C. 15*, reversed in part on another point: [1996] C.L. 677, CA.
- 1479 *Pearce v Creswick (1843) 2 Hare 286, 298; Re Dillon, Duffin v Duffin (1890) 44 Ch. D. 76.*
- 1480 *Evans v National Provincial Bank (1897) 13 T.L.R. 429.* The depositor’s signature at the back of the note does not preclude him from pleading wrongful payment.
- 1481 *Re Griffin [1899] 1 Ch. 408.*
- 1482 *Re Dillon, Duffin v Duffin (1890) 44 Ch. D. 76.*
- 1483 See, formerly, the Administration of Justice Act 1956 s.38.

## (g) - Giving Information on Financial Transactions

Chitty on Contracts 34th Ed.

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Chapter 36 - Bills of Exchange and Banking

Section 2. - Aspects of Banking Law

(g) - Giving Information on Financial Transactions

### Scope

- 36-445 Bankers give information concerning business transactions mainly in two types of cases: (a) where a customer asks the banker's advice as regards an investment <sup>1484</sup> U; and (b) where a person, through his own bankers, requests another banker to give a reference on the standing of one of the customers of this other banker.

### Advising on investments

- 36-446 In general a bank is not under a legal obligation to provide advice, but if it gives advice then it must do so using reasonable care and skill.<sup>1485</sup> In *Woods v Martins Bank*<sup>1486</sup> it was held that giving advice on financial matters to customers or potential customers is a banking business and that the banker owes his customer a duty to act with reasonable care and skill in giving such advice. The duty will be contractual where the claimant can prove a contract under which the defendant bank has agreed to provide a service including the provision of advice,<sup>1487</sup> otherwise the claimant must establish a tortious duty to advise, and such a duty will arise only in exceptional circumstances.<sup>1488</sup> Its breach would, for example, give rise to an action in damages where, in a transaction between the bank and the customer, the customer has pursued to his detriment a course of action in reliance

on a negligent statement made by the bank.<sup>1489</sup> In view of the decision of the House of Lords in *Hedley Byrne & Co v Heller & Partners*<sup>1490</sup> and the later decision of the Privy Council in *Royal Bank Trust Co (Trinidad) Ltd v Pampellone*<sup>1491</sup> it is clear that a bank owes a similar duty of care where it agrees to advise a person who is neither an actual nor a potential customer. The latter authority, though, shows that the scope of the duty owed depends largely on the circumstances of the enquiry and, further, on the information the bank agrees to provide.

<sup>1492</sup>

**U** In *Pampellone's* case the majority of the Judicial Committee held that, where the advice furnished by the bank to the enquirer was confined to his being supplied with a consultant's report on the subject of the enquiry, the bank could not be regarded as warranting or endorsing this advice and was not under a duty to suggest to the customer that reports of the type furnished could not be regarded as conclusive.<sup>1493</sup> The *Hedley Byrne* duty to take care not to misstate is much narrower than the advisory duty where it was to be expected that relevant professional standards (e.g. FCA conduct of business rules) would form part of the assessment as to whether it had been broken.<sup>1494</sup> It has even been suggested there may be what has been described as a “mezzanine” duty or intermediate duty, occupying the middle ground between a full duty to advise on the one hand, and a limited duty not to mislead on the other, whereby the bank that chooses to explain the nature and effect of a proposed transaction owes a duty to do so fully, accurately and properly.<sup>1495</sup> However, in *Property Alliance Group Ltd v Royal Bank of Scotland Plc*,<sup>1496</sup> the Court of Appeal made clear that this was not the correct approach:

“The expression ‘mezzanine’ duty or intermediate duty, first coined in *Crestsign*, is best avoided. It appears to reflect the notion that there is a continuous spectrum of duty, stretching from not misleading, at one end, to full advice, at the other end. Rather, concentration should be on the responsibility assumed in the particular factual context as regards the particular transaction or relationship in issue.”

## High-risk transaction

<sup>36-447</sup> In modern trade banks advise their customers on high-risk transactions, such as the trading in foreign exchange options. It is accepted that, in transactions of this type, the bank's duty of care is marginal because the risky nature of the markets involved is common knowledge.<sup>1497</sup> However, the bank is more likely to be held to a higher duty of care if it advises an unsophisticated customer to trade in a foreign currency in the course of a non-speculative transaction, for instance, encourages him to borrow in a foreign currency because the rate of interest charged on it is lower than applied to loans in the home currency.<sup>1498</sup> Whether or not a given customer is the type of investor capable of appreciating the risks involved in a market, to which he has access through the bank, is a question of

fact. Thus, in *ANZ Banking Group Ltd v Cattan*<sup>1499</sup> the customer was given access to the Emerging Market Debt because the bank had assumed that his background and experience gave him the experience required for trading on this sector. Morison J concluded that the bank's assessment of the customer's calibre was based on reasonable grounds. In the circumstances, the bank incurred no liability either by granting the customer access to the market or for failing to give him advice. In *JP Morgan Chase Bank v Springwell Navigation Corp*,<sup>1500</sup> Gloster J held that a trader employed by an investment bank, who made recommendations and gave advice to a financially sophisticated investor as to the purchase of emerging market debt securities, did not assume responsibility to the investor so as to bring into play the full range of obligations of an investment advisor or asset manager. In *London Executive Aviation Ltd v Royal Bank of Scotland Plc*,<sup>1501</sup> Rose J stated (obiter) that the authorities highlighted various factors that a court should take into account when considering whether a duty of care had arisen between a bank and its customer: (i) the level of sophistication of the client; (ii) the absence of a written advisory agreement; (iii) the availability of advice from other sources; and (iv) the presence or absence of indicia of an advisory relationship.

## Banking references

- 36-448 The decision of the House of Lords in *Hedley Byrne & Co v Heller & Partners*<sup>1502</sup> indicates that if a banker agrees to give a reference concerning the financial position of one of his customers, he is likely to owe a duty of care not only to the banker who requests the information but also to the person for whom the information is, in fact, obtained. The latter can, thus, sue the reference-giving banker in negligence, if he sustains financial loss due to a carelessly given false reference.<sup>1503</sup> However, the prevailing view is that the reference-giving banker successfully excludes liability, by giving the information "without responsibility".<sup>1504</sup> In such cases, the reference-giving banker owes only a duty to act honestly.<sup>1505</sup> It has also been held that a bank that provides a reference by telephone on a given customer does not warrant to the enquirer that the person who made reference to the bank is the real customer rather than an imposter. The bank, in other words, does not assume a duty of care to the enquirer as to the true identity of the customer.<sup>1506</sup>

## Footnotes

- 1484 The position at common law is considered in the paragraphs below. However, there is also a regulatory regime that controls the way a bank provides investment advice and sells investment products contained in the *Financial Services and Markets Act 2000* and the Financial Conduct Authority's (FCA) Conduct of Business Sourcebook (COBS) (prior to 1 April 2013, the Financial Services Authority was the relevant regulatory body). Specific obligations on a bank turn on the type of customer with

which it is dealing, and banks are required to categorise their clients as retail clients, professional clients and eligible counterparties. Breach of FCA conduct of business rules is actionable, as if it were an actionable breach of statutory duty, by a “private person” suffering loss ([FSMA 2000 s.138D](#): prior to 1 April 2013, this was found in [s.150 of the 2000 Act](#)). For definition of a “private person”, see para.36-222 above. No claim for breach of statutory duty is available for breaches of [FSMA 2000](#) which are not specifically defined in the Act as giving rise to a claim for breach of statutory duty ([Hall v Cable and Wireless Plc \[2009\] EWHC 1793 \(Comm\), \[2011\] B.C.C. 543](#) at 548–549); there is no common law duty of care to comply with the [FSMA 2000](#) regulatory regime ([Brown v InnovatorOne Plc \[2012\] EWHC 1321 \(Comm\)](#) at [1276]). In [Green & Rowley v Royal Bank of Scotland Plc \[2013\] EWCA Civ 1197, \[2013\] 2 C.L.C. 634](#) the Court of Appeal held that the existence of a statutory means of enforcement of the (then current) conduct of business rules under [FSMA 2000 s.150](#) (now under [s.138D](#)), meant that no separate co-extensive common law duty of care arose and there could be no claim for breach of those rules other than under [s.150](#). The case was highly fact sensitive (which is something that the courts often stress: see, e.g. [London Executive Aviation Ltd v Royal Bank of Scotland Plc \[2018\] EWHC 74 \(Ch\)](#) at [160]). The bank had not undertaken an advisory duty. As Tomlinson LJ said (at [23]): “*Absent that feature*, there is neither justification nor need for the imposition of a common law duty independent of but co-extensive with the remedy provided by statute” (emphasis added). In [London Executive Aviation Ltd v Royal Bank of Scotland Plc](#), above, at [166], Rose J cited [Rowley & Green](#) and noted that the authorities were alive to the need to keep common law causes of action separate from an action for breach of statutory duty by failing to comply with FCA rules. [Green & Rowley](#) was distinguished in [Crestsign Ltd v National Westminster Bank Plc \[2014\] EWHC 3043 \(Ch\)](#) at [146]–[147], where the Deputy High Court Judge resisted “the fallacious reasoning that because common law duties and COBS duties are not co-terminous, and because [the claimant] is excluded from the class of persons able to sue for breach of COBS duties, the banks can owe no common law duty which happens to overlap with a COBS duty”. In [CGL Group Ltd v Royal Bank of Scotland \[2017\] EWCA Civ 1073](#) at [103], the Court of Appeal held that banks do not owe a duty of care in tort to customers when carrying out a regulatory review of potential swaps mis-selling cases which was required as a result of agreement between the FCA and various banks. In [Elite Property Holdings Ltd v Barclays Bank Plc \[2018\] EWCA Civ 1688](#) at [59]–[65], the Court of Appeal held that a bank does not owe a contractual duty to its customer as to its conduct of a FCA review, absent some clear expression of intention by the bank to assume a contractual obligation. In [Flex-E-Vouchers Ltd v Royal Bank of Scotland \[2016\] EWHC 2604 \(QB\)](#) at [53] and [67], it was held that there was no implied term in a swap sale contract that the bank would comply with the requirements of the FSA/FCA’s Handbook, including when it conducted a regulatory review. Similarly, in [Target Rich International Ltd v Forex Capital Markets Ltd \[2020\] EWHC 1544 \(Ch\)](#) at [88]–[104] it was held that COBS rules were not incorporated into a foreign exchange trading contract either expressly or by implication of fact or law, and no duty of care arose in tort to comply with COBS rules. In [Fine Care Homes Ltd](#)

*v National Westminster Bank Plc [2020] EWHC 3233 (Ch)* at [100], Bacon J, applying the reasoning of Tomlinson LJ in *Green & Rowley*, held that the Statements of Principle and Code of Practice for Approved Persons (the APER code), also found in the FCA's Handbook, could not carry any greater weight in relation to the content of common law duties of care than the COB rules, but that if the bank had undertaken a duty to advise on the suitability of the interest rate hedging product "then the APER code might be taken into account in informing the content of that duty". The new Consumer Duty in financial services that requires firms to act to deliver good outcomes for retail customers (new FCA Handbook Principle 12), as supplemented by new rules that come into force on 31 July 2023 for all new and existing products or services that are currently on sale, and on 31 July 2024 for products or services that are no longer on sale, does not create a statutory duty of care, and there is no private right of action for breach of the Duty under s.138D of the FSMA 2000 (see FCA PS22/9, A new Consumer Duty – Feedback to CP 21/36 and final rules (July 2022)).

- 1485      *Finch v Lloyds TSB Bank Plc [2016] EWHC 1236 (QB)* at [52].
- 1486      [1959] 1 Q.B. 55, especially at 70–72, distinguishing *Banbury v Bank of Montreal [1918] A.C. 626*. See also *Bank of Montreal v Young, 60 D.L.R. (2d) 220 (1966)*. cf. *Mutual Life and Citizens' Assurance Co v Evatt [1971] A.C. 793*.
- 1487      Supply of Goods and Services Act 1982 s.13; Consumer Rights Act 2015 s.49. cf. *Marz Ltd v Bank of Scotland Plc [2017] EWHC 3618 (Ch)* (express contractual duties of advice specified in bank's terms and conditions negated by express term of ISDA Master Agreement which prevailed as a comprehensive and specifically applicable set of contractual terms relating to swap transaction); *Worthing v Lloyds Bank Plc [2015] EWHC 2836 (QB)* (no strict contractual obligation to correct original investment advice).
- 1488      *Property Alliance Group Ltd v Royal Bank of Scotland Plc [2018] EWCA Civ 355* at [66] ("The starting point is ... that a bank negotiating and contracting with another party owes in the first instance no duty to explain the nature and effect of the proposed arrangement to that other party."); *Finch v Lloyds TSB Bank Plc [2016] EWHC 1236 (QB)* at [47]–[59] (borrower's claim that lender owed a contractual or tortious duty to advise it about a potentially onerous clause in a loan agreement failed because there was no contract whereby the lender was to provide advice and there was nothing exceptional about the relationship to justify the imposition of a tortious duty to advise, especially where borrower represented by professional advisers and giving of advice might have been contrary to lender's best interests). As to bank being under no duty in tort to disclose its internal risk assessments and estimates of break costs of swaps contracts, see *Property Alliance Group Ltd v Royal Bank of Scotland Plc [2018] EWCA Civ 355* at [56]; *Marz Ltd v Bank of Scotland Plc [2017] EWHC 3618 (Ch)* at [332]; *London Executive Aviation Ltd v Royal Bank of Scotland Plc [2018] EWHC 74 (Ch)* at [244]–[254]; *Parmar v Barclays Bank Plc [2018] EWHC 1027 (Ch)* at [208]–[209], [215]–[217]; and also *Deslauriers v Guardian Asset Management Ltd [2017] UKPC 34* at [22] (lender under no duty to advise borrower about internal policies or external influences, regulatory or otherwise, which affect decision to reject application for

additional loan). A lender is under no duty in tort to advise borrower on the suitability of a mortgage (*Mason v Godiva Mortgages Ltd [2018] EWHC 3227 (QB)* at [32]–[37], where also held that there was no implied term importing such a duty because it would be inconsistent with express terms of mortgage contract). Lenders were held to be under no contractual or tortious duty to advise on the suitability of investments made with borrowed funds in tax avoidance schemes, nor were they vicariously liable for any breach of duty by the independent financial adviser who had acted for the borrowers, when the schemes did not work as intended: *Barness v Ingenious Media Ltd [2019] EWHC 3299 (Ch)*. As regards the weight given to a bank's promotional materials, see *James v Barclays Bank Plc (1995) 4 Bank. L.R. 131*; cf. *Finch v Lloyds TSB Bank Plc*, above, at [58].

1489 *Esso Petroleum Co Ltd v Mardon [1976] Q.B. 801; Box v Midland Bank Ltd [1979] 2 Lloyd's Rep. 391*, which shows also that a bank is liable for a branch manager's negligent statement; note that judgment was reversed on the question of costs: *[1981] 1 Lloyd's Rep. 434*. See also *Verity and Spindler v Lloyds Bank Plc [1995] C.L.C. 1557. [1964] A.C. 465*. For a fuller account, see Vol.I, paras 9-098 et seq.

1490 *[1987] 1 Lloyd's Rep. 218*.

1491 Compare the approach of the majority of the Supreme Court in *Manchester Building Society v Grant Thornton UK LLP [2021] UKSC 20* at [4], [13], [19]–[22] to the “scope of the duty” principle in professional negligence cases, where the advice/information distinction of Lord Hoffmann in *South Australia Asset Management Corp v York Montague Ltd [1997] A.C. 191* was abandoned in favour of a “purpose of the duty” test, judged on an objective basis by reference to the reason why the advice is being given. For same approach in context of negligent advice or information given by a doctor to a patient, see *Meadows v Khan [2021] UKSC 21*. See also *Charles B Lawrence & Associates v Intercommercial Bank Ltd (Trinidad and Tobago) [2021] UKPC 30* (losses claimed did not fall within the scope of the duty of care owed by valuer to bank).

1492 When a person passes on information supplied by another, the question whether he is adopting that information as his own or making some representation about it is a question of interpretation depending on the facts (*Webster v Liddington [2014] EWCA Civ 560, [2014] P.N.L.R. 26* at [36], and setting out a non-exhaustive list of possible scenarios at [46]). The test for determining which scenario applies is an objective one (*IFE Fund SA v Goldman Sachs International [2006] EWHC 2887 (Comm), [2007] 1 Lloyd's Rep. 264* at [50], per Toulson J, affirmed *[2007] EWCA Civ 811, [2007] 2 Lloyd's Rep. 449*). Generally, bank does not make representation about accuracy or reliability of valuation or competence of third party valuer simply by passing on valuation report commissioned for bank's own internal purposes to intended borrower or guarantor (*Rehman v Santander UK Plc [2018] EWHC 748 (Ch)* at [37]). See above, Vol.I, para.9-015.

1493 *Green & Rowley v Royal Bank of Scotland Plc [2012] EWHC 3661 (QB)* at [82], affirmed *[2013] EWCA Civ 1197, [2013] 2 C.L.C. 634*, and see, especially, [18] and [23], per Tomlinson LJ; *Rubenstein v HSBC Bank Plc [2011] EWHC 2304 (QB), [2011]*

*2 C.L.C. 459* at [87], reversed in part [*2012】EWCA Civ 1184*, *[2013] 1 All E.R. (Comm) 915; Shore v Sedgwick Financial Services Ltd* [*2007】EWHC 2509 (Admin), [2008】P.N.L.R. 10* at [161]; *Seymour v Ockwell* [*2005】P.N.L.R. 758* at 784; *Loosemore v Financial Concepts* [*2001】Lloyd's Rep. P.N. 235* at 241; *Anderson v Openwork Ltd* [*2015】EW Misc B14* (Slough County Court) at [13], [22]–[25]; *O'Hare v Coutts & Co* [*2016】EWHC 2224 (QB)* at [206]–[208], where Kerr J adopted the test in *Montgomery v Lanarkshire Health Board* [*2015】A.C. 1430*, a medical negligence case, to define the standard of care to be applied in the explanation of risk as part of the provision of investment advice, and considered that compliance with COBS rules “is ordinarily enough to comply with a common law duty to inform, forming part of the duty to exercise reasonable skill and care; while breach of them will ordinarily also amount to a breach of that common law duty” (see also *Thomas v Triodos Bank NV* [*2017】EWHC 314 (QB)* at [89] for application of the test of materiality in the *Montgomery* case); *London Executive Aviation Ltd v Royal Bank of Scotland Plc* [*2018】EWHC 74 (Ch)* at [166], [237]; *Fine Care Homes Ltd v National Westminster Bank Plc* [*2020】EWHC 3233 (Ch)* at [100]. See also *Grant Estates Ltd (In Liquidation) v Royal Bank of Scotland Plc* [*2012】CSOH 133* at [79]. *Green & Rowley* was distinguished in *Crestsign Ltd v National Westminster Bank Plc* [*2014】EWHC 3043 (Ch)* at [147] on the ground that in *Green & Rowley* the court was concerned with whether a duty was owed at common law co-terminous with the (then current) COBS rules.

1495     *Crestsign Ltd v National Westminster Bank Plc* [*2014】EWHC 3043 (Ch)* at [142]–[146], relying on *Bankers Trust International Plc v PT Dharmala Sakti Sejahtera* [*1996】C.L.C. 518, 533D–E*. See also *Wani LLP v Royal Bank of Scotland Plc* [*2015】EWHC 1181 (Ch)* at [34]–[36], [48]; *Thomas v Triodos Bank NV* [*2017】EWHC 314 (QB)* at [81]. But contrast the doubts as to the existence of such an intermediate duty expressed by the judge in *Thornbridge Ltd v Barclays Bank Plc* [*2015】EWHC 3430 (QB)* at [118]–[131] (appeal dismissed, Unreported 9 January 2018); and the restrictive interpretation of *Crestsign* adopted by Asplin J in *Property Alliance Group Ltd v Royal Bank of Scotland Plc* [*2016】EWHC 3342 (Ch)* at [195]–[196] (on appeal, see main text below), which was endorsed in *Marz Ltd v Bank of Scotland Plc* [*2017】EWHC 3618 (Ch)* at [237] and in *London Executive Aviation Ltd v Royal Bank of Scotland Plc* [*2018】EWHC 74 (Ch)* at [236].

1496     *[2018】EWCA Civ 355* at [67].

1497     *Stafford v Conti Commodity Services* [*1981】1 All E.R. 691* (concerning stockbrokers); *Lloyd v City Corp Australia* (*1986】1 N.S.W.L.R. 286* (forex trading); *McEvoy v ANZ Banking Group Ltd* [*1988】Aust. Tort Rep. 80-151* (ditto).

1498     *Foti v BNP* (*1989】54 S.A.S.R. 354*, Sth Aust SC. Contrast *Fine Care Homes Ltd v National Westminster Bank Plc* [*2020】EWHC 3233 (Ch)* at [115] (unsophisticated investor with no prior experience of interest rate hedging products, but held that his level of understanding, which was not as limited as investor alleged, did not turn a relationship that was *prima facie* a non-advisory one into one in which bank assumed a duty of care to advise investor on suitability of transaction)).

1499     *[2001】WL 852289*.

- 1500 [2008] EWHC 1186 (Comm) at [450]–[457], Gloster J also held (at [475]–[491]) that disclaimers in the contractual documentation precluded the existence of a general advisory duty; affirmed [2010] EWCA Civ 1221, [2010] 2 C.L.C. 705 (no appeal on general advisory duty issue). See further, paras 36-267 and 36-445, above.
- 1501 [2018] EWHC 74 (Ch) at [206]–[217]. Rose J (at [159]–[205]) also provides a useful summary of the court’s approach to claims for the negligent selling of financial products. See also *Property Alliance Group Ltd v Royal Bank of Scotland Plc* [2018] EWCA Civ 355, the first mis-selling case to be substantively determined by the Court of Appeal.
- 1502 Above. For relationship between bank’s duty of confidentiality to customer and provision of reference to third party, see above, para.36-316.
- 1503 For a summary of the three broad approaches to whether a duty of care exists, see *Customs & Excise Commissioners v Barclays Bank Plc* [2006] UKHL 28, [2007] 1 A.C. 181 at [82]–[83], although in *NRAM Ltd (formerly NRAM Plc) v Steel* [2018] UKSC 13, [2018] 1 W.L.R. 1190 at [24], assumption of responsibility was confirmed to be the “foundation of … liability” for negligent misstatement. In the context of bankers’ references, see *Playboy Club London Ltd v Banca Nazionale Del Lavoro SpA* [2018] UKSC 43 (defendant bank did not owe a duty of care to casino for negligent misstatement as to gambler’s creditworthiness when request for reference came from associated company of casino acting as agent of casino which was its undisclosed principal: Supreme Court rejected argument that because casino was undisclosed principal of associated company the relationship between bank and casino was sufficiently proximate to found a duty of care as it was “equivalent to contract”). See also *Turner v Royal Bank of Scotland Plc* [2001] EWCA Civ 64, [2001] 1 All E.R. (Comm) 1057 (on causation and loss).
- 1504 This is, indeed, the ratio in *Hedley Byrne*. And see *WB Anderson & Sons Ltd v Rhodes (Liverpool) Ltd* [1967] 2 All E.R. 850, 857. cf. dicta in *L Shaddock & Associates Pty Ltd v Paramatta City Council* (1981) 36 A.L.R. 385, 398 (Stephen J). See also *Barclays Bank Plc v Grant Thornton UK LLP* [2015] EWHC 320 (Comm) (effectiveness of auditor’s disclaimer of responsibility to third party bank).
- 1505 That this duty is not excluded: see *Commercial Banking Co of Sydney Ltd v RH Brown & Co* [1972] 2 Lloyd’s Rep. 360, HC of Aust. Note further that any exclusion of liability for negligence may perhaps be defeated under s.2(2) and/or s.3 of the Unfair Contract Terms Act 1977, and perhaps even by Pt 2 of the Consumer Rights Act 2015, where the enquirer can be classified as a “consumer”. Sections 2 and 3 of the 1977 Act do not apply to “consumer contracts” and “consumer notices”, but see the provision made about such contracts and notices in ss.62 and 65 of the 2015 Act.
- 1506 *Gold Coin Jolliers SA v United Bank of Kuwait* [1997] 6 Bank. L.R. 60.

## (h) - The Banker as Bailee

Chitty on Contracts 34th Ed.

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Section 2. - Aspects of Banking Law

(h) - The Banker as Bailee

### Degree of care

- 36-449 One of the ancillary advantages of a banking account is that facilities are afforded for the safe custody of the customer's documents and other valuables. It used to be the case that customers would deposit securities (e.g. share or bond certificates) with their bank, but this is rare in modern practice as securities are increasingly held in dematerialised form through central securities depositories such as CREST.<sup>1507</sup> In some instances the documents or other valuables are deposited loose; in other cases they may be lodged in a locked box or sealed parcel.<sup>1508</sup> When the banker accepts documents or other valuables for safe custody, he may not receive payment for this service. It is, however, doubtful whether the banker is in these cases to be regarded as a gratuitous bailee or a bailee for reward. In *Giblin v McMullen*<sup>1509</sup> the Privy Council held that, if a banker accepts without a reward the safe custody of documents, he is a gratuitous bailee. However, there is a relationship of contract between the banker and his customer and it may, therefore, be argued that although the banker does not receive a specific consideration for his services as bailee, he should be treated as a bailee for reward because of the consideration received by him under the general contract which he has with the customer. In any event, in *Houghland v RR Low (Luxury Coaches) Ltd*<sup>1510</sup> the view was expressed that it is unnecessary to put different types of bailment into watertight compartments, such as gratuitous bailments on the one hand and bailments for reward on the other. A bailee is under a duty to exercise, in each case, a degree of care warranted by the circumstances. As bankers, in order to attract customers, usually advertise that they offer facilities of safe custody, it is reasonable to presume that a high degree of care is required.<sup>1511</sup>
- 36-450 There is no English authority relating to the deposit of moneys by a customer in a night safe. It is thought that although the banker has no knowledge at the time of the actual deposit he is,

nevertheless, a bailee for reward until the moneys are duly credited to the customer's account,<sup>1512</sup> whereupon the conventional debtor-creditor relationship is created.

## Strict liability

36-451 There are some forms of loss for which the banker as bailee is liable even in the absence of negligence. Where he agrees for a reward to store items at a specified place and yet stores them elsewhere he is liable for any loss or damage at the later place, unless he can show that the loss or damage would have been inevitably occasioned had the terms of the contract been strictly observed.<sup>1513</sup> Similarly, and because misdelivery is tantamount to conversion,<sup>1514</sup> strict liability is imposed on a banker who surrenders the valuables to an unauthorised person. A banker is entitled to retain the valuables for a reasonable time in order to inquire into a suspected forgery or impersonation, but no amount of diligence will mitigate ultimate misdelivery whether the bailment is gratuitous or for reward.<sup>1515</sup> The satisfaction of a judgment for damages for conversion, however, transfers to the banker such title to the valuables as was vested in the bailor.<sup>1516</sup> A court may order the inspection of the contents of safety deposit boxes to allow the banker to trace the current owners and/or decide whether to seek an order for sale of the contents.<sup>1517</sup>

## Footnotes

- 1507 Large banks provide custody services in relation to securities for their customers. Basic custody services include settlement and various asset services (e.g. receipt of dividends and interest payments), and additional custody services include cross-selling of financial products to customers, collateral management and fund services. Provision of custody services is a regulated activity and in the UK it must be authorised under the [Financial Services and Markets Act 2000](#). Certain custody activities are subject to conduct of business rules (see FCA, Client Asset sourcebook (CASS 6), Ch.6; FCA, Principles for Business, Principle 10). The relationship between customer and custodian will be governed by written agreement, but “[s]uperimposing bailment over this agreement will be defeated in practice, given the nature of modern custodial arrangements (e.g. stock lending by custodians, the use of sub-custodians) and modern securities (represented by global note or dematerialized)” (R. Cranston, E. Avgouleas, K. van Zwieten, C. Hare and T. van Sante, *Principles of Banking Law*, 3rd edn (2018), pp.451–456). The customer's interest in securities is more likely to be held on trust by the custodian (see M. Yates and G. Montagu, *The Law of Global Custody: Legal Risk Management in Securities Investment and Collateral*, 4th edn (2013), Ch.3).
- 1508 As regards the nature of the contract relating to the hire of a safe from a bank, see the decision of the High Court of Australia in *Commissioner of Taxation v Australia and*

*New Zealand Banking Group Ltd* (1979) 53 A.L.J.R. 336, 339, which suggests that the retention by the bank of a spare key, enabling it to open the safe, gives it the “control” over the items there deposited.

1509 (1869) *L.R.* 2 P.C. 317. See also *Kahler v Midland Bank* [1948] 1 All E.R. 811, 819–820 (*affirmed* [1950] A.C. 24).

1510 [1962] 1 Q.B. 694, 698. See above, paras 35-008, 35-035, 35-056.

1511 The causes of action against the bank may include breach of contract, tort, breach of duty as bailee and liability for conversion (as to which, see *Schwarzschild v Harrods Ltd* [2008] EWHC 521 (QB)). See, e.g. *Scipion Active Trading Fund v Vallis Group Ltd* [2020] EWHC 1451 (Comm) at [86]–[114] (contractual bailment governed by English law gave bailor right to possession of bailed goods and claim to substantial damages for breach of contract of bailment by bailee).

1512 So held in *Bernstein v Northwestern National Bank* (1945) 41 A. 2d 440. See also E.P. Ellinger, E. Lomnicka and C.V.M. Hare, *Ellinger's Modern Banking Law*, 5th edn (2011), pp.742–743.

1513 cf. *Lilley v Doubleday* (1881) 7 Q.B.D. 510. See above, para.35-051.

1514 *Stephenson v Hart* (1828) 4 Bing. 476, 482–483; *Hiort v London and North Western Ry* (1879) 4 Ex. D. 188, 194; *Glyn, Mills, Currie & Co v East and West India Dock Co* (1880) 6 Q.B.D. 475, 493 (*affirmed* (1882) 7 App. Cas. 591).

1515 In order to protect itself, the bank may have to issue a stakeholder claim under CPR Pt 86, and ask the court to determine the true identity of the bailor: see *Kitover v Galmarley Ltd (t/a BullionVault.com)* [2021] EWHC 809 (Ch): held that, on balance of probabilities, claimant (bailor) was true owner of gold bullion purchased in name of another person from defendant online gold investment service using a forged passport and stored with third-party vault operator (bailee): claimant’s conduct might have been illegal but enforcing his claim did not harm the integrity of the legal system (applying *Patel v Mirza* [2016] UKSC 42, [2017] A.C. 467 at [120]).

1516 *USA v Dollfus Mieg et Cie SA* [1952] A.C. 582.

1517 Senior Courts Act 1981 s.33; CPR r.25.1(1)(c)(ii) and r.25.1(1)(i). See *Crédit Agricole Corporate and Investment Bank v Persons Unknown* [2021] EWHC 1679 (Ch), where consideration given to procedure for bailee’s application to sell (i) items deposited on or after 1 January 1978 under s.13 of the Torts (Interference with Goods) Act 1977, and (ii) items deposited prior to 1 January 1978 under common law power of sale.

## **(i) - Bankers' Commercial Credits**

**Chitty on Contracts 34th Ed.**

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**(i) - Bankers' Commercial Credits** <sup>1518</sup>



*Replace footnote 1514 with:* See, in particular, Benjamin's Sale of Goods, 11th edn (2021), Ch.23; R. King, Gutteridge and Megrah's Law of Banker's Commercial Credits, 8th edn (2001); R. Jack, A. Malek and D. Quest, Documentary Credits, 4th edn (2009); P. Ellinger and D. Neo, The Law and Practice of Documentary Letters of Credit (2010); D. Horowitz, Letters of Credit and Demand Guarantees: Defences to Payment (2010); C. Hare and D. Neo, Trade Finance: Technology, Innovation and Documentary Credits (2021).

### **Footnotes**

- 1518 See, in particular, Benjamin's Sale of Goods, 11th edn (2021), Ch.23 ; R. King, Gutteridge and Megrah's Law of Banker's Commercial Credits, 8th edn (2001) ; R. Jack, A. Malek and D. Quest, Documentary Credits, 4th edn (2009) ; P. Ellinger and D. Neo, The Law and Practice of Documentary Letters of Credit (2010) ; D. Horowitz, Letters of Credit and Demand Guarantees: Defences to Payment (2010) .

## **(i) - The UCP**

**Chitty on Contracts 34th Ed.**

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**(i) - The UCP**

### **Purpose of credit**

36-452 The expansion of international trade in the last 150 years has necessitated the development of the bankers' commercial credit. Its purpose is to finance contracts of sale of goods where the delay between delivery on board and at destination is likely to be substantial. <sup>1519</sup> The inherent difficulties of overseas transactions are aggravated by the reluctance of both seller and buyer to tie up capital during shipment. Merchants have accordingly availed themselves of the accommodation facilities offered by bankers and in some cases by commercial houses which in return for an agreed commission furnish the credit that the merchants themselves are usually unable or unwilling to afford. <sup>1520</sup>

### **Modern practice**

36-453 Modern practice shows letters of credit being supplanted by open account as the means of settling trade transactions. Nevertheless, letters of credit remain extremely popular in regions such as Asia, where more than 60 per cent of all letters of credit are handled. <sup>1521</sup> The decline in use of letters of credit is likely to continue with the development of the Bank Payment Obligation (BPO), which is an irrevocable undertaking given by an obligor bank (usually the buyer's bank) to a recipient bank (which must be the seller's bank) to pay a specified sum under the condition of a successful electronic matching of data or acceptance of mismatches. In April 2013, the International Chamber

of Commerce adopted the Uniform Rules for Bank Payment Obligations.<sup>1522</sup> The ICC suggests that the BPO is an alternative “electronic letter of credit”. However, whilst the BPO has similarities with letters of credit, it is in many ways a very different type of payment process, e.g. unlike a letter of credit, there is no checking and transmission of physical documents by banks, with everything done electronically and automatically in the SWIFT Trade Services Utility; and, unlike the beneficiary of a letter of credit, the seller does not receive a payment undertaking directly from the obligor bank (the seller’s claim is against the recipient bank, i.e. the seller’s bank, according to the terms of any separate contractual agreement that the seller will usually have entered into with that bank, but this bilateral agreement is not part of the BPO itself).<sup>1523</sup> It remains to be seen whether the BPO will be widely adopted and eventually replace the letter of credit as a method of payment settlement in international trade transactions.

## The parties to a commercial credit transaction

- 36-454 There are at least three parties in a commercial credit transaction. The buyer, having agreed in the contract of sale to furnish a commercial credit, approaches his own banker (the “issuing banker”) and requests him to open a commercial credit in favour of the seller. The details of the credit to be opened are set out in an “application form”, which is a form prepared by the banker, but filled up by the buyer and signed by him. The banker usually informs the buyer in writing of his willingness to open the commercial credit applied for. The application form will then constitute the basis of the contract between the buyer and his banker. In due course, the issuing banker sends to the seller the commercial credit, which specifies the conditions that the seller must perform in order to obtain payment under it. After receiving this credit, the seller ships the goods to the buyer and tenders the required documents (usually a bill of lading, an insurance policy and an invoice) to the issuing banker or his agent and obtains payment. As the issuing banker’s business is, in most cases, carried on at the place of the buyer, the issuing banker frequently engages another banker, operating at the seller’s place of business, and instructs him to notify the seller of the opening of the credit, and to make payment against the documents. This second banker is known as “intermediary” or “correspondent banker”. It should be added that a commercial credit does not always promise payment of cash against the required documents. In most credits opened in the United Kingdom the issuing banker promises to accept a draft drawn under, and accompanied by the documents required in, the commercial credit. In most credits opened in South East Asia the issuing banker promises to negotiate (usually “without recourse”)<sup>1524</sup> a draft, accompanied by the required documents, drawn by the seller on the buyer.<sup>1525</sup> On the Continent the issuing banker usually promises to pay cash against the documents. For most purposes these different modes of payment do not, however, lead to differences regarding the rights of the parties.

## The Uniform Customs and Practice for Documentary Credits: their development

36-455 The wide use of commercial credits in international sales has led to a need for uniformity. The first attempt to provide a uniform system was undertaken by the International Chamber of Commerce (ICC) in 1933, when the first revision of the Uniform Customs and Practice for Documentary Credits, prepared by this institute was adopted by the bankers of several European countries. A second revision of the Code was promulgated by the ICC in 1951. Although this revision was adopted widely, it was rejected by the bankers in the United Kingdom and in most Commonwealth countries. However, the bankers in these countries adopted the next revision, promulgated in 1962. This third revision settled many of the practical problems that plagued issuers of documentary credits. For this reason, it is not surprising that the third revision attained world-wide recognition. Nevertheless, the need for a further revision was felt by about the end of the decade. It was eventually undertaken by the ICC in collaboration with the United Nations Commission on International Trade Law (UNCITRAL). This revision, known as the 1974 Revision, was more comprehensive than the earlier versions. The 1974 Revision attained universal acceptance and was generally considered a satisfactory Code. But certain technological developments in communications and problems arising in respect of specific provisions of that Revision, especially as regards shipping documents, prompted a further review.<sup>1526</sup> The fourth Revision of the Uniform Customs and Practice for Documentary Credits which remained in effect for 10 years came into force on 1 October 1984. The 10 years following the promulgation of the 1983 Revision were marked by a rise in the volume of letters of credit issued all over the world and also by a substantial increase in disputes ensuing in litigation. Many of the inadequacies of the 1983 Revision surfaced in this process. Others became the subject of specific points of controversy referred to the ICC's banking commission. The 1993 Revision which came into effect on 1 January 1994,<sup>1527</sup> purported to cure these defects. There was also an attempt to improve the draftsmanship. All the same, the 1993 Revision was, basically, an updated and improved version of the 1983 Revision.

## The 2007 revision

36-456 The latest revision of the Uniform Customs and Practice for Documentary Credits ("UCP 600") was approved unanimously at an International Chamber of Commerce Banking Commission meeting in October 2006. UCP 600 came into effect on 1 July 2007.<sup>1528</sup> A supplement to the UCP dealing with the electronic presentation of documents ("eUCP") has been reissued with UCP 600.<sup>1529</sup> To accompany this latest revision of the UCP, the ICC published a new version of International Standard Banking Practice for Examination of Documentary Credits ("ISBP"), which is a checklist of items that document examiners need to check for in their review of

documents presented under the credit.<sup>1530</sup> A new version of ISBP was approved by the ICC Banking Commission in April 2013.<sup>1531</sup>

## Main changes in the 2007 revision

- <sup>36-457</sup> This is not the place for a detailed review of the changes introduced by UCP 600.<sup>1532</sup> Nevertheless, the main changes are summarised in this paragraph and those that follow. First, whereas the 1993 Revision of the UCP (“UCP 500”) covered both revocable and irrevocable credits, UCP 600 only applies to irrevocable credits.<sup>1533</sup> Secondly, art.1 of UCP 600 states that UCP 600 is to apply “when the text of the credit expressly indicates that it is subject to these rules”.<sup>1534</sup> The wording constitutes a change from UCP 500, art.1, which says that the UCP applies “where they are incorporated into the text of the credit”. Nevertheless, despite the wording of UCP 600 art.1, a court may well allow incorporation of the UCP based upon a previous course of dealing between the parties.<sup>1535</sup> Even in the absence of a previous course of dealing, it has also been suggested that English law would probably allow the incorporation of the UCP into the credit as a matter of business practice because it is so widely used by banks all over the world.<sup>1536</sup> Thirdly, UCP 600 contains a new definitions section (art.2) and interpretations section (art.3). Three definitions are particularly important. A “complying presentation” is defined to mean a presentation that is in accordance with the terms and conditions of the credit, the applicable provisions of the UCP rules and international standard banking practice. The concept of “honour” is also new to UCP 600 and is defined to mean (a) to pay at sight if the credit is available by sight payment; (b) to incur a deferred payment undertaking and pay at maturity if the credit is available by deferred payment<sup>1537</sup>; and (c) to accept a bill of exchange (“draft”) drawn by the beneficiary and pay at maturity if the credit is available by acceptance. The concept of “negotiation” has caused problems in the past. Under UCP 500 art.10(b)(ii), “negotiation” was defined in terms of “the giving of value” for drafts and/or documents by the bank authorised to negotiate. There were issues as to what this meant and ICC Banking Commission Paper No.2 (September 1994) tried to deal with these issues. The new definition in UCP 600 refers to the “purchase” of drafts and/or documents “by advancing or agreeing to advance funds to the beneficiary on or before the banking day on which reimbursement is due to the nominated bank”.
- <sup>36-458</sup> Some things have not changed. Most importantly, UCP 600 art.4, enshrines the autonomy principle into the UCP. UCP 600 art.5, states that “banks” deal with documents and not goods, services or performance to which the documents relate. The wording is slightly different from UCP 500 which in art.4 states that “all parties” concerned in documentary credit operations deal with documents and not with goods etc. The change in wording should be welcomed. Where the underlying contract is one of sale, the seller and the buyer clearly deal in goods even where the sale is on c.i.f. terms.<sup>1538</sup>

Similarly, UCP 600 art.34, makes clear that in credit operations banks have no responsibility for anything other than conformity of the documents to the credit.

## Construction of the UCP

- 36-459 English courts regard the provisions of the UCP as standard contractual terms which must be incorporated into the credit and construed according to normal principles governing the construction of commercial contracts. The modern approach to the construction of commercial contracts is contextual,<sup>1539</sup> although the courts tend to take a more literal approach to the construction of standard form contracts that reflect market practice or upon which third parties are likely to rely.<sup>1540</sup> This is reflected in the way the Supreme Court recently approached the construction of letters of credit in *Taurus Petroleum Ltd v State Oil Company of the Ministry of Oil, Republic of Iraq*,<sup>1541</sup> where emphasis was placed upon the language of the credits, construed in their contractual context, and not upon extraneous circumstances. Nevertheless, when construing provisions of the UCP, the courts “seek to give effect to the international consequences underlying the UCP”.<sup>1542</sup> In *Fortis Bank SA/NV v Indian Overseas Bank*, Thomas LJ said that the UCP was to be construed:

“... in accordance with its underlying aims and purposes reflecting international practice and the expectations of international bankers and international traders so that it underpins the operation of letters of credit in international trade. A literal and national approach must be avoided.”<sup>1543</sup>

The English courts have been willing to imply a term into the UCP,<sup>1544</sup> although Thomas LJ, without reaching a concluded view on the subject, has cautioned that, given its international status, “there would be real difficulties in using a rule of national law as to the implication of terms (if distinct from a method of construction) to write an obligation into the UCP”.<sup>1545</sup>

## Standard of examination of documents

- 36-460 UCP 600 art.14 is the key provision dealing with the standard of examination of the tendered documents. It draws together in one article, and makes some changes to, various provisions that were previously scattered across UCP 500. First, UCP 600 art.14(a), states that a bank must examine tendered documents to determine whether they appear on their face to constitute a complying presentation. Unlike UCP 500 art.13(a), UCP 600 does not expressly state that the bank must conduct its examination “with reasonable care”.<sup>1546</sup> It was felt that the general reference to reasonable care was unnecessary as UCP 600, supplemented by ISBP, adopted a significantly more

detailed approach to compliance.<sup>1547</sup> A presentation either complies or it does not: if it does not, a bank that honours or negotiates is not entitled to reimbursement and cannot claim such entitlement on the basis that it exercised reasonable care in examining the presentation.<sup>1548</sup>

36-461 Secondly, under UCP 600 art.14(b), each bank has a maximum of five banking days following the day of presentation to determine if the presentation is complying. UCP 500 art.13(b), gave the bank a reasonable time, not to exceed seven banking days, to examine the documents and make the determination. UCP 600 brings greater certainty with the removal of the reference to a reasonable time and its replacement by a fixed period of five banking days following the date of presentation.

36-462 Other changes with regard to the standard of examination of documents can be listed as follows. First, UCP 500 art.43, provides that transport documents must be presented to banks not later than 21 days after the date of shipment (but in any event not later than the expiry date of the credit). UCP 600 art.14(c) restricts this rule by stating that a presentation including one or more *original* transport documents must be made by or on behalf of the beneficiary not later than 21 days after the date of shipment (but in any event not later than the expiry date of the credit). The rule does not apply to copies. Secondly, there are two key parts of UCP 600 art.14 that deal with data content. Article 14(d) provides that data in a document, when read in context with the credit, the document itself and international standard banking practice, need not be identical to, but must not conflict with, data in that document, any other stipulated document or the credit. The intention behind art.14(d) is clearly to move away from the mirror image approach to documentary compliance. Article 14(f) provides that if a credit requires presentation of a document other than a transport document, insurance document or commercial invoice, without stipulating by whom the document is to be issued or its data content, banks will accept the document as presented if its content appears to fulfil the function of the required document and otherwise complies with art.14(d). Article 14(f) seems to take data content out of the equation when there is no stipulation as to what it should be. Thirdly, UCP 600 art.14(g) states that a document presented but not required by the credit is to be disregarded and may be returned to the presenter. Fourthly, UCP 600 art.14(h) provides that non-documentary conditions are to be ignored. A non-documentary condition would be where the credit contains a reference to goods being of “US origin”. This condition will be ignored unless the credit also calls for one of the tendered documents—most likely the certificate of origin—to indicate compliance with that condition. Fifthly, UCP 600 art.14(j), clarifies the position where the addresses and contact details (phone, fax, email, etc.) of the beneficiary and the applicant do not correspond.

## Complying presentation

36-463 Under UCP 500 there was no precise statement as to when an issuing or nominated bank had to start the settlement process. By contrast, UCP 600 provides that the issuing bank must honour the credit

when it determines that a presentation is complying.<sup>1549</sup> When a confirming bank determines that a presentation is complying, it must honour or negotiate and forward the documents to the issuing bank.<sup>1550</sup> When a nominated bank determines that a presentation is complying and honours or negotiates, it must forward the documents to the confirming bank or issuing bank.<sup>1551</sup>

## Discrepant documents, waiver and notice

- 36-464 UCP 500 art.14(d)(ii) makes it clear that a rejection notice has to state “all” discrepancies in respect of which the bank refused the documents. UCP 600 art.16(c)(ii) retains the requirement, although it does so in slightly different language: the bank must give a “single notice” of rejection to the presenter and that notice must state “each discrepancy in respect of which the bank refuses to honour or negotiate”. If the bank fails to comply with this requirement, or any other requirement of art.16, it is precluded from claiming that the documents do not constitute a complying presentation.<sup>1552</sup> This seems to mean that the bank may be precluded from raising a new objection when documents are retendered by the seller having cured the defect identified in the original notice of rejection. By contrast, in the normal course of events, the mere failure to raise a discrepancy when refusing an initial presentation does not estop a bank at common law from claiming that a subsequent presentation is non-compliant on the basis of that discrepancy.<sup>1553</sup>
- 36-465 Under UCP 500 art.14(d)(i) a bank which refuses documents must also state in its rejection notice whether it is holding the documents at the disposal of, or is returning them to, the presenter. The purpose of this provision is that, as soon as the documents have been rejected, they should be put back in circulation. However, problems have arisen where a bank serves a rejection notice and at the same time approaches the applicant for a waiver of the discrepancies, and if such waiver is received releases the documents without further notice. For example, in *Crédit Industriel et Commercial v China Merchants Bank*,<sup>1554</sup> the issuing bank’s notice of rejection was held to be bad where it ended with the words:

“Should the disc[repancy] being accepted by the applicant, we shall release the documents to them without further notice to you unless yr instructions to the contrary received prior to our payment. Documents held at yr risk for yr disposal”.

Steel J considered that the conditional nature of the rejection was not saved by the potential for acceptance of contrary instructions prior to payment, particularly where no notice was to be given. The message constituted a continuing threat of conversion of the claimant’s documents. UCP 600 art.16(c)(iii) contains additional options designed to avoid banks sitting on discrepant documents. The rejection notice must state that the bank (a) holds the documents pending further instructions from the presenter; (b) holds the documents until it receives a waiver from the applicant and agrees

to accept it, and receives further instructions from the presenter prior to agreeing to accept a waiver; (c) is returning the documents; or (d) is acting in accordance with instructions previously received from the presenter. The bank must act in accordance with the statement contained in the notice with reasonable promptness. <sup>1555</sup>

- 36-466 UCP 600 art.16(d) provides that the rejection notice must be given by telecommunication or, if that is not possible, by other expeditious means no later than the close of the fifth banking day following the day of presentation. This provision is more tightly worded than the equivalent provision in UCP 500. UCP 500 art.14(d)(i) requires notice to be given “*without delay* but no later than the close of the seventh banking day following the day of receipt of the documents”. The net effect of UCP 600 arts 14(b) and 16(d) seems to be that a bank has a maximum of five banking days following presentation of the documents to determine if the presentation is compliant, but the longer it takes to make its determination, the less time it has available to it to give a notice of rejection to the applicant.

## Original documents and copies

- 36-467 The basic rule is that original documents must be tendered to the bank, unless the credit calls for copy documents. However, there has been uncertainty as to what constitutes an original document. <sup>1556</sup> Article 17 of UCP clears up that uncertainty. It states that at least one original of each stipulated document must be tendered, <sup>1557</sup> and provides that a bank must treat as original any document bearing an apparently original signature, mark, stamp or label of the issuer of the document, unless the document itself indicates that it is not original. <sup>1558</sup> Unless a document indicates otherwise, a bank is also to accept a document as original (i) if it appears to be written, typed, perforated or stamped by the document issuer’s hand; or (ii) appears to be on the document issuer’s original stationery; or (iii) states that it is an original, unless the statement appears not to apply to the document presented. <sup>1559</sup>

## Commercial invoice

- 36-468 UCP 600 art.18 deals with the commercial invoice. Some parts of the art.18 are the same as the equivalent provision (art.37) in UCP 500, e.g. the requirements in art.18(c) that the description of the goods in the commercial invoice should correspond with that in the credit (in all other documents, the goods may be described in general terms not inconsistent with the description of the goods in the credit). But some parts of art.18 are different. Article 18(a) states that in addition to the requirement that the invoice must be made out to the applicant and made by the beneficiary, it must be made out in the same currency as the credit. This is a useful clarification as it avoids any dispute

as to whether the price is merely subject to conversion into the appropriate currency or whether a different stipulated currency makes the document non-compliant. Article 18(b) states that a bank may accept a commercial invoice in excess of the amount permitted in the credit provided the bank in question has not honoured or negotiated for an amount in excess of that permitted by the credit. The bank's decision to do so will be binding on all parties.

## The eUCP

36-469 To facilitate the electronic transmission of documents tendered under letters of credit, the ICC has promulgated a new set of guidelines entitled the eUCP, which makes provision for the dematerialisation of documents for the purpose of their being transmitted and tendered electronically.<sup>1560</sup> According to art.e1(a), they accommodate the presentation of electronic records alone or in combination with paper documents.

## A supplement

36-470 The eUCP do not replace the UCP but constitute a supplement. To avoid confusion, the letter "e" precedes the number of each article thereof. When the eUCP are incorporated in a letter of credit, it is not necessary also to incorporate the UCP because, under arts e1(b) and e2(a), the supplement incorporates the UCP in any facility subject to it. However, under art.e2(b), where the eUCP applies, its provisions prevail "to the extent that they would produce a result different from the application of the UCP". At the same time, the eUCP remains subordinate to the UCP if the letter of credit confers on the beneficiary the option of choosing between the presentation of paper documents and electronic records. If, in such a case, he:

"… chooses to present only paper documents, the U.C.P. alone shall apply to that presentation. If only paper documents are permitted under an eUCP Credit, the U.C.P. alone shall apply."

## Seldom used

36-471 To date, the eUCP are not in common use. In the case of letters of credit which call for the drawing of a bill of exchange, such letters of credit available by acceptance or by negotiation, banks and businessmen continue to opt for the presentation of paper documents because under the negotiable instruments laws prevailing in most countries a bill of exchange is issued, accepted and transferred

by means of a “signature” in the traditional sense. The eUCP can be more readily used in the case of cash and deferred payment credits but even in these instances they are not popular. All the same, a brief discussion is required.

## Important definitions

- 36-472 To blend the eUCP with the UCP where both apply to a letter of credit, art.e3(a) redefines certain terms for the purpose of applying the UCP to an electronic record presented under the eUCP. “Appears on their face”—used in art.14(a) of UCP 600—is applied to the examination of data content of an electronic record. The generic term “document” includes an “electronic record” and “place of presentation” of electronic records means an “electronic address”. Of particular importance is that “‘sign’ and the like shall include an electronic signature”. Where a letter of credit is subject to the eUCP, this definition would, accordingly, apply to “signature” of a document, for instance a marine bill of lading.<sup>1561</sup> It would not, however, apply outside the ambit of the UCP, so that, under the provisions of the applicable local law<sup>1562</sup> a negotiable instrument, such as a bill of exchange, will still require a manual or facsimile signature.

## Definitions of terms in eUCP

- 36-473 Further definitions, respecting the eUCP itself, are spelt out in art.e3(b). An “electronic record” means data created, generated, sent, communicated or stored by electronic means, provided its sender and data source can be authenticated and provided further that it is capable of being examined for compliance with the terms and conditions of the eUCP credit. An “electronic signature” means a data process attached to or logically associated with an electronic record and executed to identify the person executing it and to signify his authentication of the electronic record. “Received” means the time when an electronic record enters the information system of the applicable recipient in a form capable of being accepted by that system. An acknowledgement of receipt does not imply an acceptance or refusal of the electronic record under an eUCP credit. A document in the traditional form is called a “paper document”.

## Format

- 36-474 Under art.e4, a credit must specify the formats in which electronic records are to be presented. If no format is specified, any format would do. In art.e3(b)(iii), “format” is defined as the data organisation in which the electronic record is expressed. A word processing system, for instance, constitutes a “format”.

## Presentation

- 36-475 Article e5(a) requires that a place be stated for the presentation of the electronic record and of paper documents. Under art.e5(b) electronic records may be presented separately and need not be presented at the same time. If the eUCP credit allows for the presentation of one or more electronic records, the beneficiary must give notice to signify that the presentation is complete. Such notice may be given as an electronic record or as a paper document and has to identify the credit to which it relates. Presentation is deemed not to have been made if the beneficiary's notice is not received. Article e5(d) restates this last provision as a general rule in respect of all presentations made under an eUCP credit. In effect, this means that the beneficiary has to ensure that his communications have been received by the bank. In addition, art.e5(f) provides that an electronic record that "cannot be authenticated" is deemed not to have been presented.

## Bank's inability to receive

- 36-476 Article e5(e) deals with cases in which a bank is open but its system is unable to receive a transmitted electronic record on the stipulated expiry date or on the designated last day of a designated period. In such a case, the bank is deemed to be closed on the relevant date, which is then postponed (or extended) to "the first following banking day on which such Bank is able to receive an electronic record". However, if the only electronic record remaining to be presented is the notice of completeness, it may be given by telecommunication or by a paper document and is deemed timely as long as it is sent before the bank is able to receive an electronic record.

## Examination

- 36-477 Article e6 augments the provisions of art.14(a) of UCP 600. Under art.e6(a), an electronic record at an external system or hyperlink to which reference is made constitutes the electronic record to be examined. The failure of a stipulated system to provide the required access to the applicable electronic record constitutes a discrepancy. Under art.e6(b), the forwarding of electronic records by the nominated bank <sup>1563</sup> signifies that the bank has checked the apparent authenticity of the electronic record. Under art.e6(c), the inability of the issuing bank or of the confirming bank to examine an electronic record in a format required by the eUCP or, if no format is required, to examine it in the format presented is not a basis for the refusal of the documents.

## Time for examination of documents

- 36-478 Under art.e7(a)(i), the time for the examination of the documents commences on the banking day following the banking day on which the beneficiary's notice of completeness was received. The maximum period of five banking days, prescribed in art.14(b) of UCP 600 is not—in itself—varied. Under art.e7(a)(ii), if the time for the presentation of documents or of the notice of completeness is extended, the time for the examination of the documents commences on the banking day following the day on which the bank to which presentation is to be made is able to receive the notice of completeness.

## Notice of refusal

- 36-479 Article e7(b) does not modify the contents of the notice of refusal—spelt out in art.16(c) of UCP 600—which are to be served by a bank that decides to reject documents tendered to it. However, the clause provides that, if the rejected presentation includes electronic records and the bank that rejects the tender does not receive, within 30 days, instructions from the “presenter” [tenderor] as regards the disposition of the electronic records, “the Bank shall return any paper documents not previously returned to the presenter but may dispose of the electronic records in any manner deemed appropriate without any responsibility”. Obviously, the electronic record may be shredded. Its return to the presenter would not serve any commercial purpose.

## Originals and copies

- 36-480 Under art.e8, any requirement of the UCP or an eUCP for the presentation of one or more originals or copies of an electronic record is satisfied by the presentation of one electronic record. In respect of paper documents, the position remains governed by art.17 of UCP 600.<sup>1564</sup>

## Issuance

- 36-481 According to art.e9, unless an electronic record contains a specific date of issuance, it is deemed to have been issued on the day on which it appears to have been sent by the issuer. The date of receipt is deemed to be the date on which it was sent if no other date is apparent.

## Transport

- 36-482 If an electronic record evidencing transport does not specify a date of shipment or of dispatch, art.e10 provides that the date of the issuance of the record is to be treated as the relevant date. This presumption does not apply, however, if the record includes a notation setting out the date of shipment or of transport. Such a notation need not be separately signed or authenticated.

## Corruption of record

- 36-483 Under art.e11(a), if upon its receipt an electronic record “appears to have been corrupted”, the recipient—be it the issuing bank, the confirming or another nominated bank—may request the presenter that the record be re-presented. Under sub-cl.(b)(ii) if the nominated bank, to which notice is given, is not the confirming bank, it must communicate the request to the issuing bank and any confirming bank. Under sub-cl.(b)(i), the time for examination is thereupon suspended and resumes when the electronic record is re-presented. Under sub-cl.(b)(iii)–(iv), if the electronic record is not presented again within thirty calendar days, the bank may treat the electronic record as not presented and “any deadlines are not extended”.

## Additional disclaimer

- 36-484 The general disclaimer available to banks under the articles of the UCP are discussed elsewhere in this chapter.<sup>1565</sup> Article 12 includes additional disclaimers available where documents are tendered electronically. It provides that by checking the apparent authenticity of an electronic record, banks assume no liability for the identity of the sender, the source of information or its complete and unaltered character other than that which is apparent in the electronic record received by the use of a commercially acceptable data process for the receipt, authentication and identification of electronic records. A bank is, accordingly, not entitled to ignore a red flag which is staring in its face in consequence of a patent irregularity in the electronic record received.

## Assessment

- 36-485 The eUCP were originally adopted by a majority vote of the Banking Commission.<sup>1566</sup> It remains to be seen whether the guidelines would eventually gain popularity. Two practical problems, that are not easily overcome, may continue to quench any enthusiasm for their use. One is that

the electronic transmission of documents is bound to facilitate the recirculation of documents transmitted in this manner. Where a fraudster and his negotiating bank are in league, the eUCP is bound to play into their hands. The other problem, referred to earlier, arises where the documentary credit transaction involves the use of negotiable instruments drawn at a usance other than at sight. As negotiation and transfer require the indorsement of the instrument (by means of a physically executed signature) completed by its delivery, dematerialisation thereof is ruled out. As the remaining documents are, invariably, tendered together with the bill of exchange, their electronic transmission without the bill is of no practical benefit.

## Footnotes

- 1518 See, in particular, Benjamin's Sale of Goods, 11th edn (2021), Ch.23 ; R. King, Gutteridge and Megrah's Law of Banker's Commercial Credits, 8th edn (2001) ; R. Jack, A. Malek and D. Quest, Documentary Credits, 4th edn (2009) ; P. Ellinger and D. Neo, The Law and Practice of Documentary Letters of Credit (2010) ; D. Horowitz, Letters of Credit and Demand Guarantees: Defences to Payment (2010) .
- 1519 The last 40 years have seen a substantial increase in the use of standby credits, which serve the same function as performance bonds. For a detailed discussion of standby credits and demand guarantees, see Benjamin's Sale of Goods, 11th edn (2021), Ch.24; R.K. Chhina, Standby Letters of Credit in International Trade (2013); R.F. Bertrams, Bank Guarantees in International Trade, 4th edn (2013). Note that the ICC has published revised Uniform Rules for Demand Guarantees (URDG 758) which came into effect on 1 July 2010; and see A. Affaki and R. Goode, Guide to ICC Uniform Rules for Demand Guarantees URDG 758 (2011).
- 1520 The object of the transaction is fully explained in *Guaranty Trust Co of New York v Hannay & Co [1918] 2 K.B. 623, 652; Pavia & Co SpA v Thurmann-Nielsen [1952] 2 Q.B. 84, 88; Trans Trust SPRL v Danubian Trading Co Ltd [1952] 2 Q.B. 297, 304*. For the use of irrevocable credits in transactions other than overseas sales, see *Barclays Bank DCO v Mercantile National Bank [1973] 2 Lloyd's Rep. 541, US Cir Ct of App; McInerny v Lloyds Bank Ltd [1973] 2 Lloyd's Rep. 389, affirmed [1974] 1 Lloyd's Rep. 246* (acceptance credits).
- 1521 A. Casterman (2014) 20(1) DCInsight 18.
- 1522 ICC Publication No.750E. See also The ICC Guide to the Uniform Rules for Bank Payment Obligations (ICC Publication No.751E).
- 1523 For analysis of the differences between the BPO and a letter of credit, see *G. Wynne and H. Fearn, "The bank payment obligation: will it replace the traditional letter of credit—now, or ever?" [2014] B.J.I.B.F.L. 102*. See also *K. Vorpeil, "Bank payment obligations: alternative means of settlement in international trade" [2014] I.B.L.J. 41*.
- 1524 See the Uniform Customs and Practice for Documentary Credits, 2007 Revision (UCP 600) art.7(a) (no reference to negotiation by issuing bank "without recourse") and art.8(a)(ii) (express reference to negotiation by confirming bank "without recourse").

- 1525 UCP 600 art.6(c), states that a credit must not be issued available by a draft drawn on the applicant.
- 1526 See, generally, problems considered by the ICC's Commission on Banking Techniques and Practice, ICC Brochures No.371, 399 and 434.
- 1527 As ICC Brochure No.500.
- 1528 ICC Publication No.600.
- 1529 Discussed below in paras [36-469](#) et seq.
- 1530 ICC Publication No.681.
- 1531 ICC Publication No.745.
- 1532 See *E.P. Ellinger, "The Uniform Customs and Practice for Documentary Credits (UCP): their development and the current revisions"* [2007] *L.M.C.L.Q.* 152; *C. Debattista, "The New UCP 600—Changes to the Tender of the Seller's Shipping Documents under Letters of Credit"* [2007] *J.B.L.* 329; *J. Ulph, "The UCP 600: Documentary Credits in the Twenty-first Century"* [2007] *J.B.L.* 355.
- 1533 UCP 600 art.2 (see definition of "credit").
- 1534 The UCP may be modified or excluded in specified respects by the terms of the credit (*Taurus Petroleum Ltd v State Oil Company of the Ministry of Oil, Republic of Iraq* [2017] *UKSC 64* at [61]), although art.1 of UCP 600 provides that such modification or exclusion must be express. The question is one of ordinary contractual construction (*Yuchai Dongte Special Purpose Automobile Co Ltd v Suisse Credit Capital (2009) Ltd* [2018] *EWHC 2580 (Comm)* at [76]).
- 1535 Benjamin's Sale of Goods, 11th edn (2021), para.23-006.
- 1536 E. McKendrick (ed.), Goode on Commercial Law, 6th edn (2020), 35.45, citing, by analogy, *Harlow and Jones Ltd v American Express Bank Ltd* [1990] *2 Lloyd's Rep.* 343, 349, a case on the Uniform Rules for Collections. See also, *R.K. Chhina, "The Uniform Customs and Practice for Documentary Credit (the USP): Are they merely a set of contractual terms?"* (2016) *30 B.F.L.R.* 245.
- 1537 UCP 600 arts 7(c) and 8(c), establish a definite undertaking by issuing and confirming banks to reimburse on maturity whether or not the nominated bank prepaid or purchased its own acceptance or deferred payment undertaking before maturity. Art.12(b) provides that, by nominating a bank to accept or incur a deferred payment undertaking, an issuing bank gives the nominated bank authority to prepay or purchase a draft accepted or a deferred payment undertaking incurred by that bank. As to the effect of art.12(b) on the assignment of the beneficiary's rights under the credit to the nominated bank before maturity, see below, para.[36-495](#).
- 1538 *Arnold Karberg & Co v Blythe, Green, Jourdain & Co* [1916] *1 K.B.* 495, per Banks LJ.
- 1539 See Vol.I, paras [15-047](#) et seq.
- 1540 See Vol.I, para.[15-058](#).
- 1541 [2017] *UKSC 64* at [8], [73]. The High Court of Australia adopted a similar approach to the construction of a performance bond in *Simic v New South Wales Land & Housing Corp* [2016] *HCA 47* at [8]–[11], [31], [77]–[101]. In *Yuchai Dongte Special Purpose Automobile Co Ltd v Suisse Credit Capital (2009) Ltd* [2018] *EWHC 2580 (Comm)*

at [49] a Deputy High Court Judge stated that “extrinsic evidence can be relevant to a letter of credit ... I do not accept that a letter of credit is akin to a negotiable or quasi-negotiable document. However, having said that, where the issue is as to the parties to the contract, and one party has, effectively, via the use of a particular form [in this case, a SWIFT MT700 message], indicated that it is the issuer, then there is a need for caution about the evidence that one should look at. Quite clearly, there is the need to be satisfied that the relevant material goes to the question of the identification of the parties to the contract; and the further need to be satisfied that that material was known, or at the least, available to both parties”.

1542     *Glencore International AG v Bank of China* [1996] 1 Lloyd's Rep. 135, 148, per Sir Thomas Bingham MR.

1543     [2011] EWCA Civ 58, [2011] 2 Lloyd's Rep. 33 at [29]. See also *Tecnicas Reunidas Saudia for Services and Contracting Co Ltd v Korea Development Bank* [2020] EWHC 968 (TCC) at [47]–[48], [56] (construction of URDG 758). Opinions of the ICC Commission on Banking Technique and Practice and DOCDEX decisions provide evidence as to international banking practice: see Benjamin's Sale of Goods, 11th edn (2021), para.23-007.

1544     *Seaconsar (Far East) Ltd v Bank Markazi Jomhouri Islami Iran* [1999] 1 Lloyd's Rep. 36, 39. See also *Bankers Trust Co v State Bank of India* [1991] 1 Lloyd's Rep. 587, 599, reversed on grounds of interpretation: [1991] 2 Lloyd's Rep. 443. In the context of performance bonds, the courts have consistently emphasised that it will be rare for a term to be implied into such a contract, see below, para.36-535.

1545     *Fortis Bank SA/NV v Indian Overseas Bank* [2011] EWCA Civ 58, [2011] 2 Lloyd's Rep. 33 at [55]; cited with evident approval by Blair J in *Deutsche Bank AG, London v CIMB Bank Berhad* [2017] EWHC 1264 (Comm) at [37].

1546     In *Gian Singh & Co Ltd v Banque de l'Indochine* [1974] 2 All E.R. 754, 757–758, Lord Diplock said that the UCP's express reference to reasonable care “does no more than restate the duty of the bank at common law”.

1547     G. Collyer, Commentary on UCP 600 (2007, ICC Publication No.680), p.62.

1548     Benjamin's Sale of Goods, 11th edn (2021), para.23-099, citing *Equitable Trust Co of New York v Dawson Partners Ltd* (1927) 27 Ll. L. Rep. 49, 52 (Lord Sumner); *E.P. Ellinger* [2007] L.M.C.L.Q. 166. cf. R. Cranston, E. Avgouleas, K. van Zwieten, C. Hare and T. van Sante, Principles of Banking Law, 3rd edn (2018), pp.521, 531.

1549     UCP 600 art.15(a).

1550     UCP 600 art.15(b).

1551     UCP 600 art.15(c).

1552     UCP 600 art.16(f) (but note that the preclusion does not apply to a non-confirming nominated bank). See *Fortis Bank SA/NV v Indian Overseas Bank* [2010] EWHC 84 (Comm), [2010] 2 Lloyd's Rep. 641, affirmed [2011] EWCA Civ 58, [2011] 2 Lloyd's Rep. 33.

1553     *Kydon Compania Naviera v National Westminster Bank Ltd* [1981] 1 Lloyd's Rep. 68, 79. See also Benjamin's Sale of Goods, 11th edn (2021), para.23-223; Paget's Law of Banking, 15th edn (2018), para.37.19.

- 1554 [2002] EWHC 973 (Comm), [2002] 2 All E.R. (Comm) 427.
- 1555 *Fortis Bank SA/NV v Indian Overseas Bank* [2010] EWHC 84 (Comm), [2010] 2 Lloyd's Rep. 641, affirmed [2011] EWCA Civ 58, [2011] 2 Lloyd's Rep. 33, where the issuing bank's failure to act in accordance with the disposal statements contained in its UCP 600 art.16(c)(iii) notices, was held, applying UCP 600 art.16(f), to precluded the bank from claiming that the documents did not constitute a complying presentation (for criticism of the CA's reasoning, see *A Fletcher, "Preclusion in UCP 600 and URDG 758: more than meets the eye?"* (2020) 10 J.I.B.F.L. 694, 696). In *Fortis Bank SA/NV v India Overseas Bank* [2011] EWHC 538 (Comm), [2011] 2 Lloyd's Rep. 190, J. Hirst QC, sitting as a Deputy Judge of the High Court, held (at [35]) that "in the absence of special extenuating circumstances, a bank which failed to despatch the documents within three banking days would have failed to act within reasonable promptness".
- 1556 *Glencore International AC v Bank of China* [1996] 1 Lloyd's Rep. 135; *Kredietbank Antwerp v Midland Bank Plc* [1999] 1 All E.R. (Comm) 801; *Crédit Industriel et Commercial v China Merchants Bank* [2002] EWHC 973 (Comm), [2002] 2 All E.R. (Comm) 427.
- 1557 UCP 600 art.17(a).
- 1558 UCP 600 art.17(b).
- 1559 UCP 600 art.17(c).
- 1560 ICC Brochure No.500/3; in force since 1 April 2002; and now see revision of eUCP (Version 1.1), in force since 1 July 2007.
- 1561 UCP 600 art.20(a)(i). As regards "superimposed", "notation" and stamped, see art.e3(a) (v).
- 1562 As to which see above, para.[36-041](#).
- 1563 For the definition of "nominated bank" see below, para.[36-487](#).
- 1564 See above, para.[36-467](#).
- 1565 See below, para.[36-510](#).
- 1566 By 63 to 3 votes: on 7 November 2001; see Documentary Credit World, Vol.6, issue 2, p.28—February 2002.

## **(ii) - Types of Documentary Credits**

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 36 - Bills of Exchange and Banking

Section 2. - Aspects of Banking Law

**(i) - Bankers' Commercial Credits** <sup>1518</sup>

**(ii) - Types of Documentary Credits**

### **Irrevocable credits**

36-486 Article 2 of UCP 600 defines a documentary credit ("credit") as:

"... any arrangement, however named or described, that is irrevocable and thereby constitutes a definite undertaking of the issuing bank to honour a complying presentation."

This marks an important change from UCP 500 which covered both revocable and irrevocable credits. But revocable credits are rare in practice and so the change is not unexpected. Article 2 also contains a definition of "honour", which means:

"... to pay at sight if the credit is available by sight payment; to incur a deferred payment undertaking and pay at maturity if the credit is available by deferred payment; to accept a bill of exchange ('draft') drawn by the beneficiary and pay at maturity if the credit is available by acceptance".

Article 2 defines a "complying presentation" of documents as one:

"... that is in accordance with the terms and conditions of the credit, the applicable provisions of [the UCP] and international standard banking practice."

36-487 UCP 600 art.7(a) sets out the issuing bank's payment undertaking in the following terms:

“Provided that the stipulated documents are presented to the nominated bank or to the issuing bank and that they constitute a complying presentation, the issuing bank must honour if the credit is available by:

- i.sight payment, deferred payment or acceptance with the issuing bank;
- ii.sight payment with the nominated bank and that nominated bank does not pay;
- iii.deferred payment with a nominated bank and that nominated bank does not incur its deferred payment undertaking or, having incurred its deferred payment undertaking, does not pay at maturity;
- iv.acceptance with a nominated bank and that nominated bank does not accept a draft drawn on it or, having accepted a draft drawn on it, does not pay at maturity;
- v.negotiation with a nominated bank and that nominated bank does not negotiate.”

A “nominated bank” is defined in UCP 600 art.2 as “the bank with which the credit is available or any bank in the case of a credit available with any bank”.

36-488 The opening of an irrevocable credit leads to a contract between the issuing bank and the seller.<sup>1567</sup> A documentary credit becomes irrevocable upon issue; that is, upon its release from the control of the issuing bank or confirming bank, irrespective of the time that it is delivered to or received by the beneficiary.<sup>1568</sup> However, for the purpose of determining whether the buyer has complied with its obligations under the contract of sale, the credit may be considered to be “opened” only when it is communicated to the beneficiary.<sup>1569</sup> In each case, it will be a question of construction of the contract concerned.<sup>1570</sup>

## Revocable credits

36-489 Where the credit is revocable, the issuing bank is free to amend or cancel it at any time without notice to the beneficiary.<sup>1571</sup> Thus, the opening of a revocable credit does not lead to the creation of a contract between the issuing bank and the seller.<sup>1572</sup> All the issuing bank is required to do is reimburse any other bank for any payment, acceptance or negotiation made by such bank before receiving notice of amendments or cancellation.<sup>1573</sup> Revocable credits are rare and tend only to be found where the parties are not interested in security, e.g. they are members of the same group of companies, but where they are concerned to save costs. UCP 600 only applies to irrevocable credits; it does not apply to revocable credits.<sup>1574</sup> If the parties to the underlying contract want to

use a revocable credit, they should make the credit subject to UCP 500, the 1993 revision of the UCP, which does extend to such credits. A credit that does not indicate whether it is revocable or irrevocable will be deemed to be irrevocable.<sup>1575</sup>

## Confirmed and unconfirmed credits

- 36-490 Whether a commercial credit is confirmed or unconfirmed depends on the role assumed by the correspondent banker. If the correspondent banker is merely instructed by the issuing banker to notify the seller about the opening of the commercial credit by the issuing banker and to accept, on behalf of the issuing banker, a tender of documents complying with the terms of the credit, the correspondent banker acts as an agent of the issuing banker. The correspondent banker assumes, in such cases, the role of an “advising banker”, and the commercial credit is unconfirmed on the part of the correspondent banker, although it may contain an undertaking of the issuing banker and thus be irrevocable.<sup>1576</sup> If at the instruction of the issuing banker the correspondent banker confirms the credit, i.e. adds to the promise of the issuing banker an undertaking of his own to accept or negotiate a draft or to pay the amount of the credit to the seller against conforming documents, the correspondent banker becomes a confirming banker and the commercial credit is a confirmed credit.<sup>1577</sup> In practice the correspondent banker is asked to confirm a credit only if it is irrevocable.<sup>1578</sup> In an “irrevocable and confirmed credit” the seller obtains an undertaking of both the issuing and the correspondent banker.

## Negotiation credits

- 36-491 The credit may be available by negotiation with a bank nominated in the credit (or with any bank if the credit so provides).<sup>1579</sup> UCP 600 art.2 defines “negotiation” to mean the purchase by the nominated bank of bills of exchange (“drafts”) drawn on a bank other than the nominated bank (e.g. drawn on the issuing bank), and/or documents under a complying presentation, by advancing or agreeing to advance funds to the beneficiary on or before the banking day on which reimbursement is due to the nominated bank. This enables the beneficiary to obtain funds without delay by selling the documents to the nominated bank (and so it is only of practical use to the beneficiary where payment under the credit is not immediate). A nominated bank that has honoured or negotiated a complying presentation and forwarded the documents to the issuing bank is entitled to reimbursement from the issuing bank under UCP 600 art.7(c).<sup>1580</sup> In *Société Générale SA v Saad Trading*,<sup>1581</sup> Teare J held that (i) if the documents forwarded to the issuing bank are not compliant, the issuing bank is not obliged to reimburse the confirming bank under art.7(c) (and that the issuing bank is not bound by the view of the confirming bank that the documents are compliant)<sup>1582</sup>; and (ii) under art.7(c) the documents to be forwarded to the issuing bank must

be the documents presented to the confirming bank under the credit (discretion on the part of the confirming bank as to which documents to forward would be contrary to the principle of strict compliance).<sup>1583</sup> In this case the confirming bank did not forward bills of exchange required to be presented under the letter of credit to the issuing bank, but as there was no dispute that the documents presented by the beneficiary to the confirming bank were compliant, the judge held that the issuing bank was not entitled to refuse to reimburse the confirming bank.<sup>1584</sup>

## Branch as bank

- 36-492 One important provision of UCP 600 which is relevant as regards both the confirmation of, and the negotiation of documents tendered under, a documentary credit, is to be found in art.2. It is provided that, for the purposes of the UCP, “branches of a bank in different countries are considered to be separate banks”. It follows that there can be no doubt as regards the effect of the confirmation by the Standard Chartered Bank’s office in Singapore of, for instance, a documentary credit issued by the same bank’s office in London. Notably, the Singapore branch could also negotiate documents tendered by the beneficiary under a documentary credit opened by the London office.

## Anticipatory credits

- 36-493 In exceptional circumstances it may be stipulated both in the contract of sale and between the buyer and the issuing banker that credit facilities should in part be extended so as to assist the seller prior to shipment. The anticipatory (or packing) credit<sup>1585</sup> serves this purpose and in its so-called “red clause” authorises an early advance. Usually the advance is conditional upon the tender by the seller of such documents as the receipts of a warehouse or of a forwarding agent which may relate, as may be agreed, either to the goods themselves or even to the raw materials from which the goods are ultimately to be manufactured.

## Standby credits

- 36-494 A substantial increase in the volume of standby credits has taken place during the last few years. Whilst earlier on this facility was used predominantly in domestic transactions in the United States, it has now developed into an instrument of international trade. The standby credit serves the same function as a performance bond and a first demand guarantee. It is opened in order to protect the beneficiary against losses sustained from the non-performance or from the faulty performance of a contract made between himself and the applicant for the standby credit. Payment is usually due

against the tender of a bill of exchange for the specified amount accompanied by a certificate in which the beneficiary attests the other party's default. Under art.1, UCP 600 is applicable to standby credits. The problems of this type of facility are discussed in detail elsewhere.<sup>1586</sup>

## Transfer and assignment of credits <sup>1587</sup>

36-495 It is important to distinguish between the assignment of a credit and its transfer. There is, it is submitted, nothing to prevent a seller from assigning to a third party his rights under any commercial credit. The seller has a contingent right to claim a liquidated amount and such a demand or claim can be assigned in equity and by way of a statutory assignment.<sup>1588</sup> That the UCP do not have the intention of precluding the assignment of this right is demonstrated by UCP 600 art.39, which reads:

“The fact that a credit is not stated to be transferable shall not affect the right of the beneficiary to assign any proceeds to which it may be or may become entitled under the credit, in accordance with the provisions of the applicable law.”

This article relates only to the assignment of proceeds and not to the right to perform under the credit itself. Where such an assignment takes place, the seller continues to be the party who will tender the documents and the only effect of the assignment is that, when the seller tenders the required documents, payment will be made to the assignee.<sup>1589</sup> When a credit is *transferred*, a third party—known as second beneficiary—is substituted both to the rights and obligations of the seller or part thereof.<sup>1590</sup>

## Article 38 of UCP 600

36-496 The transferability of documentary credits is governed by art.38 of the UCP 600 which reads:

“a. A bank is under no obligation to transfer a credit except to the extent and in the manner expressly consented to by that bank.

b. For the purpose of this article:

Transferable credit means a credit that specifically states it is ‘transferable’. A transferable credit may be made available in whole or in part to another beneficiary ('second beneficiary') at the request of the beneficiary ('first beneficiary'). Transferring bank means a nominated bank that transfers the credit or, in a credit available with any bank, a bank that is specifically authorized by the issuing bank to transfer and that transfers the credit. An issuing bank may be a transferring bank.

Transferred credit means a credit that has been made available by the transferring bank to a second beneficiary.

c. Unless otherwise agreed at the time of transfer, all charges (such as commissions, fees, costs or expenses) incurred in respect of a transfer must be paid by the first beneficiary.

d. A credit may be transferred in part to more than one second beneficiary provided partial drawings or shipments are allowed. A transferred credit cannot be transferred at the request of a second beneficiary to any subsequent beneficiary. The first beneficiary is not considered to be a subsequent beneficiary.

e. Any request for transfer must indicate if and under what conditions amendments may be advised to the second beneficiary. The transferred credit must clearly indicate those conditions.

f. If a credit is transferred to more than one second beneficiary, rejection of an amendment by one or more second beneficiary does not invalidate the acceptance by any other second beneficiary, with respect to which the transferred credit will be amended accordingly. For any second beneficiary that rejected the amendment, the transferred credit will remain unamended.

g. The transferred credit must accurately reflect the terms and conditions of the credit, including confirmation, if any, with the exception of:

- the amount of the credit,
- any unit price stated therein,
- the expiry date,
- the period for presentation, or
- the latest shipment date or given period for shipment,

any or all of which may be reduced or curtailed. The percentage for which insurance cover must be effected may be increased to provide the amount of cover stipulated in the credit or these articles. The name of the first beneficiary may be substituted for that of the applicant in the credit. If the name of the applicant is specifically required by the credit to appear in any document other than the invoice, such requirement must be reflected in the transferred credit.

h. The first beneficiary has the right to substitute its own invoice and draft, if any, for those of a second beneficiary for an amount not in excess of that stipulated in the credit, and upon such substitution the first beneficiary can draw under the credit for the difference, if any, between its invoice and the invoice of a second beneficiary.

i. If the first beneficiary is to present its own invoice and draft, if any, but fails to do so on first demand, or if the invoices presented by the first beneficiary create discrepancies that did not exist in the presentation made by the second beneficiary and the first beneficiary fails to correct them on first demand, the transferring bank has the right to present the documents as received from the second beneficiary to the issuing bank, without further responsibility to the first beneficiary.

j. The first beneficiary may, in its request for transfer, indicate that honour or negotiation is to be effected to a second beneficiary at the place to which the credit has been transferred, up to and including the expiry date of the credit. This is without prejudice to the right of the first beneficiary in accordance with sub-article 38(h).

k. Presentation of documents by or on behalf of a second beneficiary must be made to the transferring bank.”

## Bank's duty to transfer

<sup>36-497</sup> Article 38 of UCP 600 sets out the conditions to be fulfilled for a credit to be transferable. The main requirements are that (a) the transferring bank must expressly consent to the extent and manner of the transfer; and (b) the credit must be specifically state that it is transferable. In *Bank Negara Indonesia 1946 v Lariza (Singapore) Pte Ltd*,<sup>1591</sup> the Privy Council held that, for the purposes of what is now art.38(a), the transferring bank's consent:

“... has to be an express consent made after the request [for transfer] and it has to cover both the extent and manner of the transfer request.”<sup>1592</sup>

This means that a bank may issue a transferable credit and, if it is a credit where no other bank is involved, later refuse to allow the transfer at will. The decision has been rightly criticised for reducing the usefulness of the transferable credit for financing supply transactions.<sup>1593</sup>

## Footnotes

<sup>1518</sup> See, in particular, Benjamin's Sale of Goods, 11th edn (2021), Ch.23 ; R. King, Gutteridge and Megrah's Law of Banker's Commercial Credits, 8th edn (2001) ; R. Jack, A. Malek and D. Quest, Documentary Credits, 4th edn (2009) ; P. Ellinger and D. Neo, The Law and Practice of Documentary Letters of Credit (2010) ; D. Horowitz, Letters of Credit and Demand Guarantees: Defences to Payment (2010) .

<sup>1567</sup> *Urquhart Lindsay & Co Ltd v Eastern Bank Ltd* [1922] 1 K.B. 318, 321–322; *Donald H Scott & Co Ltd v Barclays Bank Ltd* [1923] 2 K.B. 1, 13; *Trans Trust SPRL v Danubian Trading Co Ltd* [1952] 2 Q.B. 297, 304-305; *Midland Bank Ltd v Seymour* [1955] 2 Lloyd's Rep. 147, 166; *Hamzeh Malas & Sons v British Imex Industries Ltd* [1958] 2 Q.B. 127, 129; *McInerny v Lloyds Bank Ltd* [1973] 2 Lloyd's Rep. 389 (affirmed [1974] 1 Lloyd's Rep. 246). For the theoretical difficulties and their solution, see below, paras 36-512 et seq.

- 1568 UCP 600 arts 7(b) and 8(b). cf. *Urquart Lindsay & Co Ltd v Eastern Bank Ltd [1922] 1 K.B. 318, 321–322* (credit irrevocable once seller has acted on it); *Dexters Ltd v Schenker & Co (1923) 14 Ll.L. Rep. 586, 588* (credit irrevocable from time it reaches hands of seller).
- 1569 *Bunge Corp v Vegetable Vitamin Foods (Private) Ltd [1985] 1 Lloyd's Rep. 613* at 617, Neill J.
- 1570 R. King, Gutteridge and Megrah's Law of Bankers' Commercial Credits, 8th edn (2001), para.4-48, n.132.
- 1571 UCP 500 art.8(a).
- 1572 This was also the position in England before the adoption of the UCP: *Cape Asbestos Co Ltd v Lloyds Bank Ltd [1921] W.N. 274*.
- 1573 UCP 500 art.8(b).
- 1574 See above, para.36-486.
- 1575 UCP 600 art.3.
- 1576 A bank asked to advise a credit by the issuing bank or the confirming bank must make sure it does not use language in its communications with the beneficiary that would lead a court to find that the bank had accepted direct liability for payment of the credit: see *Den Danske Bank A/S v Surinam Shipping Ltd [2014] UKPC 10*.
- 1577 UCP 600 art.8(a). It was held in *Fortis Bank SA/NV v Indian Overseas Bank [2009] EWHC 2303 (Comm), [2010] 1 Lloyd's Rep. 227*, that an issuing bank that permitted the advising bank to confirm a letter of credit at the beneficiary's request and expense thereby authorised the bank to add its confirmation to the credit for the purposes of UCP 600 art.2, which provides that a "confirming bank" means "the bank that adds its confirmation to a credit upon the issuing bank's authorisation or request".
- 1578 If the correspondent banker reserves to himself a right of recourse against the seller, his undertaking does not constitute a confirmation: *Wahbe Tamari & Sons Ltd v Colprogeca Sociedade Geral de Fibras, Cafes e Produtos Coloniais Lda [1969] 2 Lloyd's Rep. 18*.
- 1579 As regards the construction of a credit in which it is not clear from the formula used whether it is a straight or negotiation credit, see *European Asian Bank AG v Punjab and Sind Bank (No.2) [1983] 1 W.L.R. 642*, especially 655.
- 1580 In the case of reimbursement of a nominated bank for having "honoured" a complying presentation, the issuing bank's obligation to reimburse arises only where the nominated bank has actually made the payment (*Deutsche Bank AG, London v CIMB Bank Berhad [2017] EWHC 1264 (Comm)* at [38]–[39]). UCP 600 art.7(c), adds that "[r]eimbursement for the amount of a complying presentation under a credit available by acceptance or deferred payment is due at maturity, whether or not the nominated bank prepaid or purchased before maturity". See UCP 600 art.8(c) for a similar undertaking of a confirming bank to reimburse another nominated bank that has honoured or negotiated a complying presentation and forwarded the documents to the confirming bank.
- 1581 *[2011] EWHC 2424 (Comm), [2011] 2 C.L.C. 629*.
- 1582 At [44].
- 1583 At [45]–[46].

- 1584 At [47].
- 1585 e.g. *South African Reserve Bank v Samuel & Co (1931) 40 L.L.R. 291*. Anticipatory credits originated in the South African trade in hides.
- 1586 Benjamin's Sale of Goods, 11th edn (2021), Ch.24, and see the ICC's International Standby Practices, ISP 98. For the use of such letters of credit instead of cash deposits, see *Ludgate Insurance Co Ltd v Citibank [1996] 2 L.R.L.R. 247*.
- 1587 For a fuller account, see Benjamin's Sale of Goods, 11th edn (2021), paras 23-314 et seq. (discussing also the back-to-back credit).
- 1588 See generally Vol.I, paras 22-043 et seq. (note that an undertaking to pay money is not a personal contract).
- 1589 Note that in *Singer & Friedlander v Creditanstalt-Bankverein [1981] Com. L.R. 69* the Commercial Court of Vienna held, accordingly, that the assignee was not entitled to tender in his own name a set of documents procured by the assignor. Whilst the assignee had the right to claim the proceeds from the bank, the documents had to be tendered by him on behalf of the assignor. As regards the priorities as between the rights of the assignee and the bank's claim of a set-off, see *Hongkong and Shanghai Banking Corp v Kloeckner & Co AG [1990] 2 Q.B. 514*; see also *Marathon Electrical Manufacturing Corp v Mashrebank [1997] 2 B.C.L.C. 460, QB*. And note that where a bank takes up documents tendered under a deferred payment credit by way of assignments, equities available against the beneficiary are also available against the bank: *Banco Santander SA v Banque Paribas [1999] 2 All E.R. (Comm) 18; affirmed [2000] Lloyd's Rep. Bank. 165*. But see now UCP 600 arts 7(c), 8(c) and 12(b) (see above, para.36-457). Art.12(b) was intended to shift the risk of fraud back to the issuing bank and reverse the outcome in *Santander*. But art.12(b) only refers to the nominated bank being authorised to "prepay or purchase" a deferred payment undertaking. This may have reversed the outcome in *Santander* so far as the authorisation issue was concerned, but it is far from certain that it would have reversed the position of the nominated bank as assignee taking subject to equities (as to which see *D. Horowitz [2008] J.B.L. 508*).
- 1590 The first beneficiary will usually want to keep information about his transaction with the second beneficiary away from the applicant for fear that the applicant will cut him out of the picture and deal directly with the second beneficiary. In *Jackson v Royal Bank of Scotland [2005] UKHL 3, [2005] 1 W.L.R. 377* at [20]-[24], the House of Lords confirmed that an issuing bank owes the first beneficiary of a transferable letter of credit a duty of confidentiality with regard to this information (breach of duty of confidentiality when issuing bank reveals to applicant the extent of first beneficiary's "mark-up" on price charged).
- 1591 *[1988] A.C. 583*.
- 1592 At 599, per Lord Brandon.
- 1593 *C.M. Schmitthoff [1988] J.B.L. 49, 53*.

## (iii) - The Contract between Seller and Buyer

Chitty on Contracts 34th Ed.

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(iii) - The Contract between Seller and Buyer

### The documentary credit clause

- 36-498 The documentary credit transaction commences when a buyer and a seller agree in their contract of sale that payment should be made through a commercial credit. The buyer is then under an obligation to furnish the seller with a commercial credit. This obligation of the buyer is a condition precedent to the seller's duty to ship the goods. <sup>1594</sup> The buyer must furnish the seller with the type of credit that has been agreed upon in the contract of sale. Thus, if the contract of sale provides for the opening of a confirmed credit, the furnishing of a revocable credit, <sup>1595</sup> or of an irrevocable but unconfirmed credit, <sup>1596</sup> is insufficient. Similarly, if the contract of sale calls for an irrevocable credit to be opened in London, the buyer does not perform his duty by furnishing an irrevocable credit available in another place. <sup>1597</sup> Difficulties arise if the contract of sale does not specify what type of commercial credit should be opened. As a revocable credit does not constitute good security, it may be presumed that the seller and buyer agree that an irrevocable credit should be furnished. In *Giddens v Anglo-African Produce Co Ltd* <sup>1598</sup> the contract of sale provided that a credit was to be "established" with a certain bank. The buyers furnished the sellers with a revocable credit of that bank, whereupon the sellers declined to ship the goods. An action by the buyers against the sellers was dismissed. Bailhache J read the word "established" as describing the word "credit", and explained that the revocable credit furnished by the buyers could not be considered an "established credit". His Lordship thus appears to have treated the term "established credit" as synonymous with "irrevocable credit". The case indicates that if the contract of sale does not specify what type of credit should be opened, the courts tend to construe the contract as stipulating for an irrevocable credit. However, one authority indicates that if the parties fail to

reach an agreement as to the nature of the credit to be furnished, or the documents against which payment is to be made, the contract of sale is incomplete.<sup>1599</sup>

## Time when credit is to be made available

- 36-499 If the contract of sale provides a date for the opening of the credit, the buyer must furnish it by that date.<sup>1600</sup> If the contract of sale requires that a credit be opened immediately, the buyer must have such time as is needed by a person of reasonable diligence to get such a credit established.<sup>1601</sup> A provision that a credit should be furnished within a few weeks, means within a reasonable time, and what constitutes reasonable time depends on the facts of each case.<sup>1602</sup> In most cases a contract of sale does not stipulate a time for the furnishing of the credit, but specifies a date or period for the shipment of the goods. When the contract of sale provides a period during which the goods are to be shipped, the buyer must furnish the commercial credit at the very beginning of this period, so that the seller may, if necessary, be able to ship the goods at its very first date. This rule applies both in the case of contracts c.i.f. and f.o.b.<sup>1603</sup> If the contract of sale specifies an actual date and not a period of shipment, the buyer must furnish the commercial credit within a reasonable time before that date.<sup>1604</sup> The reason for this is that the seller is entitled to have the credit before he actually prepares the goods for shipment. If the obligation of the buyer to open a credit is dependent upon the prior receipt of explicit instructions from the seller, the buyer is not obliged to obtain in the meantime from the banker a letter indicating that the credit will be established as soon as these instructions are received.<sup>1605</sup>

## Defects in opening of credit

- 36-500 It is the duty of the buyer to ensure that the credit when opened satisfies the agreed specifications. In order to escape the danger of repudiation he must cure the credit of any initial defects before it is required; and if he does this the seller cannot afterwards complain.<sup>1606</sup> If the seller ships the goods despite the buyer's failure to open the credit either on the due date or in its appropriate form, the seller may be taken by his conduct to have waived his objections to the breach of contract. In *Panoutsos v Raymond Hadley Corp*<sup>1607</sup> payment had been agreed to be by a confirmed credit but the credit that was opened was in fact revocable. The seller, with notice of this defect, made certain shipments and applied to the buyer for an extension of time for the remaining shipments. Before that time had elapsed, the seller suddenly sought to cancel the contract on the ground that the credit was not in accordance with the original specifications. The Court of Appeal concluded that as the buyer had been led to suppose that the breach of the condition precedent had been waived, he was entitled to reasonable notice to enable him to comply with the condition and that the purported cancellation was unjustified.

## Waiver or variation

36-501 A similar attitude was taken by the Court of Appeal in *Plasticmoda Societa Per Azioni v Davidsons (Manchester) Ltd*<sup>1608</sup> but a difference of opinion occurred in *WJ Alan & Co Ltd v El Nasr Export and Import Co.*<sup>1609</sup> The buyers undertook to furnish a confirmed credit covering the sale on f.o.b. terms of two shipments of coffee at a price of Kenyan shs. 262 per ton. The sellers did not raise any objection when the buyers furnished a confirmed credit expressed in sterling and, in point of fact, began to operate the credit and asked for an extension of the shipping time. After the second shipment but before the presentment of the documents, the pound sterling was devalued; the value of the Kenyan currency remained unaltered. The sellers obtained payment under the confirmed credit and then sued the buyers for the difference between the amount paid and the amount in Kenyan currency for which the credit ought to have been opened. The Court of Appeal held that the sellers were not entitled to recover. Lord Denning MR said:

“... the sellers, by their conduct, waived the right to have payment by means of a letter of credit in Kenyan currency and accepted instead a letter of credit in sterling.”<sup>1610</sup>

He emphasised that a person is entitled to rely on the waiver although no consideration has moved from him and although he has not sustained any detriment by acting on it. Megaw LJ based his concurring judgment on a different ground. In his view the consequence of the acceptance of the sterling credit by the sellers was “that the original term of the contract of sale as to the money of account was varied from Kenyan currency to sterling”.<sup>1611</sup> He conceded that if there were no variation of the contract, the buyers would still be entitled to succeed on the ground of waiver. But he thought that this principle would have a more suitable scope of application in cases involving a number of shipments. A similar view was expressed by Stephenson LJ, who doubted whether the waiver doctrine would apply in cases where the buyer had not altered his position to his detriment.

## Default by banker

36-502 As it is agreed in the contract of sale that payment should be made by the furnishing of a commercial credit, the seller has to claim payment from the bank in the first instance and only on the bank’s default from the buyer.<sup>1612</sup> The buyer’s obligation to pay the price of the goods is not absolutely discharged by the opening of the credit, and that upon the banker’s default the seller can claim payment from the buyer.<sup>1613</sup> In *Saffron v Société Minière Cafrika*<sup>1614</sup> the High Court of Australia suggested that while this principle applies in the case of revocable and irrevocable but unconfirmed credits, the opposite is true in the case of a confirmed credit. It is, however, difficult

to see why the furnishing of a confirmed credit should discharge the buyer. The only difference between a “confirmed” and an “irrevocable but unconfirmed” credit is that in the former the seller obtains a promise of both the issuing and the correspondent banker whilst in the latter he obtains only one promise, i.e. that of the issuing banker. It is submitted that the correct view is that the opening of a commercial credit (whether confirmed or unconfirmed) does not, in itself, discharge the buyer.<sup>1615</sup>

## Default after acceptance of draft

36-503 Authorities indicate, further, that even if the banker accepts a draft drawn under the commercial credit, the buyer is not discharged; if the banker subsequently dishonours the draft by non-payment, the seller is entitled to claim payment from the buyer.<sup>1616</sup> However, in order to save the buyer from having to pay twice, the courts will release him from any obligation assumed by him towards the defaulting issuing banker. In *Sale Continuation Ltd v Austin Taylor & Co Ltd*<sup>1617</sup> the defendants, as selling agents, contracted in London for the sale of timber by Malaysian principals to a Belgian buyer. The defendants, who for all practical purposes assumed the position of a buyer vis-à-vis the Malaysian sellers, instructed the plaintiffs, a firm of merchant bankers, to furnish the sellers with an irrevocable credit to be confirmed by a correspondent banker in Malaysia. In the application form the defendants promised to provide funds as soon as the plaintiffs should receive advice about the negotiation of the sellers' draft by the correspondent banker in Malaysia. A draft drawn by the sellers under the credit and accompanied by the required documents was, in due course, negotiated in Malaysia and accepted by the plaintiffs in London. Subsequently, but before payment of the draft, the documents were released by the plaintiffs to the defendants under a trust receipt, in which the defendants agreed to hold the documents and proceeds as trustees of the plaintiffs. Shortly afterwards the plaintiffs stopped payment and it was clear that they would dishonour the draft of the Malaysian sellers. The defendants thereupon refused to remit the price of the goods, paid to them by the Belgian buyer, to the plaintiffs, paying the amount due directly to the Malaysian sellers. An action brought by the receiver of the plaintiffs was dismissed. Paull J held that the plaintiffs were under an obligation to honour the draft drawn by the Malaysian sellers under the commercial credit. By entering into a voluntary liquidation, the plaintiffs had evinced an intention not to fulfil this obligation and the defendants were, thereupon, discharged from their obligation to provide funds for meeting the plaintiffs' acceptance of the draft of the Malaysian sellers. When this draft was dishonoured by the plaintiffs, the defendants became entitled to be released from their obligations under the trust receipt and to pay the price directly to the Malaysian sellers.

## Default after remittance of funds

36-504

It remains to be considered who should sustain the loss if the buyer has paid the amount of the credit to the issuing banker, but the latter fails before making payment to the seller, e.g. after the acceptance of a draft drawn under the credit but before it is honoured. It has been held that in such a case the buyer is not entitled to claim that he has performed his entire bargain by furnishing the required letter of credit and by remitting to the banker the funds necessary for making payment. He is not discharged from his duty to pay the price to the seller, because the buyer promises “*to pay* by letter of credit not to provide by a letter of credit a source of payment which [does] not pay”.<sup>1618</sup> Any damages that may be recoverable against the buyer in the event of the defalcation of the banker will be for non-payment of money. If, which has been doubted,<sup>1619</sup> the law rigidly limits those damages to the amount of the money due, together with such interest as may be due<sup>1620</sup> or as the court may award,<sup>1621</sup> the limitation will apply, provided that the credit has been opened. Damages for the failure of the buyer to open the credit are wider in extent, and embrace any loss to the seller that was at the time of the contract reasonably foreseeable by both parties as the probable consequence of the breach.<sup>1622</sup>

## Seller's rights where documents are faulty

- 36-505 What is the seller's position if the bank has lawfully rejected documents tendered under the documentary credit as it found them to contain discrepancies? It seems obvious that, if despite the bank's rejection of the documents, the buyer accepts the goods, he is bound to pay the price. The buyer cannot possibly retain the goods but claim that the bank's right to reject the documents discharges him from his duty to settle the price. The position is more difficult if the buyer uses the bank's rejection of the documents as a ground for the rejection of the goods. In *Shamsher Jute Mills v Sethia (London)*<sup>1623</sup> Bingham J held that as the seller's inability to obtain the amount of the documentary credit was occasioned by his failure to tender a proper set of documents, he was unable to enforce the contract of sale. His Lordship, thus, treated the seller's failure to bring himself within the terms of the documentary credit as a breach of his duties under the contract of sale. But as the contract of sale and the documentary are deemed to be autonomous of, and unqualified by, each other, it is perhaps arguable that the seller's inability to recover under the documentary credit, due to a formality concerning the regularity of the documents, need not necessarily bar him from seeking a remedy under the contract of sale. The buyer's breach could, for instance, be seen in his refusal to instruct the bank to accept the documents despite the discrepancies. This argument, which would appear not to have been raised in the instant case, derives support from the fact that the opening of the documentary credit does not, in itself, constitute an unconditional discharge of the buyer's duty to pay the price.<sup>1624</sup> That the mutual rights of the seller and buyer are not abrogated by the opening of the credit is demonstrated by *Famouri v Dialcord Ltd*,<sup>1625</sup> in which it was held that the buyer would be entitled to sue the seller in deceit or in breach of contract where it turned out that documents were false or forged.

## Footnotes

- 1518 See, in particular, Benjamin's Sale of Goods, 11th edn (2021), Ch.23 ; R. King, Gutteridge and Megrah's Law of Banker's Commercial Credits, 8th edn (2001) ; R. Jack, A. Malek and D. Quest, Documentary Credits, 4th edn (2009) ; P. Ellinger and D. Neo, The Law and Practice of Documentary Letters of Credit (2010) ; D. Horowitz, Letters of Credit and Demand Guarantees: Defences to Payment (2010) .
- 1594 *Dix v Grainger* (1922) 10 *Ll.L. Rep.* 496, 497; *Garcia v Page & Co Ltd* (1936) 55 *Ll.L. Rep.* 391, 392; *Trans Trust SPRL v Danubian Trading Co Ltd* [1952] 2 *Q.B.* 297, 304; *Lindsay & Co Ltd v Cook* [1953] 1 *Lloyd's Rep.* 328, 335; *Soproma SpA v Marine and Animal By-Products Corp* [1966] 1 *Lloyd's Rep.* 367. Provision of a letter of credit is a condition precedent to any obligation on the part of the seller to perform any aspect of the loading operation which is the seller's responsibility: *Kronos Worldwide Ltd v Sempra Oil Trading SARL* [2004] EWCA Civ 3, [2004] C.L.C. 136 at [19], per Mance LJ. In some cases the contract of sale may impose on the seller an obligation precedent to the buyer's duty to furnish a credit: *Knotz v Fairclough, Dodd & Jones Ltd* [1952] 1 *Lloyd's Rep.* 226. And see *Transpetrol Ltd v Transol Olieprodukten Nederland BV* [1989] 1 *Lloyd's Rep.* 309, especially at 310–311 where Phillips J treated a nonsensical condition precedent as irrelevant. A buyer who fails to open a credit may be able to defend the seller's claim for damages on the ground that it would have been illegal to have opened the credit: see *Soeximex SAS v Agrocorp International Pte Ltd* [2011] EWHC 2743 (Comm).
- 1595 *Panoutsos v Raymond Hadley Corp* [1917] 2 *K.B.* 473.
- 1596 *Soproma SpA v Marine and Animal By-Products Corp* [1966] 1 *Lloyd's Rep.* 367, 386. The credit must conform not only in form but also in substance to the type specified in the contract of sale. Thus, where a confirmed credit is required, the buyer does not discharge his duty by furnishing a credit in which the correspondent banker purports to give a confirmation but at the same time reserves a right of recourse: *Wahbe Tamari & Sons Ltd v Colprogeca Sociedade Geral de Fibras, Cafes e Produtos Coloniais Lda.* [1969] 2 *Lloyd's Rep.* 18, 21.
- 1597 *Furst & Co v WE Fischer Ltd* [1960] 2 *Lloyd's Rep.* 340 and see *H & JM Bennett Europe Ltd v Angrexco Co Ltd Unreported* 6 April 1990, suggesting that the buyer is in breach of the contract of sale if he seeks to include onerous terms in the credit. (1923) 14 *Ll. L. Rep.* 230.
- 1599 *Schijveschuurder v Canon (Export) Ltd* [1952] 2 *Lloyd's Rep.* 196.
- 1600 As regards the construction of an ambiguous clause, see *Sohio Supply Co v Gatoil (USA) Inc* [1989] 1 *Lloyd's Rep.* 588, 591, CA.
- 1601 *Garcia v Page & Co Ltd* (1936) 55 *Ll.L. Rep.* 391, 392.
- 1602 *Etablissements Chainbaux SARL v Harbormaster Ltd* [1955] 1 *Lloyd's Rep.* 303.

- 1603 As regards contracts c.i.f., see *Pavia & Co SpA v Thurmann-Nielsen* [1952] 2 Q.B. 84, 88–89; but cf. *Sinason-Teicher Inter-American Grain Corp v Oilcakes and Oilseeds Trading Co Ltd* [1954] 1 W.L.R. 1394, 1400 which suggests that the credit should be opened at a reasonable time before the commencement of the shipping period. As regards contracts f.o.b., see *Ian Stach Ltd v Baker Bosley Ltd* [1958] 2 Q.B. 130; *Glencore Grain Rotterdam BV v Lebanese Organisation for International Commerce* [1997] 2 Lloyd's Rep. 386; *Kolmar Group AG v Traxpo Enterprises Pvt Ltd* [2010] EWHC 113 (Comm), [2010] 2 Lloyd's Rep. 653.
- 1604 *Plasticmoda Societa per Azioni v Davidsons (Manchester) Ltd* [1952] 1 Lloyd's Rep. 527, 538.
- 1605 *Nicolene Ltd v Simmonds* [1952] 2 Lloyd's Rep. 419; affirmed [1953] 1 Q.B. 543.
- 1606 *Kronman & Co v Steinberger* (1922) 10 Ll.L. Rep. 39.
- 1607 [1917] 2 K.B. 473. See also *Ian Stach Ltd v Baker Bosley Ltd* [1958] 2 Q.B. 130; *Furst & Co v WE Fischer Ltd* [1960] 2 Lloyd's Rep. 340; *Soproma SpA v Marine and Animal By-Products Corp* [1966] 1 Lloyd's Rep. 367.
- 1608 [1952] 1 Lloyd's Rep. 527.
- 1609 [1972] 2 Q.B. 189.
- 1610 [1972] 2 Q.B. 189 at 214. A similar view was taken by Lord Denning in the *Plasticmoda* case, above, at 538. The principle had already a distinguished lineage. Denning LJ traced it back through *Charles Rickards Ltd v Oppenheim* [1950] 1 K.B. 616 to the decision of the House of Lords in *Hughes v Metropolitan Railway Co* (1877) 2 App. Cas. 439.
- 1611 [1972] 2 Q.B. at 217. See also *Maran Road Saw Mill v Austin Taylor & Co Ltd* [1975] 1 Lloyd's Rep. 156.
- 1612 *Soproma SpA v Marine and Animal By-Products Corp* [1966] 1 Lloyd's Rep. 367, 385–386.
- 1613 *WJ Alan & Co v El Nasr Export and Import Co* [1972] 2 Q.B. 189 at 212. See also *Newman Industries Ltd v Indo-British Industries Ltd* [1956] 2 Lloyd's Rep. 219, 236, reversed on a different point: [1957] 1 Lloyd's Rep. 211; *Soproma SpA v Marine and Animal By-Products Corp*, above.
- 1614 (1958) 100 C.L.R. 231, especially at 243–244.
- 1615 So held by Lord Denning MR in *WJ Alan & Co Ltd v El Nasr Export and Import Co* [1972] 2 Q.B. 189, 212. Megaw and Stephenson LJJ did not express a view on this point: [1972] 2 Q.B. 189 at 218, 220.
- 1616 *Hindley v Tothill, Watson & Co* (1894) 13 N.Z.L.R. 13, 23, and the US cases of *Greenough v Munroe*, 53 F. 2d 362 (1931) at 364–365; *Bank of United States v Seltzer*, 251 N.Y.S. 637, 644 (1931); *Re Canal Bank and Trust Co's Liquidation* (1933) 152 So. 297, 300; and see Uniform Commercial Code s.5-117.
- 1617 [1968] 2 Q.B. 849 following *Bank of United States v Seltzer*, above. As regards trust receipts, see below, paras 36–554 et seq.
- 1618 *Maran Road Saw Mill v Austin Taylor Co & Ltd* [1975] 1 Lloyd's Rep. 156, 159 noted (1977) 40 M.L.R. 91. See also *ED & F Man Ltd v Nigerian Sweets and Confectionary Co Ltd* [1972] 2 Lloyd's Rep. 50, in which the seller was allowed to recover payment

- from the buyer although the issuing bank was nominated in the contract of sale. See Benjamin's Sale of Goods, 11th edn (2021), para.23-303.
- 1619      *Trans Trust SPRL v Danubian Trading Co Ltd [1952] 2 Q.B. 297, 306, 307.*
- 1620      Late Payment of Commercial Debts (Interest) Act 1998; see above, Vol.I, paras 29-199 et seq., 29-291 et seq., 29-295 et seq.
- 1621      In pursuance of Senior Courts Act 1981 s.35A.
- 1622      On the basis of *Hadley v Baxendale (1854) 9 Exch. 341*; see *Trans Trust SPRL v Danubian Trading Co Ltd [1952] 2 Q.B. 297*; and *Ian Stach Ltd v Baker Bosley Ltd [1958] 2 Q.B. 130*.
- 1623      *[1987] 1 Lloyd's Rep. 388.*
- 1624      Above, para.36-502.
- 1625      *(1983) 13 New L.J. 153.*

## **(iv) - The Relationship of Issuing Banker and Buyer**

**Chitty on Contracts 34th Ed.**

**Consolidated Mainwork Incorporating First Supplement**

**Volume II - Specific Contracts**

**Chapter 36 - Bills of Exchange and Banking**

**Section 2. - Aspects of Banking Law**

**(i) - Bankers' Commercial Credits** <sup>1518</sup>

**(iv) - The Relationship of Issuing Banker and Buyer**

### **The application form**

- 36-506 Pursuant to the contract of sale the buyer, in order to procure the issue of the credit, applies to a local banker setting out his requirements. This is usually made upon a standard "application form" provided by the banker and if accepted the details there recorded represent the limits of his authority. The buyer should specify how the credit is to be advised, e.g. by teletransmission, airmail or courier, the duration, extent and revocability or irrevocability of the credit; details of the manner in which shipment and insurance is to be effected; an exact description of the goods; a list of the documents against which the banker is to make payment and the name of the person to whom or to whose order the bill of lading should be addressed. If the seller has nominated a correspondent banker, the issuing banker should be so instructed, for the credit may otherwise be issued directly to the seller or facilities be arranged through channels that may prove unacceptable. The standard form upon which application is made will ordinarily contain a clause entitling the issuing banker to retain the shipping documents as security pending reimbursement by the buyer, and sometimes an acknowledgment that if before reimbursement delivery is made to the buyer of either documents or goods in connection with which the credit is to be issued, the buyer will thereupon execute a trust receipt. Once the extent of the commission and the manner of reimbursement have been agreed the issuing banker will open the credit and thereby enter into separate relations with the seller.
- 36-507 The relations between the buyer and the issuing banker depend solely on the terms of the contract between them and are not affected by rights or obligations which either of them has against or owes to other parties. <sup>1626</sup> Thus, if the banker, at the instruction of the buyer, issues an irrevocable credit,

then despite any dispute that the buyer may thereafter have with the seller under the contract of sale, the buyer cannot of his own will compel the banker to cancel the credit.<sup>1627</sup> The application form, having been accepted by the banker, is not only final but must be rigidly observed. Whether the terms on which the banker is instructed to make payment may seem reasonable or unreasonable, and whether or not they stem from the contract of sale, the banker's right to reimbursement depends upon a strict and not a liberal interpretation.<sup>1628</sup> However, if the buyer's instructions are ambiguous, the issuing bank is entitled to reimbursement as long as he gives the instructions a reasonable interpretation and acts accordingly.<sup>1629</sup> This principle applies notwithstanding that the relationship between the buyer—the applicant for the credit—and the issuing bank is not purely one of principal and agent.<sup>1630</sup> Naturally, the bank cannot invoke this principle if the ambiguity resulted from a shortcoming in the drafting of a clause in the bank's standard form. Moreover, even where the bank—as agent—is entitled to invoke the principle under discussion, it must show that it has given the ambiguous instruction a reasonable construction.<sup>1631</sup>

## Strict adherence to mandate

- 36-508 If the buyer has stipulated the form of any document against which payment is to be made, the banker must at his peril insist upon complete compliance.

“There is no room for documents which are almost the same, or which will do just as well. Business could not proceed securely on any other lines.”<sup>1632</sup>

Applying this principle to the circumstances before the Court of Appeal in *Rayner & Co Ltd v Hambros Bank Ltd*, Goddard LJ remarked<sup>1633</sup>:

“... if the bank wants to be reimbursed by the customer, it must show that it has performed its mandate. If I employ someone at a remuneration to pay money for me on getting a receipt in a particular form, and he pays the money without getting the receipt in that form, he has not carried out the duty which I imposed upon him. It would be no answer for him to say: ‘But I got a receipt which in fact gives you all reasonable protection.’ My answer to that would be: ‘You are not concerned with the protection which you have given me. You are concerned to carry out the orders which I have given you.’”

However, if the buyer, after having come to know of the breach of authority of the issuing banker, adopts his act, he is considered to have ratified the act of the issuing banker and is obliged to reimburse him despite the breach.<sup>1634</sup>

## Deposit of security

- 36-509 The issuing banker may require funds or securities to be deposited by the buyer before any bills drawn under the credit should fall due. Provided there is sufficient evidence of appropriation, <sup>1635</sup> funds <sup>1636</sup> or securities <sup>1637</sup> so deposited will not go in satisfaction of general creditors of the banker in the event of failure prior to payment but are recoverable in full by the buyer. <sup>1638</sup> The issuing bank may be well advised to obtain security from the buyer (applicant) because the orthodox view is that, as the issuing bank's undertaking under a letter of credit involves a primary obligation and not a secondary one, it does not acquire a right of subrogation to the underlying commercial relationship between buyer and seller (beneficiary). <sup>1639</sup>

## Exemption clauses

- 36-510 Most application forms include clauses exempting the banker from responsibility for matters which are not in his control. In fact, even in the absence of an express exemption clause, an issuing banker is not responsible if it turns out that an apparently regular document, accepted by him from the seller, has been forged or obtained by fraud. <sup>1640</sup> At present, most exemption clauses are set out in UCP 600, which, as mentioned above, are incorporated in the contract between the buyer and the issuing banker. Article 14(a) specifies that bankers must examine documents tendered under a documentary credit to ascertain that they appear on their face to be in accordance with the terms of the credit; documents which appear on their face to be inconsistent with one another will be considered as non-complying. <sup>1641</sup> It is clear that the banker is not responsible if he fails to notice a defect that a prudent inspection would not disclose. Article 5 specifies that the banker is concerned solely with the documents and not with the goods. The issuing banker is, thus, not responsible if, despite the conformity of the documents, the goods are faulty. Article 34 provides that the banker does not assume any responsibility for the genuineness, sufficiency, accuracy and legal effect of any document. Article 35 provides that the banker assumes no responsibility for the consequences arising out of the delay or loss in transit of a message as well as for loss arising out of errors in the translation or decoding of messages. Under art.36 the banker is not responsible for any loss occurring due to the interruption of his business by strikes, riots, wars, acts of God and other causes beyond his control. Article 37 provides that if the issuing banker utilises the services of a correspondent banker, he does so at the risk of the buyer and assumes no liability, should the instructions transmitted to the correspondent banker not be carried out. <sup>1642</sup> Under art.37(d), the applicant for the credit—the buyer—is bound and liable to indemnify the banks against all obligations and responsibilities imposed by foreign laws and usages. It is to be doubted that the

application of these articles is affected by the [Unfair Contract Terms Act 1977](#) as the articles appear to satisfy the reasonableness tests laid down in s.11 of the Act.<sup>1643</sup>

## Footnotes

- 1518 See, in particular, Benjamin's Sale of Goods, 11th edn (2021), Ch.23 ; R. King, Gutteridge and Megrah's Law of Banker's Commercial Credits, 8th edn (2001) ; R. Jack, A. Malek and D. Quest, Documentary Credits, 4th edn (2009) ; P. Ellinger and D. Neo, The Law and Practice of Documentary Letters of Credit (2010) ; D. Horowitz, Letters of Credit and Demand Guarantees: Defences to Payment (2010).
- 1626 See *Societe Generale SA v Saad Trading [2011] EWHC 2424 (Comm), [2011] 2 C.L.C. 629* at [33], where Teare J confirmed that the relationship between the applicant and the issuing bank was to be found in the facility agreement between them, and in the particular instructions, or mandate, which the former gave the latter to issue the credit, and held that the issuing bank was entitled to an indemnity from the applicant under the terms of the facility agreement. See also *Petrologic Capital SA v Banque Cantonale de Geneve [2012] EWHC 453 (Comm)* at [52]–[56], where S. Males QC, sitting as a deputy judge of the High Court, held that the applicant for a letter of credit could not rely on the [Contracts \(Right of Third Parties\) Act 1999](#) so as to enforce an English law and exclusive jurisdiction clause contained in the letter of credit itself in an action to prevent the issuing bank from performing its obligations under the credit.
- 1627 *Sovereign Bank of Canada v Belhouse, Dillon & Co (1911) 23 Q.R. (K.B.) 413*. See also *Kingdom of Sweden v New York Trust Co, 96 N.Y.S. 2d 779, 791 (1949)*.
- 1628 *Midland Bank Ltd v Seymour [1955] 2 Lloyd's Rep. 147*.
- 1629 *Midland Bank Ltd v Seymour*, above, at 153, 168. cf. *European Asian Bank AG v Punjab and Sind Bank (No.2) [1983] 1 W.L.R. 642, 656*, where Goff LJ suggested that where the ambiguity is patent, the bank ought to ask for a clarification; *Cooper v National Westminster Bank Plc [2009] EWHC 3035 (QB), [2010] 1 Lloyd's Rep. 490* at [63].
- 1630 *Credit Agricole Indosuez v Muslim Commercial Bank Ltd [2000] 1 Lloyd's Rep. 275*.
- 1631 *Patel v Standard Chartered Bank [2001] Lloyd's Rep. Bank. 229*.
- 1632 *Equitable Trust Co of New York v Dawson Partners Ltd (1927) 27 Ll.L. Rep. 49, 52; South African Reserve Bank v Samuel & Co (1931) 40 Ll.L. Rep. 291*.
- 1633 [1943] K.B. 37, 43. See also UCP 600 art.14.
- 1634 *Midland Bank Ltd v Seymour [1955] 2 Lloyd's Rep. 147*. See also *Swotbooks.com Ltd v Royal Bank of Scotland Plc [2011] EWHC 2025 (QB)*, [40]–[48] (held no ratification).
- 1635 The burden of proof is not easily discharged: see *Re Barned's Banking Co Ltd, Massey's Case (1870) 39 L.J. Ch. 635*.
- 1636 *Farley v Turner (1857) 26 L.J. Ch. 710*.
- 1637 *Jombart v Woollett (1837) 2 My. & C. 389*.
- 1638 See also S. Connolly, "Bank recovery and resolution: the case of contingent letters of credit under bail-in" [2016] *J.I.B.F.L.* 78.

- 1639 See *A. Ward and G. McCormack*, “*Subrogation and Bankers’ Autonomous Undertakings*” (2000) 116 *L.Q.R.* 121. The issue is touched upon, but without decision, by Vos J in *Ibrahim v Barclays Bank Plc [2011] EWHC 1897 (Ch), [2011] 2 C.L.C. 589* at [136]–[137]: there were no issues about subrogation on appeal, although Lewison LJ stated (following citation of McCormack and Ward at 136) that it was “received wisdom that when an issuing bank honours a letter of credit its payment will discharge the obligation that gave rise to the need for the letter of credit” (*[2012] EWCA Civ 640, [2012] 2 B.C.L.C. 1* at [59]).
- 1640 *Woods v Thiedemann* (1862) 1 *H. & C.* 478; *Ulster Bank v Synnott* (1871) 5 *Ir. R. Eq.* 595; *Basse and Selve v Bank of Australasia* (1904) 90 *L.T.* 618; *Guaranty Trust Co of New York v Hannay & Co* [1918] 2 *K.B.* 623.
- 1641 UCP 600 art.14(d). And see *National Bank of Egypt v Hannevig’s Bank Ltd* (1919) 1 *Ll.L. Rep.* 69; Legal Decisions Affecting Bankers, Vol.III, pp.211, 213. See also *British Imex Industries Ltd v Midland Bank Ltd* [1958] 1 *Q.B.* 542, 552; *Singh & Co v Banque de L’Indochine* [1974] 1 *Lloyd’s Rep.* 56, 60–61; affirmed [1974] 2 *Lloyd’s Rep.* 1.
- 1642 As regards the position where the UCP do not apply, see *Equitable Trust Co of New York v Dawson Partners Ltd* (1926) 27 *Ll. L. Rep.* 49. But art.37 does not preclude the buyer from disputing the regularity of documents taken up by the issuer’s correspondent: *Credit Agricole Indosuez v Generale Bank (No.2)* [2000] 1 *Lloyd’s Rep.* 123 (distinguished in *Societe Generale SA v Saad Trading* [2011] *EWHC 2424 (Comm)*, [2011] 2 *C.L.C.* 629 at [49]–[53], on basis that documents when presented were compliant and not discrepant, so issuing bank could rely on reimbursement clause against applicant on basis that it had mistakenly indemnified confirming bank “in good faith”).
- 1643 See generally Vol.I, paras 17-069 et seq., especially para.17-099.

## **(v) - The Relationship of Banker and Seller**

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### **Nature and form**

- 36-511 In the case of a revocable credit the seller does not obtain a binding promise of the issuing banker, and the credit may be revoked at any time prior to the acceptance of documents by the issuing banker. An irrevocable credit, on the other hand, creates a legally binding contract between the banker and the seller. If the credit is irrevocable but unconfirmed the contract is between the seller and the issuing banker. If the credit is both irrevocable and confirmed, the correspondent banker is jointly bound with the issuing banker towards the seller.<sup>1644</sup> A commercial credit, whether revocable or irrevocable, need not be in any specified form, but, in fact, most current forms follow a uniform pattern. It is at the outset both dated and numbered, and clearly sets out its duration and the amount of cover provided. It is addressed to the seller and states that, on the instructions of the buyer, the banker authorises the seller to draw bills of exchange up to the stated amount. There then follows the list of the documents which are to accompany the bill upon presentation and to be surrendered upon acceptance or payment. The letter of credit specifies the manner in which the documents are to be made out and the shipments to which they are to relate. The letter concludes with the undertaking to honour all bills of exchange drawn within the terms of the credit, provided that they bear on their face the number and date of the credit to enable identification.

### **Theoretical analysis**

- 36-512

UCP 600 provides that the issuing bank becomes irrevocably bound to honour the credit as of the time it issues the credit,<sup>1645</sup> and that the confirming bank becomes irrevocably bound to honour or negotiate the credit as of the time it adds its confirmation to the credit.<sup>1646</sup> Each bank becomes contractually bound to the seller at these respective times. But it is far from clear as to what, if any, consideration is provided by the seller for these contractual promises. There have been a number of theories advanced to find the necessary consideration. It has been argued, for example, that consideration for the credit is the seller's agreement to present shipping documents to the bank or, alternatively, that the credit becomes binding as a result of the seller's reliance on it. However, none of these theories stand up to close scrutiny.<sup>1647</sup> There are flaws in the two theories highlighted above.<sup>1648</sup> First, the seller makes no promise to the bank to produce the shipping documents. Secondly, the idea that reliance by the seller makes the bank's promise binding is irreconcilable with the commercial understanding of the credit as irrevocable from the moment that it is issued. The enactment of the *Contracts (Rights of Third Parties) Act 1999*, which allows third parties (the beneficiary under the credit) to enforce rights conferred on them in other peoples' contracts (the contract between the applicant and the issuing bank), does not take the matter any further. Article 4(a) of UCP 600 provides that the beneficiary cannot avail himself of the contract between the banks, or between the applicant and the issuing bank, and this would effectively exclude the operation of the Act.<sup>1649</sup>

## Mercantile usage

36-513 The best explanation of the legal nature of an irrevocable credit is based on regarding it as established by a mercantile usage recognised all over the world. This explanation derives support from an observation of Jenkins LJ in *Hamzeh Malas & Sons v British Imex Industries Ltd*<sup>1650</sup>:

“[T]he opening of a confirmed letter of credit constitutes a bargain between the banker and the vendor of the goods, which imposes upon the banker an absolute obligation to pay ... An elaborate commercial system has been built up on the footing that bankers' confirmed credits are of that character, and, in my judgment, it would be wrong for this court in the present case to interfere with that established practice.”<sup>1651</sup>

This decision further intimates that arguments assailing the validity of irrevocable credits will meet with little sympathy from the courts.<sup>1652</sup>

## The autonomy of an irrevocable credit

36-514

An irrevocable credit constitutes an independent contract between the issuing banker and the seller, and is not qualified by or subject to the terms of the contract of sale, made between the buyer and the seller,<sup>1653</sup> or the contract between the issuing banker and the buyer.<sup>1654</sup> It can be enforced by the seller even if the issuer is a foreign central bank. A plea of sovereignty on such an issuer's part is untenable.<sup>1655</sup> The autonomy of the issuing bank's undertaking is most clearly declared in art.4(a) of the UCP, but it has been well established in England for several decades.<sup>1656</sup> Thus, the buyer cannot enjoin the issuing bank from honouring a draft presented by the seller and accompanied by the required documents merely because the seller has failed to perform his contract with the buyer, e.g. by supplying goods of an inferior quality.<sup>1657</sup> The autonomy of the bank's undertaking is considered to be of such importance that an English court will be prepared to uphold it, provided the credit is available in England, even if a foreign court has granted the buyer an injunction.<sup>1658</sup> There are only two exceptions to the autonomy doctrine.<sup>1659</sup>

## Illegality

36-515 The first arises in cases in which the transaction is tainted with illegality. Thus, if a letter of credit infringes the exchange control provisions of a country which is a member of the International Monetary Fund Treaty, an English court would refuse to enforce the credit in view of the Bretton-Woods Agreement Order in Council 1946.<sup>1660</sup> But the respective contravention does not necessarily vitiate the letter of credit *in toto*. The court will enforce payment of any part of the amount of the credit which is unaffected by and hence lawfully due notwithstanding the exchange control contravention.<sup>1661</sup> The illegality exception to the autonomy doctrine is not confined to cases where payment of the credit infringes exchange control provisions.<sup>1662</sup> In *Group Josi Re v Walbrook Insurance Co Ltd*,<sup>1663</sup> Staughton LJ expressed the view that a court would restrain a bank from paying under a letter of credit that was being used as a means of payment of an illegal arms sale, at least where the illegality was clearly established and known to the bank. More recently, in *Mahonia Ltd v JP Morgan Chase Bank*,<sup>1664</sup> Colman J refused to strike out an illegality defence to enforcement of a letter of credit where the underlying contract was alleged to have been made for an illegal purpose, namely the contravention of US Securities law.

## The fraud rule

36-516 The most important exception to the autonomy doctrine is where there is fraud on the part of the seller (the beneficiary of the credit), or his agent, in relation to the presentation of the documents.<sup>1665</sup> In *United City Merchants (Investments) Ltd v Royal Bank of Canada, (The American Accord)*, Lord Diplock said that the fraud exception arose<sup>1666</sup>:

“... where the seller, for the purposes of drawing on the credit, fraudulently presents to the confirming bank documents that contain, expressly or by implication, material representations of fact that to his knowledge are untrue.”

However, if the fraud is that of an independent third party, as it was in the *United City Merchants* case, where the fraudulent ante-dating of a bill of lading was carried out by the loading brokers—who were the carrier’s, and not the seller’s, agents—then the seller can still enforce the credit, so long as he is unaware of the fraud at the time of presentation. Moreover, there is no separate exception to the autonomy doctrine that applies simply because the tendered document is a “nullity” in the sense that it is a forgery or executed without the authority of the person by whom it purports to be issued.<sup>1667</sup>

## Obtaining an injunction against a bank

- 36-517 Even where the alleged fraud can be brought home to the seller, an injunction will be granted only if there is clear proof to support that it has taken place.<sup>1668</sup> A court will not readily intervene to stop payment under an irrevocable letter of credit because, as Kerr J famously stated in *RD Harbottle (Mercantile) Ltd v National Westminster Bank Ltd*, irrevocable obligations assumed by banks are the life-blood of international commerce.<sup>1669</sup> An injunction should only be granted to restrain a bank from paying under a letter of credit where the fraud exception applies and the bank is aware of the fraud. Evidence must be clear, both as to the fact of fraud and as to the bank’s knowledge.<sup>1670</sup> In *United Trading Corp v Allied Arab Bank Ltd*, Ackner LJ stated that, in order to obtain an interlocutory injunction, the claimant had to establish that it is seriously arguable that, on the material available, “the only realistic inference is that the [beneficiary] could not honestly have believed in the validity of its demands on the performance bonds”.<sup>1671</sup> This test sets a lower standard of proof at the pre-trial hearing than at the full trial, but it was later stressed by Rix J, in *Czarnikow-Rionda Sugar Trading Inc v Standard Bank London Ltd*, that this places on the court “an additional requirement to be careful in its discretion not to upset what is in effect a strong presumption in favour of the fulfilment of the independent banking commitments”.<sup>1672</sup> The approach taken by Rix J was later endorsed Mance LJ in *Solo Industries UK Ltd v Canara Bank*.<sup>1673</sup> In *Alternative Power Solution Ltd v Central Electricity Board*, Lord Clarke, delivering the judgment of the Board of the Privy Council, agreed with the reasoning of Rix J and Mance LJ, and continued<sup>1674</sup>:

“It recognises that the test cannot be quite the same as at a trial and that the test at the interlocutory stage can properly be described as Ackner LJ described it, namely whether it is seriously arguable that, on the material available, ‘the only realistic inference is that [the beneficiary] could not honestly have believed in the validity of its demands on the

performance bonds' and that the bank was aware of the fact. In the view of the Board the expression 'seriously arguable' is intended to be a significantly more stringent test than good arguable case, let alone serious issue to be tried. As Mance LJ put it, a case of established fraud known to the bank, is, by its nature, one which, if it is good at all, must be capable of being established with clarity at the interlocutory stage. In summary, the Board concludes that it must be clearly established at the interlocutory stage that the only realistic inference is (a) that the beneficiary could not honestly have believed in the validity of its demands under the letter of credit and (b) that the bank was aware of the fraud."

The Board also accepted that<sup>1675</sup> :

"... the reasons why reported cases of injunctions being granted (or continued) under the fraud exception are so rare are (a) because it is almost never possible to establish the test for fraud as opposed to a mere possibility of fraud, but also (b) because the balance of convenience will almost always militate against the grant of an injunction."

The Board stated<sup>1676</sup> that it agreed with Kerr J in *RD Harbottle (Mercantile) Ltd v National Westminster Bank*, who said that the balance of convenience issue faced the applicant with an "insuperable difficulty",<sup>1677</sup> and also with Rix J in the *Czarnikow-Rionda* case, who did not regard Kerr J as necessarily saying that it could never be done, but added "that it would of necessity take extraordinary facts to surmount this difficulty".<sup>1678</sup>

## Tender by third party

- 36-518 A direct result of the multi-national character of the documentary credit transaction is that usually the forged documents are tendered to the issuing bank not by the seller, who is the beneficiary of the credit, but by an innocent third party such as a negotiating or discounting bank. In *Discount Records Ltd v Barclays Bank Ltd*<sup>1679</sup> Megarry J held that the fraud principle could not be invoked against such a third party, as a holder in due course of the bill of exchange ought not to be enjoined from enforcing the credit by reason of the seller's fraud. The difficulty with this view is that a bill of exchange drawn under a documentary credit does not bear the issuing bank's acceptance at the time of its tender. For this reason it cannot confer any rights against the bank on the holder thereof. His being a holder in due course would therefore appear to be immaterial. It is true that, in the case of a negotiation credit,<sup>1680</sup> the holder of the bill may claim to be the promisee of the bank's undertaking in the letter of credit. He may therefore seek to enforce this promise rather than the bill of exchange.<sup>1681</sup> But, even so, it is to be doubted that the bank's undertaking involves a promise to accept documents which are forged or fraudulent and hence ineffective. In the case of

a straight credit, in which the bank's promise is addressed to the beneficiary alone, it is even more strongly arguable that the third party should not be regarded as being in a better position than the beneficiary. Undoubtedly, both the beneficiary and a third party such as a negotiating bank are protected against a misuse of the fraud rule by its main limitation which is that, to invoke it, it is necessary to establish the occurrence of forgery or of fraud.<sup>1682</sup> It seems that this principle applies even if the injunction is sought only as against the beneficiary. In *Deutsche Rückversicherung AG v Walbrook Insurance Co Ltd*<sup>1683</sup> Phillips J held that an injunction restraining the beneficiary from making a call under the credit would be granted only to the extent that it was also to be available as an order precluding the bank from making payment.

## Banco Santander

- 36-519 The points just made are echoed in *Banco Santander SA v Bank Paribas*,<sup>1684</sup> which involved a deferred payment credit. A fraud respecting the documents came to light after the acceptance of the tender but before the date on which payment was due. The issuing bank refused to pay whereupon the negotiating bank instituted an action for the amount of the credit relying on its position as the beneficiary's assignee. The Court of Appeal held that the negotiating bank's right was subject to the equities available against the "assignor" and that, accordingly, that bank was not entitled to payment against the fraudulent documents.<sup>1685</sup> But their Lordship indicated that, if the negotiating bank had brought the action in its own rights—that is, as a negotiation bank—the fraud in the documents could not be asserted against it. Naturally, the bank would be entitled to sue in its own name only if the letter of credit sanctioned negotiation or—in other words—constituted a negotiation credit and provided that the "negotiation"<sup>1686</sup> of the documents could be established.

## Restrictions on beneficiary's right to call for payment

- 36-520 In *Sirius International Insurance Corp (Publ) v FAI General Insurance Co Ltd*,  
1687

**U** the Court of Appeal held that the principle of autonomy did not mean that a beneficiary could draw on a letter of credit when he had expressly agreed not to do so unless certain conditions were satisfied and those conditions had not been met. In this case, the restrictions were contained in a separate agreement made between the beneficiary (Sirius) and the applicant (FAI). May LJ stated that:

"… although those restrictions were not terms of the letter of credit, and although the bank would have been obliged and entitled to honour a request to pay which fulfilled its

terms, that does not mean that, as between themselves and FAI, Sirius were entitled to draw on the letter of credit if the express conditions of this underlying agreement were not fulfilled. They were not so entitled.”<sup>1688</sup>

The Court of Appeal was also of the opinion that if draw-down was attempted in these circumstances, a court would be likely to grant an injunction restraining the beneficiary from drawing on the letter of credit in breach of express conditions contained in the underlying agreement. It should be noted that fraud was not alleged against Sirius and so the case did not fall within the fraud exception to the autonomy principle. The Court of Appeal held that an express condition of the separate agreement between the parties had not been met and that Sirius were not entitled to the proceeds of the credit. The House of Lords<sup>1689</sup> reversed that decision on the ground that the condition had been satisfied. Their Lordships found it unnecessary to examine arguments about the autonomy principle.

- 36-521 The *Sirius* case raises important questions about the extent of the autonomy principle. There must be some concern as to how far it undermines the principle and its consequential benefits of commercial certainty. However, the English courts have not shown themselves willing to embrace the wider principle of “unconscionable demand” which has gained judicial support in Singapore.<sup>1690</sup> It is not entirely clear what constitutes unconscionability, although it seems to be something more than unfairness and less than fraud, nor as to the standard of proof required to obtain injunctive relief on this ground.<sup>1691</sup> The uncertainty that this creates is obvious. Nevertheless, there have been dicta in recent English cases which suggests that the previous reluctance to apply a concept of “unconscionability” may not last forever.<sup>1692</sup> The concept might find acceptance in the area of independent guarantees, which merely perform a security function as opposed to being a mode of payment.<sup>1693</sup> In *Simon Carves Ltd v Ensus UK Ltd*,<sup>1694</sup> Akenhead J granted an injunction restraining a beneficiary from seeking payment under an on-demand performance bond on the ground that the issuing bank had a strong case that, as between it and the beneficiary, the bond was null and void pursuant to the terms of the underlying contract. Akenhead J said that:

“... [i]n principle, if the underlying contract, in relation to which the bond has been provided by way of security, clearly and expressly prevents the beneficiary party to the contract from making a demand under the bond, it can be restrained by the Court from making a demand under the bond.”<sup>1695</sup>

Akenhead J was tentatively of the view, although not deciding the issue, that this constituted a second type of exception (the other being fraud) to the general principle that the court will not act to prevent a beneficiary calling on an on-demand bond.<sup>1696</sup> In *Salam Air SAOC v Latam Airlines Group SA*,<sup>1697</sup> where standby letters of credit provided security for payment of rent by the lessee of

aircraft, Foxton J stated (obiter) that the same enhanced merits test as applied to an application for an injunction under the fraud exception against the credit-issuer<sup>1698</sup> also extended to an application to injunct the beneficiary from calling for payment on the ground that pre-conditions to a call on the instrument had not been satisfied.

## Dealings in documents

- 36-522 The principle that the commercial credit is not qualified by the underlying contract of sale is linked with one further important rule. Article 5 of the UCP provides that in commercial credit transactions the parties deal in documents and not in goods. Thus, insofar as the seller tenders all the required documents, the banker is not entitled to reject them on the ground that the goods are not up to contract.<sup>1699</sup>

## Examination of the documents

- 36-523 Banks must examine all tendered documents to determine, on the basis of the documents alone, whether or not the documents appear on their face to constitute a complying presentation, i.e. whether they constitute a presentation in accordance with the terms and conditions of the credit, the applicable provisions of the UCP and international standard banking practice.<sup>1700</sup> Under UCP 600 art.14(b), the issuing bank, the confirming bank and any other nominated bank acting on its nomination (including an advising bank) each has a maximum of five banking days following the day of presentation to determine if the presentation is complying. UCP 500 was differently worded. UCP 500 art.13(b), gave the bank a reasonable time, not to exceed seven banking days, to examine the documents and make the determination. What was a reasonable time could be a matter of some uncertainty, but it could certainly arise in less than seven banking days.<sup>1701</sup> Where the issuing bank, the confirming bank, or a nominated bank acting on its nomination, decides to refuse to honour or negotiate a credit, it must give a single notice to that effect to the presenter, i.e. the beneficiary, bank or other party that makes a presentation of documents under a credit.<sup>1702</sup> UCP 600 art.16(d), provides that the rejection notice must be given by telecommunication or, if that is not possible, by other expeditious means no later than the close of the fifth banking day following the day of presentation.<sup>1703</sup> The net effect of UCP 600 arts 14(b) and 16(d), seems to be that a bank has a maximum of five banking days following presentation of the documents to determine if the presentation is compliant, but that the longer it takes to make its determination, the less time it has available to it to give a notice of rejection to the applicant. If the bank fails to comply with the five (banking) day maximum period, it will not have served a proper notice which satisfies art.16(d) and, because of the effect of UCP 600 art.16(f),<sup>1704</sup> will be precluded from claiming that the documents do not comply with the credit.<sup>1705</sup> To avoid the problems resulting from the need

of making a conclusive decision of whether to accept or reject the documents, UCP 500 gave the bank the option of paying “under reserve” or “against indemnity”.<sup>1706</sup> The option is no longer available under UCP 600, which appears to be due to the bank now having the option to reject the tendered documents pending a waiver of discrepancies from the applicant.<sup>1707</sup>

## Rejection notice

36-524 The notice of rejection must state the discrepancies in respect of which the document is being rejected. There has been some doubt as to whether a bank would be estopped from later raising further discrepancies not identified in the original rejection notice. The position at common law is that, absent special circumstances raising a true estoppel, the bank will not be prevented from relying upon discrepancies which were not listed in the original rejection notice.<sup>1708</sup> But the position was thought to be different under the UCP.<sup>1709</sup> The 1993 revision of the UCP clarified the issue by stating, for the first time, that the notice must specify *all* discrepancies in respect of which the bank refused the documents.<sup>1710</sup> UCP 600 art.16(c)(ii), retains the requirement, although it does so in slightly different language: the bank must give a “single notice” of rejection to the presenter and that notice must state “each discrepancy in respect of which the bank refuses to honour or negotiate”.<sup>1711</sup> If the bank fails to comply with this requirement, or any other requirement of art.16, it is precluded from claiming that the documents do not constitute a complying presentation.<sup>1712</sup> This seems to mean the bank may be precluded from raising a new objection when documents are retendered by the seller having cured the defects identified in the original notice of rejection.<sup>1713</sup>

36-525 Under UCP 500 art.14(d)(i), a bank which refused documents had also to state in its rejection notice whether it was holding the documents at the disposal of, or was returning them to, the presenter. The purpose of this provision was that, as soon as the documents had been rejected, they should be put back in circulation. However, problems arose where a bank served a rejection notice and at the same time approached the applicant for a waiver of the discrepancies, and if such waiver was received released the documents without further notice.<sup>1714</sup> In *Crédit Industriel et Commercial v China Merchants Bank*,<sup>1715</sup> the issuing bank’s notice of rejection was held to be bad where it ended with the words:

“Should the disc[repency] being accepted by the applicant, we shall release the documents to them without further notice to you unless yr instructions to the contrary received prior to our payment. Documents held at yr risk for yr disposal.”

Steel J considered that the conditional nature of the rejection was not saved by the potential for acceptance of contrary instructions prior to payment, particularly where no notice was

to be given.<sup>1716</sup> The message constituted a continuing threat of conversion of the claimant's documents. However, UCP 600 art.16, contains additional options designed to avoid banks sitting on discrepant documents. Under art.16(c)(iii) the rejection notice must state that the bank<sup>1717</sup>:

- “(a)holds the documents pending further instructions from the presenter; or
- (b)holds the documents until it receives a waiver from the applicant and agrees to accept it, and receives further instructions from the presenter prior to agreeing to accept a waiver; or
- (c)is returning the documents; or
- (d)is acting in accordance with instructions previously received from the presenter.”

The bank must act in accordance with the statement contained in the notice with reasonable promptness.<sup>1718</sup>

**36-526** According to UCP 600 art.16(f), if the issuing bank or confirming bank fails to act in accordance with the provisions of art.16, it is precluded from claiming that the documents do not constitute a complying presentation. But the article makes no reference to the position of a nominated bank. However, if a nominated bank is employed by the issuing bank or confirming bank to take up and examine the documents on its behalf, the nominated bank's failure to comply with art.16 will bar the issuing bank or confirming bank from claiming that the documents are not conforming.<sup>1719</sup>

## The banker's recourse against the seller

**36-527** It is doubtful whether a banker, who accepts a faulty tender, has a right of recourse against the seller if the buyer rejects the documents tendered. The question must be considered both from the point of view of the law of negotiable instruments and the general principles of the law of contract. As regards the law of negotiable instruments, it should be borne in mind that the undertaking of the banker may assume one of three forms. First, he may promise to pay cash either when the documents are tendered or at a stipulated deferred date. Secondly, he may promise to accept and pay a bill of exchange drawn on himself by the beneficiary or, if the bill is to be drawn on a third party such as the confirming bank, promise that it would be duly honoured. Thirdly, the issuing banker may promise to negotiate a draft drawn by the seller on the buyer and accompanied by the documents. In the first case the law of negotiable instruments will, obviously, not apply. In the second case, where the banker is the acceptor of the draft and the seller the drawer, the law of negotiable instruments does not confer on the former a right of recourse against the latter. The third case, however, gives rise to problems. The seller here is the drawer and the banker an indorser or holder. Thus, if the draft is dishonoured by the drawee (the buyer), the issuing banker may

claim to have a right of recourse against the seller under ss.43(2) or 47(2) of the Bills of Exchange Act 1882. Moreover, the case of *M.A. Sassoon & Sons Ltd v International Banking Corp*<sup>1720</sup> lays down that the fact that a draft is stated to be drawn under a commercial credit does not necessarily exclude a right of recourse. However, this case did not concern the relationship of issuing banker and seller; it was a case in which a discounting banker sought to claim recourse against the seller, after the dishonour of a draft by the buyer.<sup>1721</sup> The issue is no longer a live one under UCP 600 as art.6(c) provides that a credit must not be issued available by a draft drawn on the applicant (the buyer).<sup>1722</sup>

## Position at common law

- 36-528 In considering whether, in certain circumstances, the general principles of the common law may confer on the banker a right of recourse against the seller, a distinction must be drawn between three types of case. First, the banker may wish to recover an amount paid to the seller, if the tender was affected with fraud. In this type of case the banker should be entitled to claim against the seller in deceit.<sup>1723</sup> Secondly, the banker may wish to reclaim payment from the seller if the buyer fails. It is, however, difficult to see on what principle he may establish such a claim, especially as a commercial credit constitutes a security given by the banker to the seller. Thirdly, the banker may wish to seek recourse to the seller if he has accepted, by mistake, a faulty set of documents tendered by the seller. It is, however, to be doubted whether the banker should be allowed to claim the amount back as money paid under a mistake of fact. In most cases the seller would change his position by parting with the documents against the banker's acceptance or payment and the banker should accordingly be precluded from claiming that the money was paid under a mistake of fact.<sup>1724</sup> UCP 600 art.16(f), supports this contention:

“... if an issuing bank or a confirming bank fails to act in accordance with the provisions of this article, it shall be precluded from claiming that the documents do not constitute a complying presentation.”

Moreover, the issuing banker is under a duty to examine the documents tendered to him.<sup>1725</sup> The seller is, thus, entitled to presume that, if the banker accepts the documents tendered, the set is regular. In this situation the seller may perhaps be entitled to claim that the banker has waived inquiry and that he should, therefore, be precluded from claiming that he paid the amount of the credit under a mistake of fact.<sup>1726</sup>

## The measure of damages

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The modern cases support the proposition that if the issuing or confirming bank fails to pay against presentation of conforming documents under a letter of credit payable at sight, the beneficiary may sue in debt to recover the value of the credit, provided he is willing and able to transfer the documents to the bank against payment.<sup>1727</sup> If the beneficiary is willing and able to transfer the documents to the bank, he is entitled to recover the face value of the credit as a debt (subject to the right to recover any consequential losses as damages).<sup>1728</sup> If he is not willing or able to hand over the documents, the position is different; his claim is in damages for wrongful failure to honour the credit.<sup>1729</sup> In *Urquhart Lindsay & Co Ltd v Eastern Bank Ltd*<sup>1730</sup> the issuing banker opened an irrevocable credit covering several shipments of machinery. He wrongfully dishonoured one draft of the seller on the ground that, although the draft and documents complied with the terms of the commercial credit, the amount exceeded the sum agreed upon in the contract of sale. The seller treated the dishonour of the draft as a repudiation by the banker of the entire commercial credit. The seller was allowed to recover the difference between on the one hand the value of the materials left on his hands plus the cost of such as he would have further provided, and on the other hand what the seller would have been entitled to receive for the manufactured goods from the buyers. However, Rowlatt J stressed that the damages could not exceed the amount of the credit.

## Damages for delay in payment

- 36-530 It has been held that a bank is liable for loss directly resulting from a delay in the performance of its undertaking in the letter of credit. In *Ozalid Group Export Ltd v African Continental Bank Ltd*<sup>1731</sup> a letter of credit in favour of a British exporter was for an amount of US \$125,939.22. Although the exporter tendered the required documents before the expiry of the credit, the bank made payment only after the lapse of two months. During this period the US dollar lost in parity vis-à-vis the pound sterling and, as a result, the exporter obtained £2987.17 less for the amount eventually paid in US dollars than he would have got if payment had been made promptly. Giving judgment for the exporter for this amount plus interest and disbursements, Donaldson J observed that the bank ought to have realised that the British exporter would have promptly converted any amount paid in US dollars into pounds sterling. His Lordship held that the exporter, the beneficiary of the credit, had the option of claiming payment in US dollars, or in pounds sterling.<sup>1732</sup>

“Notwithstanding that in the present case the price of the goods was agreed to be paid in US dollars, it is clear that the [exporter’s] loss was incurred in sterling and that this was foreseeable by the [issuing bank].”<sup>1733</sup>

## Footnotes

- 1518 See, in particular, Benjamin's Sale of Goods, 11th edn (2021), Ch.23 ; R. King, Gutteridge and Megrah's Law of Banker's Commercial Credits, 8th edn (2001) ; R. Jack, A. Malek and D. Quest, Documentary Credits, 4th edn (2009) ; P. Ellinger and D. Neo, The Law and Practice of Documentary Letters of Credit (2010) ; D. Horowitz, Letters of Credit and Demand Guarantees: Defences to Payment (2010) .
- 1644 See above, para.36-490.
- 1645 UCP 600 art.7(b).
- 1646 UCP 600 art.8(b).
- 1647 See R.M. Goode, "Abstract Payment Undertakings", Ch.9 of P. Cane and J. Stapleton (eds), Essays for Patrick Atiyah (1991), p.218.
- 1648 Goode, as above, p.218.
- 1649 See *Petrologic Capital SA v Banque Cantonale de Geneve [2012] EWHC 453 (Comm)* at [52]–[56] (applicant for letter of credit held unable to rely on the Contracts (Right of Third Parties) Act 1999 to enforce English law and exclusive jurisdiction clause contained in the credit in an action to prevent the issuing bank from performing its obligations under the credit).
- 1650 *[1958] 2 Q.B. 127, 129*. See also *International Banking Corp v Barclays Bank Ltd (1925) 5 Legal Decisions Affecting Bankers 1, 4*.
- 1651 See also Kerr J in *RD Harbottle Mercantile Ltd v National Westminster Bank Ltd [1987] 1 Q.B. 146, 155–156*; *Centi Force Engineering v Bank of Scotland, The Times, 23 December 1992*.
- 1652 As, e.g. in *Taurus Petroleum Ltd v State Oil Company of the Ministry of Oil, Republic of Iraq [2017] UKSC 64* at [25], [95], [100].
- 1653 *Urquhart Lindsay & Co Ltd v Eastern Bank Ltd [1922] 1 K.B. 318, 322–323*.
- 1654 The autonomy principle is not offended where the issuing bank exercises a right of set-off against the sum due to the beneficiary under the letter of credit: see, e.g. *Hong Kong and Shanghai Banking Corp v Kloekner & Co AG [1990] 2 Q.B. 514*; *Safa v Banque du Caire [2000] 2 Lloyd's Rep. 600*; *Lehman Brothers Commodity Services Inc v Credit Agricole Corporate and Investment Bank [2011] EWHC 1390 (Comm), [2012] 1 All E.R. (Comm) 254* (issuing bank entitled to set-off sums owed to it under a separate, pre-existing ISDA Master Agreement, against sums owed by it to beneficiary under letter of credit).
- 1655 *Trendtex Trading Corp v Central Bank of Nigeria [1978] Q.B. 529*; *Hispano Americana Mercantil SA v Central Bank of Nigeria [1979] 2 Lloyd's Rep. 277*, which also interprets the State Immunity Act 1978 s.3(3)(b). See also *Banca Carige SpA Casa di Risparmio di Genova e Imperio v Banco Nacional de Cuba [2001] 1 W.L.R. 2039*.
- 1656 *Urquhart Lindsay & Co Ltd v Eastern Bank Ltd [1922] 1 K.B. 318*; *Hamzeh Malas & Sons v British Imex Industries Ltd [1958] 2 Q.B. 127*; *United City Merchants (Investments) Ltd v Royal Bank of Canada [1983] A.C. 168*; *Power Curber International Ltd v National Bank of Kuwait [1981] 2 Lloyd's Rep. 394, 397*. See also *RD Harbottle (Mercantile) Ltd v National Westminster Bank Ltd [1978] 1 Q.B. 146*; *Edward Owen Engineering Ltd v Barclays Bank International Ltd [1978] Q.B. 159*; *Howe Richardson Scale Co Ltd v Polimex-Cekop [1978] 1 Lloyd's Rep. 161*; *Bolivinter*

*Oil SA v Chase Manhattan Bank NA* [1984] 1 W.L.R. 392; *Turkiye Is Bankasi AS v Bank of China* [1998] 1 Lloyd's Rep. 250; *Petrologic Capital SA v Banque Cantonale de Geneve* [2012] EWHC 453 (Comm) at [56]; *National Infrastructure Development Co Ltd v BNP Paribas* [2016] EWHC 2508 (Comm) at [12]; *Petrosaudi Oil Services (Venezuela) Ltd v Novo Banco SA* [2017] EWCA Civ 9 at [55]; *Taurus Petroleum Ltd v State Oil Marketing Company of the Ministry of Oil, Republic of Iraq* [2017] UKSC 64 at [73], [84]. But the autonomy principle does not preclude looking at the terms of the credit to see what it is that the bank is paying: *Ibrahim v Barclays Bank Plc* [2012] EWCA Civ 640, [2012] 2 B.C.L.C. 1 at [61]. In the case of performance guarantees, the application of the autonomy doctrine depends on whether the document is a traditional or a first demand guarantee: see *Gold Coast Ltd v Caja de Ahorros del Mediterraneo* [2001] EWCA Civ 1806, [2002] 1 Lloyd's Rep. 617; *Marubeni Hong Kong & South China Ltd v The Government of Mongolia* [2005] EWCA Civ 395, [2005] 2 All E.R. (Comm) 289; *Uzinterimpex JSC v Standard Bank Plc* [2008] EWCA Civ 819, [2008] 2 Lloyd's Rep. 456; *Wuhan Guoyu Logistics Group Co v Emporiki Bank of Greece SA* [2012] EWCA Civ 1629, [2013] 1 All E.R. (Comm) 1191; *Yuanda (UK) Co Ltd v Multiplex Construction Europe Ltd* [2020] EWHC 468 (TCC).

1657 *Hamzeh Malas & Sons v British Imex Industries Ltd*, above. However, Andrew Smith J has held in *Oliver v Dubai Bank Kenya Ltd* [2007] EWHC 2165 (Comm) that the autonomy principle was not infringed where a standby credit required presentation of a telex issued by the same bank that had issued the credit confirming that the beneficiary had fulfilled its commitments set out in the underlying contract, thereby giving that bank sole power to prevent the credit from becoming payable. He held (at [13]) that the requirement of the confirming telex did not offend the autonomy principle as the bank did not seek to rely upon any claims or defences which the applicant might have had.

1658 *Power Curber International Ltd v National Bank of Kuwait* [1981] 2 Lloyd's Rep. 394; *National Infrastructure Development Co Ltd v Banco Santander SA* [2017] EWCA Civ 27 at [45]; *National Infrastructure Development Co Ltd v BNP Paribas* [2016] EWHC 2508 (Comm) at [17]. For detailed discussion of jurisdictional issues and the governing law of letters of credits, see M. Brindle and R. Cox (eds), *Law of Bank Payments*, 5th edn (2018), paras 8-123 et seq. In *Taurus Petroleum Ltd v State Oil Marketing Company of the Ministry of Oil, Republic of Iraq* [2017] UKSC 64 at [31]–[32], [60], [72], [83], [124]–[125], the Supreme Court held (unanimously), overturning *Power Curber* on the point, that the general rule that the situs of a debt is the debtor's residence (i.e. the place where the debt is recoverable) applies to letters of credit: for a credit issued by the London branch of an overseas bank, when the credit incorporated UCP 600 (art.3 of which provides that “[b]ranches of a bank in different countries are to be considered as separate banks”), the situs of the debt due under the credit was London, thereby making the debt susceptible to a third party debt order made by an English court.

1659 For a possible further exception, see below, para.36-521. But the autonomy doctrine is not engaged where the validity of the letter of credit or performance bond is in issue, as where the instrument itself was procured by a fraudulent conspiracy and/or fraudulent misrepresentation: *Solo Industries UK Ltd v Canara Bank* [2001] EWCA Civ 1059,

*[2001] 1 W.L.R. 1800*. For the tendency to construe a bank's irrevocable undertaking, such a cumbersomely phrased performance bond, as autonomous, see *Siporex Trade SA v Banque Indosuez [1986] 2 Lloyd's Rep. 146*. In *Wuhan Guoyu Logistics Group Co v Emporiki Bank of Greece SA [2012] EWCA Civ 1629, [2013] 1 All E.R. (Comm) 1191*, Longmore LJ (with the agreement of Rimer and Tomlinson LJJ) tried to find some consistency of approach when deciding whether a document was a suretyship guarantee or an autonomous "on demand" guarantee. He said (at [25]) that "while everything must in the end depend on the words actually used by the parties, there is nevertheless a presumption that, if certain elements are present in the document, the document will be construed in one way or the other". He cited and approved (at [26]) of the analysis in Paget's Law of Banking, 11th edn (1996), and now contained in almost identical words in the 15th edition (2018), para.35.8, which provides that: "where an instrument (i) relates to an underlying transaction between the parties in different jurisdictions, (ii) is issued by a bank, (iii) contains an undertaking to pay 'on demand' (with or without the words 'first' and/or 'written'); and (iv) does not contain clauses excluding or limiting the defences available to a guarantor, it will almost always be construed as a demand guarantee." It should be noted, however, that the Court of Appeal held that the instrument in this case was an "on demand" guarantee despite the fact that the fourth element of the presumption was absent. The same result followed in *Spliethoff's Bevrachtingskantoor BV v Bank of China Ltd [2015] EWHC 999 (Comm)* at [71] and [81], *Caterpillar Motoren GmbH and Co KG v Mutual Benefits Assurance Co [2015] EWHC 2304 (Comm)* at [21] and [27]; *South Lanarkshire Council v Aviva Insurance Ltd [2016] CSOH 83* at [26] (Outer House of Court of Session) and *Bitumen Invest AS v Richmond Mercantile Ltd FZC [2016] EWHC 2957 (Comm)* at [31]. The presumption that an instrument gives rise to independent, primary liability seems to apply "[w]here ... the grantee is a bank or other financial institution whose business includes the granting of financial instruments for a fee", e.g. an insurance company: *South Lanarkshire Council v Aviva Insurance Ltd*, above, at [25], per Lord Doherty, citing *Meritz Fire & Marine Insurance Co Ltd v Jan de Nul NV [2010] EWHC 3362 (Comm)*, [2011] 1 All E.R. (Comm) 1049 at [65]–[66], per Beatson J; *Caterpillar Motoren GmbH & Co KG v Mutual Benefits Assurance Co*, above, at [20], per Teare J; *Spliethoff's Bevrachtingskantoor BV v Bank of China Ltd*, above, at [83], per Carr J. See also *Wuhan Guoyu Logistics Group Co Ltd v Emporiki Bank of Greece SA [2013] EWCA Civ 1679, [2014] 1 Lloyd's Rep. 273*, where it was held that money paid by bank to beneficiary under the "on demand" guarantee was not held in trust for bank when, between beneficiary making demand in good faith and payment being made to beneficiary, it had been conclusively determined by a final arbitration award that the event which triggered demand had not in fact fallen due. In *Marubeni Hong Kong & South China Ltd v The Government of Mongolia [2005] EWCA Civ 395, [2005] 2 All E.R. (Comm) 289* at [28], Carnwath LJ said that cases where documents are issued by banks which are "described as, or assumed to be, performance bonds ... provide no useful analogy for interpreting a document which was not issued by a bank and which contains no overt indication of an intention to create a performance bond or

anything analogous to it". But the presumption that an instrument issued by a non-bank party does not give rise to independent primary liability may be rebutted by the clear language of the instrument itself, as in *IIG Capital LLC v Van Der Merwe* [2008] EWCA Civ 542, [2008] 2 Lloyd's Rep. 187; *Meritz Fire & Marine Insurance Co Ltd v Jan de Nul NV*, above, affirmed [2011] EWCA Civ 827, [2011] 2 Lloyd's Rep. 379; *ABM Amro Commercial Financed Plc v McGinn* [2014] EWHC 1674 (Comm); *Caterpillar Motoren GmbH and Co KG v Mutual Benefits Assurance Co*, above; *Bitumen Invest AS v Richmond Mercantile Ltd FZC*, above; *Ultrabulk AS v Jagatramka* [2017] EWHC 2792 (Comm); *Multiplex Construction Europe Ltd v Dunne* [2017] EWHC 3073 (TCC). For cases where the presumption was not rebutted, see *Vossloh Aktiengesellschaft v Alpha Trains (UK) Ltd* [2010] EWHC 2443 (Ch), [2011] 2 All E.R. (Comm) 307; *Carey Value Added SL v Grupo Urvasco SA* [2010] EWHC 1905 (Comm), [2011] 2 All E.R. (Comm) 140; *North Shore Ventures Ltd v Anstead Holdings Inc* [2011] EWCA Civ 230, [2011] 3 W.L.R. 628; *Autoridad del Canal de Panama v Sacyr SA* [2017] EWHC 2228 (Comm). In *Rubicon Vantage International Pte Ltd v Krisenergy Ltd* [2019] EWHC 2012 (Comm) at [18] it was held that (a) the *Marubeni* presumption deals with whether a particular instrument should be construed as imposing autonomous obligations, or merely as a see-to-it guarantee, and that the *Marubeni* presumption is spent once that question has been answered; (b) there is no presumption that an on-demand obligation itself should be construed narrowly rather than broadly merely because it is a non-bank that has agreed to such obligations; and (c) the scope of an on-demand obligation should be construed according to normal principles of contract construction, free from any antecedent presumption as to what meaning it is likely to have, or as towards a wide or narrow construction. More recently, in *Shanghai Shipyard Co Ltd v Reignwood International Investment (Group) Co Ltd* [2021] EWCA Civ 1147 at [29]–[35], the Court of Appeal held that, in the context of a payment guarantee of a shipbuilding contract, there was no room for a priori preconceptions or assumptions about the nature of an instrument to be derived from the identity of the guarantor; what mattered was the wording in which the parties chose to express their bargain, interpreted according to the well-established rules of construction.

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Pt I art.8.

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*United City Merchants (Investments) Ltd v Royal Bank of Canada* [1983] A.C. 168, affirming on this point [1981] 1 Lloyd's Rep. 604, in which the Court of Appeal varied the conclusion of Mocatta J ([1979] 2 Lloyd's Rep. 498), who thought the illegality in the underlying transaction vitiated the letter of credit in toto. As to effect of orders invalidating facilities in the place of issue, see *Shanning International Ltd v Lloyds TSB Bank Plc* [2001] UKHL 31, [2001] 1 W.L.R. 1462.

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See N. Enonchong, "The autonomy principle of letters of credit: an illegality exception?" [2006] L.M.C.L.Q. 404. See generally, N. Enonchong, The Independence Principle of Letters of Credit and Demand Guarantees (2011), Ch.8.

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[1996] 1 W.L.R. 1152.

- 1664 [2003] EWHC 1927 (Comm), [2003] 2 Lloyd's Rep. 911. It was later held at the trial of the action that there was no illegality which affected the transaction: *Mahonia Ltd v JP Morgan Chase Bank* [2004] EWHC 1938 (Comm).
- 1665 See Benjamin's Sale of Goods, 11th edn (2021), paras 24-023 et seq.
- 1666 [1983] 1 A.C. 168, 183. In *Sinocore International Co Ltd v RBRG Ltd* [2017] EWHC 251 (Comm) at [46], Phillips J held that the authorities do not support a much wider proposition that a party who presents forged documents cannot obtain relief from the court in the transaction more generally, e.g. a claim for damages for a prior breach of the underlying contract.
- 1667 *Montrod Ltd v Grundkotter Fleischvertriebs GmbH* [2001] All E.R. (Comm) 368; affirmed [2001] EWCA Civ 1954, [2002] 1 W.L.R. 1975. For a critique, see *Hooley* [2002] C.L.J. 279. The Singapore Court of Appeal has since recognised a separate "nullity" defence: *Beam Technology (Mfg) Pte Ltd v Standard Chartered Bank* [2003] 1 S.L.R. 597, noted by *Chin and Wong* [2004] L.M.C.L.Q. 14. See also *K. Donnelly* [2008] J.B.L. 316; *P. Todd* [2008] L.M.C.L.Q. 547; *J. Ren* [2015] J.B.L. 1.
- 1668 Note that fraud in this context refers to common law fraud, namely deceit: *GKN Contractors Ltd v Lloyds Bank Plc* (1985) 30 Build. L.R. 48. See further on the meaning of fraud, as explained in the context of performance bonds, *Edward Owen Engineering Ltd v Barclays Bank International Ltd* [1978] 1 Lloyd's Rep. 166, 171, 172–173; *Bolivinter Oil SA v Chase Manhattan Bank NA* [1984] 1 W.L.R. 392; *Esal (Commodities) Ltd v Oriental Credit Ltd* [1985] 2 Lloyd's Rep. 546, 549; *Balfour Beatty Civil Engineering v Technical & General Guarantee Co Ltd* (1999) 68 Con. L.R. 180 at 190–191; *TTI Team Telecom International Ltd v Hutchison 3G UK Ltd* [2003] EWHC 762 (TCC), [2003] 1 All E.R. (Comm) 914. In *Enka Insaat Ve Sanayi AS v Banca Popolare dell'Alto Adige SpA* [2009] EWHC 2410 (Comm), [2009] C.I.L.L. 2777 at [24]–[25], the test applied by Teare J, when deciding whether to give summary judgment against a bank on a demand guarantee, was whether there was a real prospect that the bank would establish at trial that the only realistic inference was that the beneficiary did not honestly believe in the validity of its demand. In *National Infrastructure Development Co Ltd v Banco Santander SA* [2017] EWCA Civ 27 at [20]–[24], *Enka* was said to provide the correct approach where the beneficiary of a letter of credit seeks summary judgment against a bank, and that the position was different from those cases where the bank's own customer was seeking an interlocutory injunction against the bank (as in *Solo Industries UK Ltd v Canara Bank* [2001] 1 W.L.R. 1800 and *Alternative Power Solution Ltd v Central Electricity Board* [2014] UKPC 31, [2015] 1 W.L.R. 697: see main paragraph). See also N. Enonchong, "The problem of abusive calls on demand guarantees" [2007] L.M.C.L.Q. 83. Mere suspicions of a fraud do not justify the rejection of a regular set of documents: *Society of Lloyd's v Canadian Imperial Bank of Commerce* [1993] 2 Lloyd's Rep. 579.
- 1669 [1978] Q.B. 146, 155; approved by Lord Denning MR in *Edward Owen Engineering Ltd v Barclays Bank International Ltd* [1978] Q.B. 159, 169.
- 1670 *Bolivinter Oil SA v Chase Manhattan Bank NA* [1984] 1 W.L.R. 392, 393 (Sir John Donaldson MR was considering the position at the interlocutory stage).

- 1671 [1985] 2 *Lloyd's Rep.* 554, 561.
- 1672 [1999] 2 *Lloyd's Rep.* 187, 202.
- 1673 [2001] 1 *W.L.R.* 1800 at [32].
- 1674 [2014] *UKPC* 31, [2015] 1 *W.L.R.* 697 at [59] (Lord Mance was a member of the Board). The same standard of proof of fraud is required whether the injunction is sought against the bank or the beneficiary: see *Dong Jin Metal Co Ltd v Raymet Ltd Unreported 13 July 1993, CA*; *Deutsche Ruckversicherung AG v Walbrook Insurance Co Ltd* [1995] 1 *W.L.R.* 1017, 1030–1031; *Group Josi Re v Walbrook Insurance Co Ltd* [1996] 1 *W.L.R.* 1152, 1161–1162; *Czarnikow-Rionda Sugar Trading Inc v Standard Bank London Ltd* [1999] 2 *Lloyd's Rep.* 187, 190; *Solo Industries UK Ltd v Canara Bank* [2001] *EWCA Civ* 1059, [2001] 1 *W.L.R.* 1800 at [31]; *Simon Carves Ltd v Ensus UK Ltd* [2011] *EWHC* 657 (TCC), [2011] *B.L.R.* 340 at [29], [33(b)]: cf. *Themehelp Ltd v West* [1996] *Q.B.* 84, where a majority of the Court of Appeal (Waite and Balcombe LJJ) held requirements of fraud exception did not apply to an injunction restraining the beneficiary from making a demand under a performance guarantee; but there has been little enthusiasm for the majority decision in subsequent authorities, and Foxton J was unwilling to give it any broader application than it strictly required in *Salam Air SAOC v Latam Airlines Group SA* [2020] *EWHC* 2414 (Comm) at [36]–[43], cited and applied in *Shapoorji Pallonji & Co Pvt Ltd v Yumn Ltd* [2021] *EWHC* 862 (Comm) at [22]–[23], where HH Judge Pelling QC added (at [24]) that, subject to the safeguards described by Foxton J in *Salam*, there was no principled reason why a court could not order a beneficiary to withdraw a demand if the circumstances were such that it would have restrained it from making a demand. See generally, Benjamin's Sale of Goods, 11th edn (2021), paras 24-035—24-036. See also below, paras 36-520 et seq.
- 1675 At [79].
- 1676 At [81].
- 1677 [1978] *Q.B.* 146, 155.
- 1678 [1999] 2 *Lloyd's Rep.* 187, 202–204 (and, in particular, his conclusion at point (11)). See also *Tetronics (International) Ltd v HSBC Bank Plc* [2018] *EWHC* 201 (TCC) at [69] (balance of convenience means “such relief is extremely rare”). For cases where an injunction was granted to restrain bank from paying on grounds of fraud exception, see *Kvaerner John Brown Ltd v Midland Bank Plc* [1998] *C.L.C.* 446, 450 (“a wholly exceptional case”, but no consideration given to balance of convenience); *ETC Export Trading Co SA v Aplas Importer* [2020] *EWHC* 3229 (QB) at [22] (no express reference to balance of convenience, but statement that bank will be protected by cross-undertaking in damages and that, without injunction, applicant would lose over \$2 million).
- 1679 [1975] 1 *W.L.R.* 315. See also *Hamzeh Malas & Sons v British Imex Industries Ltd* [1958] 2 *Q.B.* 127, at 130; and *European Asian Bank AG v Punjab and Sind Bank (No.2)* [1983] 1 *W.L.R.* 642, 645, suggesting that whether a third party is to be regarded an agent for collection or a holder depends on his position at the time of the tender. Contrast the position when it is alleged that a third party can enforce the credit as an undisclosed principal: see *Taurus Petroleum Ltd v State Oil Marketing Company of the*

- Ministry of Oil, Republic of Iraq* [2013] EWHC 3494 (Comm), [2014] 1 Lloyd's Rep. 432 at [21], Field J (obiter): the issue was not addressed by either the Court of Appeal [2015] EWCA Civ 835 or the Supreme Court [2017] UKSC 64.
- 1680 As regards such credits, see above, para.36-491.
- 1681 In *DCD Factors Plc v Ramada Trading Ltd* [2007] EWHC 2820 (QB), [2008] Bus. L.R. 654, Lloyd Jones J held (at [32]) that it was artificial to inquire whether payment was sought under the bill of exchange or letter of credit when they formed different elements of one substantial transaction amounting to the negotiation of a negotiation credit.
- 1682 *Discount Records Ltd v Barclays Bank Ltd* [1975] 1 W.L.R. 315.
- 1683 [1996] 1 Lloyd's Rep. 345; but contrast as regards performance bonds *Themehelp Ltd v West* [1996] Q.B. 84 (restrictively applied by Foxton J in *Salam Air SAOC v Latam Airlines Group SA* [2020] EWHC 2414 (Comm) at [36]–[43]; and in *Shapoorji Pallonji & Co Pvt Ltd v Yumn Ltd* [2021] EWHC 862 (Comm) at [22]–[23]). In *Armlea Plc v Gov & Co of the Bank of Scotland* Unreported 4 June 2004, where Lord Mackay (at [39]–[43]), sitting in the Outer House of the Court of Session, rejected a submission by a principal that it did not have to plead fraud when seeking an injunction against the bank to restrain payment under a demand guarantee (as opposed to where the bank wanted to avoid making payment, when fraud had to be pleaded). Lord Mackay (at [44]–[46]) also rejected a submission that the fraud exception only applied to demand guarantees involved in international commerce and not to those involved in domestic commerce.
- 1684 [2000] Lloyd's Rep. Bank. 165; affirming [1999] 2 All E.R. (Comm) 18.
- 1685 But see now UCP 600 arts 7(c), 8(c) and 12(b): and for discussion of whether art.12(b) would have had an effect on the assignment point in the *Santander* decision, see above, para.36-495.
- 1686 As to which see above, para.36-491.
- 1687 [2003] EWCA Civ 470, [2003] 1 All E.R. (Comm) 865, noted by Hare [2004] C.L.J. 288. For examples of Australian cases to similar effect, see *Selvas Pty Ltd v Hansen Yuncken (SA) Pty Ltd* (1987) 6 Australian Construction Law Rep. 36; *Boral Formwork v Action Motors* [2002] NSWSC 713. For the treatment of bank guarantees by the Australian courts, see R. Chhina, “The underlying contract exception: effect on the degree of abstraction of bank guarantees” [2022] J.B.L. 1.
- 1688 At [27]. The right to drawdown must be clearly precluded by the express (as in *Sirius*) or implied terms of the underlying contract: *MW High Tech Projects UK Ltd v Biffa Waste Services Ltd* [2015] EWHC 949 (TCC) at [34] (where Stuart-Smith J refused to imply term that prior call on parent company guarantee, which was a condition of a call on the on-demand retention bond, had to be “valid”); *Shapoorji Pallonji & Co Pvt Ltd v Yumn Ltd* [2021] EWHC 862 (Comm) at [21], HH Judge Pelling QC (“[i]t is difficult to see how any such term could be implied applying the general principles that apply to the implication of terms in long form professionally drawn contracts ... especially having regard to high level of certainty required before an injunction can be granted”).
- 1689 [2004] UKHL 54, [2004] 1 W.L.R. 3251.

- 1690 See, e.g. *Bocotra Construction Pte Ltd v A-G (No. 2)* [1995] 2 S.L.R. 733; *GHL Pte Ltd v Unitrack Building Construction Pte Ltd* [1994] 4 S.L.R. 904; *Samwoh Asphalt Premix Pte Ltd v Sum Cheong Piling Pte Ltd* [2002] B.L.R. 459; *McConnell Dowell Construction (Aust) Pty Ltd v Semcorp Engineering and Constructions Pte Ltd* [2002] B.L.R. 450; *BS Mount Sophia Pte Ltd v Join-Aim Pte Ltd* [2012] SGCA 28, [2012] 3 S.L.R. 352; *CKR Contract Services Pte Ltd v Asplenium Land Pte Ltd* [2015] SGCA 24, [2015] 3 S.L.R. 1041; *Sulzer Pumps Spain SA v Hyflux Membrane Manufacturing (S) Pte Ltd* [2020] SGHC 122; *Samsung C&T Corp v Soon Li Heng Civil Engineering Pte Ltd* [2020] SGCA 79. See further, P. Ellinger and D. Neo, *The Law and Practice of Documentary Letters of Credit* (2010), pp.319 et seq. (the principle has emerged in Singapore with reference to independent guarantees as distinct from commercial letters of credit). See also *Chhina* [2016] L.M.C.L.Q. 412. In *National Infrastructure Development Co Ltd v Banco Santander SA* [2016] EWHC 2990 (Comm) (affirmed [2017] EWCA Civ 27), Knowles J (at [26]–[27]) refused an invitation to develop the law to recognise a different approach to standby letters of credit used to settle performance obligations, as opposed to letters of credit used to settle primary payment obligations, and noted that the position under Singaporean law appeared to be different.
- 1691 See *Ganotaki* [2004] L.M.C.L.Q. 148 at 152.
- 1692 See, especially, the dicta of Potter LJ in *Montrod Ltd v Grundkotter Fleischvertriebs* [2001] EWCA Civ 1954, [2002] 1 All E.R. (Comm) 257 at [59], and that of Judge Thornton QC, sitting as a deputy High Court judge, in *TTI Team Telecom International Ltd v Hutchison 3G UK Ltd* [2003] EWHC 762 (TCC), [2003] 1 All E.R. (Comm) 914 at [37].
- 1693 See Ellinger and Neo, *The Law and Practice of Documentary Letters of Credit*, above, at p.319.
- 1694 [2011] EWHC 657 (TCC), [2011] B.L.R. 340.
- 1695 At [33]. Applied by Edwards-Stuart J in *Doosan Babcock Ltd v Comercializadora de Equipos y Materiales Mabe Limitada* [2013] EWHC 3201 (TCC), [2014] B.L.R. 33, at [36]; *ETC Export Trading Co SA v Aplas Importer* [2020] EWHC 3229 (QB) at [18]. It has been stressed that in order to obtain injunctive relief “it must be positively established that the beneficiary was not entitled to draw down under the underlying contract”: *MW High Tech Projects UK Ltd v Biffa Waste Services Ltd* [2015] EWHC 949 (TCC) at [34], per Stuart-Smith J, citing *Permasteelisa Japan KK v Bouyguesstroi and Bank Intesa SpA* [2007] EWHC 3508 (QB), Ramsey J.
- 1696 At [34].
- 1697 [2020] EWHC 2414 (Comm) at [41]–[42]; cited and applied in *Shapoorji Pallonji & Co Pvt Ltd v Yumn Ltd* [2021] EWHC 862 (Comm) at [22]–[23].
- 1698 As set out by the Privy Council in *Alternative Power Solution Ltd v Central Electricity Board* [2014] UKPC 31, 2015 1 W.L.R. 697 at [59]: see above, para.36-517.
- 1699 *Urquhart Lindsay & Co Ltd v Eastern Bank Ltd* [1922] 1 K.B. 318; *Hamzeh Malas & Sons v British Imex Industries Ltd* [1958] 2 Q.B. 127. But see also *Ibrahim v Barclays Bank Plc* [2011] EWHC 1897 (Ch), [2011] 2 C.L.C. 589 at [116] (UCP 600 art.5 did not prevent conditions attached to payment of letter credit providing indication of parties’

- intentions as to whether payment discharged a third party's debt in complex financial transaction), affirmed [\[2012\] EWCA Civ 640](#), [\[2012\] 2 B.C.L.C. 1](#) (Lewison LJ at [61]: "the autonomy principle does not preclude looking at the terms of the letter of credit to see what it is that the bank is paying").
- 1700 UCP 600 art.14(a).
- 1701 As to the meaning of "reasonable time", see *Co-operative Centrale Raiffeisen-Borenleenbank BA v Sumitomo Bank Ltd* [1987] Fin. L.R. 275 varied [1988] Fin. L.R. 207; *Bankers Trust Co v State Bank of India* [1991] 2 Lloyd's Rep. 443; affirming [1991] 1 Lloyd's Rep. 587. *Seaconsar Far East Ltd v Bank Markazi Jomhouri Islami Iran* [1997] 2 Lloyd's Rep. 89; affirmed [1999] 1 Lloyd's Rep. 36, CA.
- 1702 UCP 600 art.16(c).
- 1703 On what is meant by the word "given" in UCP 600 art.16(d), and whether or not it requires receipt of the notice by the presenter, see *Bulgrains & Co Ltd v Shinhan Bank* [2013] EWHC 2498 (QB) at [29]–[31]. UCP 600 art.16(d) is more tightly worded than the equivalent provision in UCP 500. UCP 500 art.14(d)(i) required notice to be given "without delay but no later than the close of the seventh banking day following the day of receipt of the documents". An issue could arise as to whether notice had been given "without delay": see, e.g. *Bayerische Vereinsbank Aktiengesellschaft v National Bank of Pakistan* [1997] 1 Lloyd's Rep. 59.
- 1704 See above, para.[36-464](#).
- 1705 *J. Ulph, "The UCP 600: Documentary Credits in the Twenty-first Century"* [2007] J.B.L. 355, 364.
- 1706 As regards the position of the parties in such a case, see *Banque de l'Indochine et de Suez SA v JH Rayner (Mincing Lane) Ltd* [1983] Q.B. 711.
- 1707 R. Cranston, E. Avgouleas, K. van Zwieten, C. Hare and T. van Sante, *Principles of Banking Law*, 3rd edn (2018), p.534.
- 1708 *Kydon Compania Naviera SA v National Westminster Bank Ltd (The Lena)* [1981] 1 Lloyd's Rep. 68, 79. See also Benjamin's *Sale of Goods*, 11th edn (2021), para.23-223; *Paget's Law of Banking*, 15th edn (2018), para.37.19.
- 1709 See *Hing Yip Hing Fat Co Ltd v Daiwa Bank Ltd* [1991] 2 H.K.L.R. 35, 45–51.
- 1710 UCP 500 art.14(d)(ii).
- 1711 Where the bank specifies discrepancies in the tendered documents, but fails to state that the bank is refusing to honour or negotiate as required by UCP 600 art.16(c)(i), and later serves another notice correcting the defect, it may be able to rely on the second notice as long as it serves that notice in time and adopts the same substantive reasons: *Bulgrains & Co Ltd v Shinhan Bank* [2013] EWHC 2498 (QB) at [32]–[33], distinguishing *United Bank Ltd v Banque Nationale de Paris* [1992] 2 S.L.R. 64, 76, as relied on by Benjamin's *Sale of Goods*, 11th edn (2021), para.23-212 (now also citing *Swiss Singapore Overseas Enterprises Pts Ltd v China CITIC Bank Corp Ltd (No.2)* [2014] 1 HKC 96 at [57]), arguing to the contrary. The bank's refusal statement may be explicit but it may also be implicit, either from use of a particular type of message format, as where a SWIFT standard-form MT734 message is transmitted from one bank to another, which will be universally understood by bankers as a refusal, or where there

is a statement in a free form SWIFT message sent by one bank to another that it should be regarded as a MT734 message: *Bulgrains & Co Ltd v Shinhan Bank*, above, at [39] and [42].

1712 UCP 600 art.16(f) (but note that the preclusion does not apply to a non-confirming nominated bank). See *Fortis Bank SA/NV v Indian Overseas Bank* [2010] EWHC 84 (Comm), [2010] 2 Lloyd's Rep. 641, affirmed [2011] EWCA Civ 58, [2011] 2 Lloyd's Rep. 33.

1713 See above, para.36-464, and below, para.36-538.

1714 UCP 600 art.16(b) allows the issuing bank “in its sole judgement” to approach the applicant for a waiver of discrepancies. The article expressly provides that this does not extend the maximum period of five banking days, allowed under art.14(b), for determination by the bank whether the presentation is complying.

1715 [2002] EWHC 973 (Comm), [2002] 2 All E.R. (Comm) 427.

1716 At [68].

1717 But see *Bulgrains & Co Ltd v Shinhan Bank* [2013] EWHC 2498 (QB) at [50]–[51], where it was held that, in a communication between banks, it is enough that the rejection notice merely identifies the applicable provision, in that case “notify, as per UCP 600 article 16(c)(iii)(b)”, without expressly stating what the issuing, confirming or nominated bank is proposing to do with the documents.

1718 *Fortis Bank SA/NV v Indian Overseas Bank* [2010] EWHC 84 (Comm), [2010] 2 Lloyd's Rep. 641, affirmed [2011] EWCA Civ 58, [2011] 2 Lloyd's Rep. 33 (where the issuing bank’s failure to act in accordance with the disposal statements contained in its UCP 600 art.16(c)(iii) notices, was held, applying UCP 600 art.16(f), to precluded the bank from claiming that the documents did not constitute a complying presentation). In *Fortis Bank SA/NV v India Overseas Bank* [2011] EWHC 538 (Comm), [2011] 2 Lloyd's Rep. 190, J. Hirst QC, sitting as a Deputy Judge of the High Court, held (at [35]) that “in the absence of special extenuating circumstances, a bank which failed to despatch the documents within three banking days would have failed to act within reasonable promptness”. A bank which takes possession of a bill of lading for examination but then rejects it and holds it to the order of the person presenting it, refuses to accept delivery and thereby prevents the completion of the indorsement in its favour for the purposes of the *Carriage of Goods by Sea Act 1992 s.5(2)(b)*, i.e. it does not become a holder of the bill of lading: see *Standard Chartered Bank v Dorchester LNG (2) Ltd, The Erin Schulte* [2014] EWCA Civ 1382, where held that s.5(2)(b) requires both an intention on the part of the indorser to transfer the document and an intention on the part of the indorsee to accept it (but note that the bank in this case was held to have become the holder of the bill of lading with the rights of suit under the contract of carriage for different reasons).

1719 See *E.P. Ellinger* [1997] 3 (No.2) D.C.I. 9.

1720 [1927] A.C. 711, 731.

1721 cf. *D. Sheehan, “Rights of Recourse in Documentary (and Other) Credit Transactions”* [2005] J.B.L. 326.

1722 Also UCP 600 art.8(a)(ii) provides that a confirming bank negotiates without recourse (provided there has been a complying presentation). See, further, Benjamin’s Sale of

- Goods, 11th edn (2021), para.23-304 (distinction drawn between positions of issuing and confirming bank on the one hand, and non-confirming nominated banks on the other).
- 1723 *KBC Bank v Industrial Steels (UK) Ltd* [2001] 1 All E.R. (Comm) 409; *Komeraci Banka AS v Stone and Rolls Ltd* [2002] EWHC 2263 (Comm), [2003] 1 Lloyd's Rep. 383.
- 1724 See on this point, Vol.I, paras 32-199 et seq. and above, paras 36-128 et seq.
- 1725 Above, para.36-523.
- 1726 Both in view of the seller's change of a position, as to which see above, para.36, and the principle considered in *Beevor v Marler* (1898) 14 T.L.R. 289.
- 1727 *Standard Chartered Bank v Dorchester LNG (2) Ltd* [2014] EWCA Civ 1382 at [51], per Moore-Bick LJ, citing *Power Curber International Ltd v National Bank of Kuwait Ltd* [1981] 2 Lloyd's Rep. 394; *United City Merchants (Investments) Ltd v Royal Bank of Canada* [1983] A.C. 168; *Floating Dock v The Hong Kong and Shanghai Banking Corp* [1986] 1 Lloyd's Rep. 65; *Seaconsar Far East Ltd v Bank Markazi Jomhouri Islami Iran* [1999] 1 Lloyd's Rep. 36. In *Taurus Petroleum Ltd v State Oil Company of the Ministry of Oil, Republic of Iraq* [2017] UKSC 64, at [23], [64]-[65], [77]-[78], a majority of the Supreme Court construed an unusually worded letter of credit to give rise to two separate obligations: an obligation to pay the proceeds of the credit into the account of a third party in New York, which was owed to the beneficiary alone and which sounded in debt, and a separate collateral obligation to pay the proceeds into that account which was owed to the beneficiary and the third party jointly and which sounded in damages. For earlier authorities where the claim was held to sound in damages measured by reference to the face value of the credit, see *Belgian Grain and Produce Co Ltd v Cox & Co (France) Ltd* (1919) 1 Ll. L. Rep. 256; *Stein v Hambro's Bank of Northern Commerce* (1921) 9 Ll. L. Rep. 433, 507; reversed on a different point (1922) 10 Ll. L. Rep. 529; *Dexters Ltd v Schenker & Co* (1923) 14 Lloyd's Rep. 586. For the position on insolvency of the issuing bank or the confirming bank, see S. Connolly, "Bank recovery and resolution: the case of contingent letters of credit under bail-in" [2016] J.I.B.F.L. 78.
- 1728 *Standard Chartered Bank v Dorchester LNG (2) Ltd* [2014] EWCA Civ 1382 at [51]-[52].
- 1729 *Standard Chartered Bank v Dorchester LNG (2) Ltd* [2014] EWCA Civ 1382 at [51]; *Seaconsar Far East Ltd v Bank Markazi Jomhouri Islami Iran* [1999] 1 Lloyd's Rep. 36, 38 (col.1).
- 1730 [1922] 1 K.B. 318, especially at 324. But establishing a causal link between breach of contract and loss remains essential, see *Fortis Bank SA/NV v India Overseas Bank* [2011] EWHC 538 (Comm), [2011] 2 Lloyd's Rep. 190 (where restitutionary claim also failed).
- 1731 [1979] 2 Lloyd's Rep. 231.
- 1732 His Lordship analysed in this context the principle of *Miliangos v George Frank (Textiles) Ltd* [1976] A.C. 443.
- 1733 [1979] 2 Lloyd's Rep. 231 at 234.

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## (vi) - The Relationship of Issuing and Correspondent Bankers

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 36 - Bills of Exchange and Banking

Section 2. - Aspects of Banking Law

(i) - Bankers' Commercial Credits <sup>1518</sup>

(vi) - The Relationship of Issuing and Correspondent Bankers

### Relationship of principals

36-531 The status of the correspondent banker will vary with the role adopted. If the correspondent banker, situated in the country of the seller, has been designated in the contract of sale as the banker with whom the credit should be opened, the buyer need not be deterred from making arrangements through his own local banker. The local banker will instruct the correspondent banker to open a credit in favour of the seller. The correspondent is in those circumstances the real issuing banker<sup>1734</sup> for he has not merely passed on or added his support to the credit of the issuing banker, but has instead issued a credit under which he has taken upon himself sole liability to the seller. In that case it is difficult to resist the implication that between the two bankers the relationship is not that of principal and agent but rather that of two independent principals.

### Principal and agent

36-532 Where the correspondent does not assume sole liability but forwards to the seller with or without confirmation a letter of credit issued by the issuing banker, an agency relationship is more easily imputed. In such a case the correspondent banker acts as the agent of the issuing banker for the purpose of transmitting the credit of the issuing banker to the seller. At the same time, when the correspondent banker confirms the credit, he acts as principal, as he undertakes an obligation in his own name. The nature of the relationship between an issuing and confirming banker was of some significance in *Bank Melli Iran v Barclays Bank DCO*<sup>1735</sup> where inaction or silence of the issuing

banker was held in the circumstances to provide sufficient evidence of ratification of those acts of the correspondent which were otherwise outside the scope of authority.<sup>1736</sup> The submission that the relationship between the issuing and the correspondent banker was not that of principal and agent but of customer and banker,<sup>1737</sup> where the principle of ratification would be inapplicable, was there rejected as contrary to the understanding of the House of Lords in *Equitable Trust Co of New York v Dawson Partners Ltd.*<sup>1738</sup> It is to be emphasised, as the House of Lords indicated, that the principal is the issuing banker and that the buyer is not a party to the relationship, and that there is no privity of contract between the buyer and the correspondent banker. UCP 600 art.2, provides that a “confirming bank” means “the bank that adds its confirmation to a credit upon the issuing bank’s authorisation or request”. It was held by Hamblen J, in *Fortis Bank SA/NV v Indian Overseas Bank*,<sup>1739</sup> that it amounts to a relevant authorisation for the purposes of UCP 600 where an issuing bank permits the advising bank to confirm a letter of credit at the beneficiary’s request and expense. The correspondent bank also acts as agent of the issuing bank when examining and accepting or rejecting the tendered documents, so that where the correspondent bank accepts discrepant documents, as between the issuing bank and the beneficiary of the credit, its acceptance will bind the issuing bank, its principal.<sup>1740</sup>

## Compliance with instructions

- 36-533 Just as the issuing banker must strictly comply with the instructions of the buyer so must the correspondent comply with those of the issuing banker. Any departure from the conditions laid down endangers his right to reimbursement and exposes him to an action for damages for breach of contract.<sup>1741</sup> The instructions to the correspondent may be merely to forward the credit,<sup>1742</sup> or more probably to pay or accept bills of exchange drawn on himself,<sup>1743</sup> or to pay, accept or negotiate<sup>1744</sup> bills drawn either on the issuing banker or on the buyer.

## Effect of red signal

- 36-534 In some extraordinary cases a “red signal”, or a clear indication of fraud, ought to put the negotiating bank on enquiry. In *Standard Bank London Ltd v Bank of Tokyo Ltd*<sup>1745</sup> one X asked the S Bank in London to finance certain transactions on the security of standby credits to be issued by the Kuala Lumpur office of BOT, a Japanese bank. Over a period of some 18 months, X delivered to the S Bank three letters of credit which, on their face, appeared to have been issued by BOT. In reality, all three documents were skilfully perpetrated forgeries. Any suspicions which the S Bank may have had were, however, allayed when it received in respect of each letter of credit a tested telex in which BOT confirmed the authenticity of the facility. But these tested telexes were also issued by the fraudsters, who got access to BOT’s terminal and code. When called upon to pay,

BOT denied liability. Its main argument was that the circumstances of each transaction were such as to put the S Bank on enquiry. The S Bank's failure to investigate, constituted a breach of a duty of care owed by it to BOT and, in consequence, the S Bank was not entitled to enforce the letters of credit. Waller J gave judgment for the S Bank. Having cited the evidence of an expert witness, who described a "tested telex" as "the electronic signature of the bank sending the message", his Lordship emphasised that it was unchallenged that banks all over the world relied with complete confidence on tested telexes. "The tested telex system" he added "is meant to avoid arguments in relation to authority". Rejecting an argument to the effect that, in the instant case, the S Bank was put on enquiry, his Lordship said that:

"… the duty to inquire will depend on the circumstances of each and every case, and what should, or may, put someone on enquiry, will also depend on the circumstances of any individual case. Thus, the more usual the circumstances and the clearer a representation appears to be, the less the duty to inquire should be, and the less likely there will be circumstances which will put anyone on enquiry".

## Footnotes

- 1518 See, in particular, Benjamin's Sale of Goods, 11th edn (2021), Ch.23 ; R. King, Gutteridge and Megrah's Law of Banker's Commercial Credits, 8th edn (2001) ; R. Jack, A. Malek and D. Quest, Documentary Credits, 4th edn (2009) ; P. Ellinger and D. Neo, The Law and Practice of Documentary Letters of Credit (2010) ; D. Horowitz, Letters of Credit and Demand Guarantees: Defences to Payment (2010) .
- 1734 *Skandinaviska Kreditaktiebolaget v Barclays Bank (1925)* 22 *Ll.L. Rep.* 523; *National Bank of Egypt v Hannevig's Bank Ltd (1919)* 1 *Ll.L. Rep.* 69.
- 1735 [1951] 2 *Lloyd's Rep.* 367, [1951] 2 *T.L.R.* 1057. But see also *Credit Agricole Indosuez v Muslim Commercial Bank Ltd [2000]* 1 *All E.R. (Comm)* 172, 180, CA.
- 1736 Following *Prince v Clark (1823)* 1 *B. & C.* 186.
- 1737 For which some support may have been gathered from the analogy drawn in *Rayner & Co Ltd v Hambro's Bank Ltd [1943]* *K.B.* 37, 43.
- 1738 (1927) 27 *Ll. L. Rep.* 49, 52, 53, 57.
- 1739 [2009] *EWHC* 2303 (*Comm*), [2010] 1 *Lloyd's Rep.* 227 at [59]–[60].
- 1740 *Yuchai Dongte Special Purpose Automobile Co Ltd v Suisse Credit Capital (2009) Ltd [2018] EWHC 2580 (Comm)* at [80]–[82].
- 1741 But note that the issuer is liable where his instructions are ambiguous: *Midland Bank Ltd v Seymour [1955]* 2 *Lloyd's Rep.* 147. UCP 600 art.35, also provides a disclaimer on transmission and translation, but UCP 600 does not contain a provision equivalent to UCP 500 art.12 (incomplete or unclear instructions). See also *Habib Bank Ltd v Central Bank of Sudan [2006] EWHC 1767 (Comm)*, [2006] 2 *Lloyd's Rep.* 412, on waiver of discrepancies by the issuing bank.
- 1742 *Cape Asbestos Co Ltd v Lloyds Bank [1921]* *W.N.* 274.

- 1743      *Donald H Scott & Co Ltd v Barclays Bank Ltd [1923] 2 K.B. 1.*
- 1744      As to the position of a negotiating banker generally, see UCP 600 arts 7(c), 8(c) and 12. See also *Societe Generale SA v Saad Trading [2011] EWHC 2424 (Comm), [2011] 2 C.L.C. 629* (see above, para.36-491). “Negotiation” is defined in UCP 600 art.2.
- 1745      *[1995] 2 Lloyd's Rep. 169*. See also *Industrial & Commercial Bank Ltd v Banco Ambrosiano Veneto SpA [2003] 1 S.L.R. 221.*

## (vii) - The Tender of Documents

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(vii) - The Tender of Documents

### Construction of terms of credit

36-535 The insistence upon strict compliance is continually reiterated. In *English, Scottish and Australian Bank v Bank of South Africa*, Bailhache J remarked <sup>1746</sup>:

“It is elementary to say that a person who ships in reliance on a letter of credit must do so in exact compliance with its terms. It is also elementary to say that a bank is not bound or indeed entitled to honour drafts presented to it under a letter of credit unless those drafts with the accompanying documents are in strict accord with the credit as opened.” <sup>1747</sup>

This duty prevails in all the contracts which occur in a documentary credit transaction, i.e. the contract between the buyer and the banker, the contract of banker and seller and in the relationship of issuing and correspondent banker. <sup>1748</sup> The UCP lays down detailed rules concerning the requirements of the compliance of the documents, and there are also many authorities concerning this problem. The courts will imply additional terms into a banker's irrevocable credit only in rare and exceptional circumstances. <sup>1749</sup>

### Modern review

36-536

The doctrine of strict compliance has been fine tuned in *Kreditbank Antwerp v Midland Bank Plc*.<sup>1750</sup> One of the documents called for in a letter of credit was a “draft survey report issued by Griffith Inspectorate”. The survey report tendered was executed on the letterhead of a firm describing itself as “Daniel C Griffith (Holland) BV” and signed for that company. However, a logo at the foot of the document stated “Inspectorate” and underneath it appeared the words: “Member of the Worldwide Inspectorate—dedicated to the elimination of risk”. Holding that the document was regular, Evans LJ, in the Court of Appeal, noted that banks were concerned with the form of documents presented to them and not with the underlying facts. Accepting that mere trivialities or misprints had to be ignored,<sup>1751</sup> his Lordship observed:

“... the requirement of strict compliance is not equivalent to a test of exact literal compliance in all circumstances and as regards all documents. To some extent, therefore, the banker must exercise his own judgment whether the requirement is satisfied by the documents presented to him”.<sup>1752</sup>

In respect of the certificate under consideration, his Lordship concluded<sup>1753</sup>:

“... the requirement of a Report ... issued by ‘Griffith Inspectorate’ is amply met by the documents issued by the Dutch company named which declares itself a member of the Inspectorate Group. If there is a literal requirement that the name ‘Griffith Inspectorate’ shall appear in the documents, then it does so, assuming only that there is a world-wide Inspectorate group and that the company bearing the name Daniel Griffith (Holland) is a member of it. That is an assumption which, as the [trial] judge held, an experienced banker can be expected to assume”.

## Summary

<sup>36-537</sup> *Kreditbank Antwerp*<sup>1754</sup> defeats any attempt to rely on a discrepancy based on asserting a “mirror image” test as the yardstick of strict compliance. At the same time, the Court of Appeal did not seek to modify the strict compliance doctrine. This fundamental doctrine remains intact but is given a reasonable and not a literal, robotic, construction. Nevertheless, it remains the case that a bank has no discretion to accept a document issued by a party other than the issuer as designated and styled in the credit.<sup>1755</sup> In *Simic v New South Wales Land and Housing Corp*,<sup>1756</sup> where the beneficiary was incorrectly named in a performance bond as “New South Wales Land & Housing Department trading as Housing NSW ABN 45754121940” and correctly named in the demand for payment as “New South Wales Land and Housing Corporation ABN 24960729253”, the High Court of Australia held the demand to be non-compliant, although the applicant’s claim for rectification of the bond was upheld. French CJ stated<sup>1757</sup>:

“In the ordinary case, saving minor slips and misdescriptions, the designation of a person or entity as a beneficiary cannot simply, as a matter of construction, be transmuted into the designation of a different person or entity. Nor can a reference to a non-existent entity be construed as a reference to an existing entity with quite a different name.”

## Technical defences

- 36-538 If a tender of documents does not strictly comply with the requirements of the commercial credit, the banker is entitled to reject it. It does not matter whether the discrepancy is significant or minute. This is the position even after the Court of Appeal’s decision in *Kredietbank Antwerp*, just discussed. The rule is that *de minimis non curat lex* does not apply in commercial credit transactions.<sup>1758</sup> Moreover, the person to whom the documents are tendered is entitled to raise any lawful objections against the documents, even if in fact his objection is purely technical and the true motive for his rejection of the documents is to be found in a falling market.<sup>1759</sup> English courts have held, consistently, that the fact that he does not, at the time of the rejection of the documents, raise all the defences available to him does not preclude him from setting up all of them at the trial.<sup>1760</sup> However, the law in point must now take account of UCP 600 arts 16(c)(ii) and 16(f), which appear to establish a preclusion.<sup>1761</sup>

## UCP and technical defences

- 36-539 The latest revision of the UCP contains a number of provisions which are designed to ensure that tendered documents are not rejected for overly technical reasons. Three of these provisions merit special mention. First, UCP 600 art.14(d) provides that data in a document, when read in context with the credit, the document itself and international standard banking practice, need not be identical to, but must not conflict with, data in that document, any other stipulated document or the credit. Documents need not be mirror images of each other, but they must not be inconsistent. Secondly, UCP 600 art.14(f) provides that if a credit requires presentation of a document other than a transport document, insurance document or commercial invoice, without stipulating by whom the document is to be issued or its data content, banks will accept the document as presented if its content appears to fulfil the function of the required document and otherwise complies with sub-art.14(d). Sub-article 14(f) seems to take data content out of the equation when there is no stipulation as to what it should be. For example, if the credit calls for an inspection certificate without more, the condition will be satisfied if an inspection certificate is presented even if it does

not “pass” the goods. If the buyer wants tender of an inspection certificate which states that the goods have passed inspection, then he must specify this in his application to the issuing bank to open the credit and the credit must be issued in those terms.<sup>1762</sup> Thirdly, UCP 600 art.14(h), provides that non-documentary conditions are to be ignored. A non-documentary condition would be where the credit contains a reference to goods being of “US origin”. Under the UCP this condition would be ignored unless the credit also called for one of the tendered documents—most likely the certificate of origin—to indicate compliance with that condition.<sup>1763</sup>

## Regularity of documents

- 36-540 In order to constitute a valid tender a document must, in the first place, be effective and, secondly, must be of the type current in the trade in question, i.e. a document on which questions cannot be raised.<sup>1764</sup> The set must also be regular as a whole. If the documents are inconsistent with each other the set is defective.<sup>1765</sup> Article 14(c) of UCP 600 settles the vexed problem of stale documents, i.e. documents presented before the expiry of the credit but after an unduly long time from the day of issue. UCP 600 art.14(c) provides that a presentation including one or more original transport documents must be made by or on behalf of the beneficiary not later than 21 days after the date of shipment (but in any event not later than the expiry date of the credit).<sup>1766</sup>

## The ISBP

- 36-541 A novel source for the determination of the regularity of documents tendered under letters of credit is the International Standard Banking Practice for the Examination of Documents under UCP 600 (the ISBP), originally issued by the ICC in 2002.<sup>1767</sup> The current version of the ISBP was published in 2013.<sup>1768</sup> The detailed provisions of the ISBP spell out the requirements of the document usually called for in documentary credit transactions and fill in many voids and uncertainties left unanswered by the UCP. It remains to be seen how far these provisions will guide the courts in the determination of the regularity of documents tendered under letters of credit. David Steele J’s decision in *Credit Industriel et Commercial v China Merchant Bank*<sup>1769</sup> indicates that, in general, the construction of banking practice by the ICC is given weight in legal disputes respecting the law of letters of credit. Once the ISBP become a regular tool of the banking world in general, the courts would, undoubtedly, be guided by them. Nevertheless, the ISBP merely represents one source of international standard banking practice: it is not the exclusive source. Expert evidence can still be relied upon by the parties to a dispute to establish a local or regional banking practice which may be at odds with that found in the ISBP.<sup>1770</sup>

## Originals and copies

- 36-542 An important innovation resulting from the use of electronically produced documents was reflected in art.20(b) of the UCP 500, under which a document constitutes an original although it has been produced either by a reprographic, automated or computerised system or as a carbon copy provided it is marked as an original and, where necessary, appears to be signed. In *Glencore International AG v Bank of China*,<sup>1771</sup> the Court of Appeal held that the two requisites were cumulative. Accordingly, where it was sought to give the status of an original to a document produced, or appearing to have been produced, by one of the methods specified in art.20(b), it had to be marked as an original. Its being signed by hand did not, in itself, convert it into an original. A very different conclusion was reached by the Court of Appeal in *Kreditbank Antwerp v Midland Bank Plc*,<sup>1772</sup> which suggests that, where the appearance of a document establishes that it is an original, a marking is superfluous. Both decisions were reviewed by Steel J in *Crédit Industriel et Commercial v China Merchants Bank*,<sup>1773</sup> who held that it was appropriate to turn to the ICC's Policy Statement, published on 12 July 1999, for guidance. In essence, the Policy Statement embodied the general principle upheld in the *Kreditbank* case, namely that art.20(b) did not apply to a document which appeared on its face to be an original. This is now the position under UCP 600 art.17, which addresses the issue as follows:

- “a. At least one original of each document stipulated in the credit must be presented.
- b. A bank shall treat as an original any document bearing an apparently original signature, mark, stamp or label of the issuer of the document, unless the document itself indicates that it is not an original.
- c. Unless a document indicates otherwise, a bank will also accept a document as an original if it:
  - i. appears to be written, typed, perforated or stamped by the document issuer’s hand; or
  - ii. appears to be on the document issuer’s original stationery; or
  - iii. states that it is original, unless the statement appears not to apply to the document presented.”

Article 17 goes on to permit the presentation of either originals or copies if a credit requires presentation of copies of documents.<sup>1774</sup> In addition, if a credit requires presentation of multiple documents by using terms such as “in duplicate”, “in two fold” or “in two copies”, this can be satisfied by the presentation of at least one original and the remaining number in copies, except when the document itself indicates otherwise.<sup>1775</sup>

## Compliance with time

- 36-543 UCP 600 art.6(d)(i), provides that a credit must state an expiry date for presentation and that an expiry date stated for honour or negotiation will be deemed to be an expiry date for presentation. A presentation by or on behalf of the beneficiary must be made on or before the expiry date.<sup>1776</sup> Article 6(d)(ii) provides that the place of the bank with which the credit is available is the place for presentation (and that the place for presentation under a credit available with any bank is that of any bank). A place for presentation other than that of the issuing bank is in addition to the place of the issuing bank. The expiry date of the credit or the last day for presentation of documents may be extended by the operation of UCP 600 art.29, which applies where a time limit would otherwise expire on a day on which the bank to which presentation is to be made is closed.

## Compliance with amount

- 36-544 A draft in excess of the amount of the credit must be rejected by the banker as it does not comply with the terms of the credit.<sup>1777</sup> But where the sum demanded does not in itself exceed the amount of the credit, the bank has the discretion to make payment notwithstanding that the attached invoice is for an excessive figure.<sup>1778</sup>

## Quantity and weight

- 36-545 Article 30(b) of the UCP 600 permits, in the absence of stipulation to the contrary, a discrepancy of up to 5 per cent of the weight or quantity of the goods. The quantity must be stated in the documents either in the words of the commercial credit, or in such manner as to make it possible to calculate it.<sup>1779</sup>

## The description of the goods

- 36-546 At one time it was thought that each document should contain a full and accurate description of the goods in the words of the commercial credit.<sup>1780</sup> More recent authorities show that it is, in fact, sufficient if all the documents, when read together, give a full description of the goods.<sup>1781</sup> A similar solution is adopted by art.18(c) of the UCP 600 according to which the description of

the goods in the commercial invoice must correspond with the description in the credit.<sup>1782</sup> In the remaining documents the goods may be described in general terms.<sup>1783</sup>

## The bill of lading

- 36-547 The tender of a full set of bills of lading is required in most commercial credits opened for the finance of c.i.f. and f.o.b. contracts.<sup>1784</sup> The bill of lading is, in fact, the banker's security for his advances to the seller.<sup>1785</sup> In most respects a bill of lading tendered under a commercial credit must fulfil all the requirements of a bill of lading tendered under a c.i.f. contract.<sup>1786</sup> The bill of lading must, of course, be of the type required in the commercial credit. A bill of lading dated after the last day specified for shipment is irregular.<sup>1787</sup>

## UCP provisions

- 36-548 Several rules concerning the type of bill of lading to be tendered in the absence of stipulation to the contrary are provided for by the UCP. Article 27 of UCP 600 defines a clean transport document as one which bears no superimposed clause or notation<sup>1788</sup> which expressly declares a defective condition of the goods or packing. The word "clean" need not appear on the transport document, even if the credit has a requirement for that transport document to be "clean on board".<sup>1789</sup> Articles 14(l) and 20 of UCP 600 entitle the banker to reject bills of lading issued by a forwarding agent who does not claim to be the carrier's agent, bills issued under and subject to the condition of a charterparty and bills of lading covering shipment by sailing vessels.<sup>1790</sup> Article 20 of UCP 600 provides that bills of lading must show that the goods have been shipped on board a named vessel.<sup>1791</sup> Compliance with this requirement may be evidenced either by a bill of lading bearing words indicating loading or shipment on board a named vessel or by a notation on the bill to that effect.<sup>1792</sup> Article 20(c) of UCP 600 permits the tender of a bill of lading which includes a clause authorising transhipment.<sup>1793</sup> Under art.26(a) of UCP 600 a bill of lading which shows stowage on deck constitutes a bad tender. But a bill of lading that does not show that stowage on deck has taken place, may not be rejected merely because it includes a clause permitting such stowage.

## Other transport documents involving carriage of goods by sea

- 36-549 Article 21 of UCP 600 makes specific provisions respecting non-negotiable sea waybills. In most regards, the provisions applicable to such documents are similar to those governing marine bills of

lading, except that the waybill need not be a negotiable document of title. Article 22 of UCP 600 governs charterparty bills of lading. Such a document may, of course, include a reference to its being subject to a charterparty. However, under art.22(b), “a bank will not examine such charter party contracts, even if they are required to be presented by the terms of the credit”.

## Multimodal or combined transport documents

- 36-550 Multimodal or combined transport documents are covered in art.19 of UCP 600. Such a document must indicate the name of the carrier and has to be signed by the carrier, or his agent or by the master or an agent acting on his behalf. Another requirement is that the document indicate that the goods have been “dispatched, taken in charge or shipped on board at the place stated in the credit” (UCP 600 art.19(a)(ii)). The document must, further, indicate “the place of dispatch, taking in charge or shipment, and the place of final destination stated in the credit” (UCP 600 art.19(a)(iii)).

## Other transport documents

- 36-551 UCP 600 includes detailed provisions concerning transport documents used where carriage is by air or over land. Article 23 covers air transport documents, applying to them, basically, the main provisions applicable to bills of lading. Thus, the document has to indicate the name of the air carrier and be signed by the carrier or his agent and must show that the goods have been accepted for carriage (art.23(a)(i)(ii)). It must, further, indicate the airports of departure and of destination (art.23(a)(iv)). The principles respecting documents covering carriage by road, rail or inland waterways are regulated on similar lines in art.24. The provisions respecting courier and postal receipts are set out in art.25.

## Insurance documents

- 36-552 UCP 500 art.34 deals with “insurance documents” without further elaboration as to what the term covers. It certainly includes an insurance policy,<sup>1794</sup> and art.34(d) goes on to make it clear that certificates of insurance will be accepted by banks unless the credit expressly stipulates otherwise. Cover notes issued by brokers will only be accepted if specifically authorised in the credit.<sup>1795</sup> UCP 600 art.28, makes it clear that that an insurance document includes an insurance policy, an insurance certificate or a declaration under an open cover, so long as these documents appear to be issued and signed by an insurance company, an underwriter or their agents or their proxies. But art.28(c) provides that cover notes will not be accepted. An insurance document may contain reference to any exclusion clause.<sup>1796</sup>

## Invoices and certificates

- 36-553 UCP 600 art.18(a) states that a commercial invoice (i) must appear to have been issued by the beneficiary,<sup>1797</sup> (ii) must be made out in the name of the applicant,<sup>1798</sup> (iii) must be made out in the same currency as the credit, but (iv) need not be signed. Where the amount in which the invoice is made out exceeds the amount of the credit, the bank to which the invoice has been presented can accept it provided that the amount due for settlement does not exceed the value of the credit.<sup>1799</sup> UCP 600 art.18(c) provides that the description of the goods in the commercial invoice should correspond with that in the credit. Otherwise the data in the invoice need not be identical to, but must not conflict with, data in that or other documents, including the credit.<sup>1800</sup> In addition to the usual shipping documents, letters of credit not infrequently insist upon the tender of consular certificates or certificates of origin or of weight.<sup>1801</sup> Unless the credit stipulates by whom the certificate must be issued or the required data content, banks will accept the certificate as presented provided only that it appears to fulfil the function of the required certificate and that there is no conflict of data as prohibited by art.14(d).<sup>1802</sup>

## Footnotes

- 1518 See, in particular, Benjamin's Sale of Goods, 11th edn (2021), Ch.23 ; R. King, Gutteridge and Megrah's Law of Banker's Commercial Credits, 8th edn (2001) ; R. Jack, A. Malek and D. Quest, Documentary Credits, 4th edn (2009) ; P. Ellinger and D. Neo, The Law and Practice of Documentary Letters of Credit (2010) ; D. Horowitz, Letters of Credit and Demand Guarantees: Defences to Payment (2010) .
- 1746 (*1922*) 13 *Ll.L. Rep.* 21, 24. But note that when the terms of the credit are construed, it is important to read it as a whole: *Elder Dempster Lines Ltd v Ionic Shipping Agency Inc* [1968] 1 *Lloyd's Rep.* 529, 535–536; see also *Kreditbank Antwerp v Midland Bank Plc* [1998] *Lloyd's Rep. Bank.* 173; affirmed [1999] *Lloyd's Rep. Bank* 219, where the trial judge said that where a credit was ambiguous any doubts should be resolved so as to give the transaction efficacy; but his words are not supported by the Court of Appeal. Whether the strict compliance rule applies to performance bonds and demand guarantees has been the subject of some uncertainty: but see *IE Contractors Ltd v Lloyds Bank Plc* [1990] 2 *Lloyd's Rep.* 496 at 500–501, per Staughton LJ (“[i]t is a question of construction of the bond”), applied in *Sea-Cargo Skips AS v State Bank of India* [2013] EWHC 177 (Comm), [2013] 2 *Lloyd's Rep.* 477 at [30], *Lukoil Mid-East Ltd v Barclays Bank Plc* [2016] EWHC 166 (TCC) at [17]; *South Lanarkshire Council v Coface SA* [2016] CSIH 15 at [12]; *MUR Joint Ventures BV v Compagnie Monegasque de Banque* [2016] EWHC 3107 (Comm) at [26]–[28]; *Sumitomo Mitsui Banking Corp*

- Europe Ltd v Euler Hermes Europe SA [2019] EWHC 2250 (Comm)* at [71]. See also *Simic v New South Wales Land and Housing Corp [2016] HCA 47* at [6], where French CJ, sitting in the High Court of Australia, stated: “Two complementary principles apply to letters of credit and performance bonds alike—the principle of strict compliance and the principle of autonomy or independence”.
- 1747 For a specific application of this maxim, see *Kydon Compania Naviera SA v National Westminster Bank Ltd (The Lena) [1981] 1 Lloyd's Rep. 68, 74-75*, where it was held that a tender of documents was bad because, *inter alia*, the bill of exchange was drawn on the issuing bank instead of on the applicant of the credit, who was designated as its drawee in the letter of credit. And see *Seaconsar Far East Ltd v Bank Mardazi Jamhouri Islami Iran [1994] 1 Lloyd's Rep. 1, HL*.
- 1748 Contrast *Dolan (1988) 105 Banking L.J. (U.S.) 380*, who suggests that a less stringent standard is applicable in the relationship of issuing banker and buyer. See also *Dolan, "A Principled Exception to the Strict Compliance Rule in Trilateral Letter of Credit Transactions" (2003) 18 B.F.L.R. 245*.
- 1749 *Cauxell Ltd v Lloyd's Bank, The Times, 26 December 1995; Uzinterimpex JSC v Standard Bank Plc [2007] EWHC 1151 (Comm), [2007] 2 Lloyd's Rep. 187* at [157]–[158]; *South Lanarkshire Council v Aviva Insurance Ltd [2016] CSOH 83* at [29], which cases, although dealing with performance bonds, ought to apply also to letters of credit. See also above, para.36-459.
- 1750 *[1998] Lloyd's Rep. Bank 173*; affirmed *[1999] 1 All E.R. (Comm) 801*.
- 1751 The courts are willing to overlook a trivial defect in a tendered document where there is an *obvious* typographical error: see, e.g. *Bankers Trust Co v State Bank of India [1991] 2 Lloyd's Rep. 443*, where one of the tendered documents gave the buyer's telex number as 931310 instead of 981310. But where it is not obvious that the error is merely typographical, the bank is entitled to reject the tendered document as discrepant: see, e.g. *Bulgrains & Co Ltd v Shinhan Bank [2013] EWHC 2498 (QB)*, where the claimant beneficiary was identified in the credit as “Bulgrains Co Ltd” but in the tendered commercial invoice as “Bulgrains & Co Ltd”, and it was held (at [24]) “that there was a discrepancy as to name that was not clearly and demonstrably simply a typographical error and was material” (approving *United Bank Ltd v Banque Nationale de Paris [1992] 2 S.L.R. 64, 73–74*, Tin J: “the name of the beneficiary is a very significant matter”): the judge added that even if there was no facility to insert an ampersand when (as here) using the SWIFT messaging system to transmit a credit to the beneficiary, the word “and” could and should have been used because it was properly part of the beneficiary's name (and see Benjamin's Sale of Goods, 11th edn (2021), para.23-127, questioning whether the issuing bank should have been prevented from raising the discrepancy because it was caused by an error in the terms of the credit attributable to the bank itself). See also *Beyene v Irving Trust Co Ltd (1985) 762 Fed. Rep. 2d 4, US Second Circuit CA*; cf. *Hing Yip Hing Fat Co Ltd v Daiwa Bank Ltd [1991] 2 H.K.L.R. 35, Hong Kong SC*. It must also be remembered that the wording of the credit remains of paramount importance. Even an apparently trivial discrepancy will justify rejection of the documents if the credit is specific as to that requirement: see, e.g. *Seaconsar Far*

- East Ltd v Bank Markazi Jomhouri Islami Iran* [1993] 1 *Lloyd's Rep.* 236, CA (reversed on other grounds: [1994] 1 A.C. 438), where tendered documents did not bear the letter of credit number or buyer's name as required under the express terms of the credit.
- 1752 [1999] 1 All E.R. (Comm) at 806.
- 1753 [1999] 1 All E.R. (Comm) at 816.
- 1754 [1998] 2 *Lloyd's Rep.* 173; affirmed [1999] 1 All E.R. (Comm) 801.
- 1755 See Benjamin's Sale of Goods, 11th edn (2021), para.23-125—23-127.
- 1756 [2016] HCA 47.
- 1757 At [10].
- 1758 *Moralice (London) Ltd v ED & F Man* [1954] 2 *Lloyd's Rep.* 526; *Soproma SpA v Marine and Animal By-Products Corp* [1966] 1 *Lloyd's Rep.* 367, 390; *Astro Exito Navegacion SA v Chase Manhattan Bank NA (The Messiniaki Tolmi)* [1986] 1 *Lloyd's Rep.* 455. But see *Bunge Corp v Vegetable Vitamin Foods (Pte) Ltd* [1985] 1 *Lloyd's Rep.* 613 (held de minimis rule did apply to underlying contract between applicant and beneficiary).
- 1759 *Guaranty Trust Co of New York v Van Den Berghs* (1925) 22 *Ll.L. Rep.* 58, 112; affirmed 287, 477, 455. But see *Mannesman Handel AG v Kaunlaran Shipping Corp* [1993] 1 *Lloyd's Rep.* 89, in which Saville J, in a case governed by Swiss law, invoked a doctrine of good faith in the performance of contractual duties, to defeat an unconscionable reliance on a meaningless discrepancy.
- 1760 *Skandinaviska Kreditaktiebolaget v Barclays Bank* (1925) 22 *Ll.L. Rep.* 523, 525; *Westminster Bank v Banca Nazionale Di Credito* (1928) 33 *Ll.L. Rep.* 306, 311; *Kydon Compania Naviera SA v National Westminster Bank Ltd (The Lena)* [1981] 1 *Lloyd's Rep.* 68, 78–80, which suggested that the position had not been changed by art.8 of the 1974 Revision of the UCP. But it is probably too late to raise a new defence at the stage of an appeal: *Gian Singh & Co Ltd v Banque de L'Indochine* [1974] 2 *Lloyd's Rep.* 1, 12.
- 1761 See above, paras 36-256 and 36-524. But see also Benjamin's Sale of Goods, 11th edn (2021), para.23-223 (as to the position of non-confirming nominated banks).
- 1762 P. Downes, "UCP 600: not so strict compliance" [2007] B.J.I.F.L. 196, 197–198.
- 1763 English courts have in the past construed non-documentary conditions in letters of credit as calling for production of a reasonable document evidencing its satisfaction: *Banque de l'Indochine et de Suez SA v JH Rayner (Mincing Lane) Ltd* [1983] Q.B. 711; *Floating Dock Ltd v Hong Kong and Shanghai Banking Corp* [1986] 1 *Lloyd's Rep.* 65; *Astro Exito Navegacion SA v Chase Manhattan Bank NA (The Messiniaki Tolmi)* [1986] 1 *Lloyd's Rep.* 455. Where the credit incorporates UCP 600, it is unclear whether an English court will continue to follow this approach on the ground that the terms of the credit should prevail as they reflect the intention of the parties. There is no direct authority on the point but *Credit Agricole Indosuez v Generale Bank (No.2)* [2000] 1 *Lloyd's Rep.* 123 suggests that the old approach will continue to be followed. See also *Kumagai-Zenecon Construction Co Ltd v Arab Bank Ltd* [1997] 3 *S.L.R.* 770; *Korea Exchange Bank v Standard Chartered Bank* [2006] 1 *S.L.R.* 565. See generally,

- 1764      *E. Adodo*, “Non-documentary Requirements in Letters of Credit Transactions: What is the Bank’s Obligation Today?” [2008] *J.B.L.* 103.
- 1765      *Skandinaviska Kreditakiebolaget v Barclays Bank*, above, at 525. See also *Karberg & Co v Blythe, Green, Jourdain & Co* [1916] 1 *K.B.* 495.
- 1766      *Banque de l’Indochine et de Suez SA v JH Rayner (Mincing Lane) Ltd* [1983] *Q.B.* 711. The 21-day period specified in art.14(c) can be truncated or extended, or made to run from a different date, by the terms of the credit: see, e.g. *Euro-Asian Oil SA v Credit Suisse AG* [2018] *EWCA Civ* 1720, [2019] 1 *Lloyd’s Rep.* 444 (“documents presented more than 21 days from bill of lading date but within documentary credit validity period acceptable”).
- 1767      ICC Publication No.645.
- 1768      ICC Publication No.745. An earlier version was published in 2007 to accompany the issue of UCP 600 (ICC Publication No.681).
- 1769      [2002] *EWHC* 973 (*Comm*), [2002] 2 *All E.R. (Comm)* 427.
- 1770      See *Ellinger* [2007] *L.M.C.L.Q.* 152, 159.
- 1771      [1996] 1 *Lloyd’s Rep.* 135.
- 1772      [1998] *Lloyd’s Rep. Bank.* 173; affirmed [1999] *Lloyd’s Rep. Bank.* 219.
- 1773      [2002] *EWHC* 973 (*Comm*), [2002] 2 *All E.R. (Comm)* 427.
- 1774      UCP 600 art.17(d).
- 1775      UCP 600 art.17(e).
- 1776      UCP 600 art.6(e).
- 1777      1777 But note that a tolerance of 5 per cent less in the amount of the drawing is often permissible: art.30(c) of UCP 600. See also art.30(a) of UCP 600 construing “about” and “approximately”. The tolerance provided for in subart.30(c) does not apply when the credit specifies a specific tolerance or uses the expressions referred to in subart.30(a).
- 1778      1778 UCP 600 art.18(b). UCP 600 art.18(a)(iii) states that the invoice must be made out in the same currency as the credit.
- 1779      1779 *London and Foreign Trading Corp v British and North European Bank* (1921) 9 *Ll.L. Rep.* 116. As regards the meaning of “about” or “approximately” see art.30(a) of UCP 600. And see *Kydon Compania Naviera SA v National Westminster Bank Ltd (The Lena)* [1981] 1 *Lloyd’s Rep.* 68, 76, showing that this provision applies only to weight and quantity strictu sensu.
- 1780      1780 See, e.g. *London and Foreign Trading Corp v British and North European Bank*, above; cf. *Rayner & Co Ltd v Hambro’s Bank Ltd* [1943] *K.B.* 37.
- 1781      1781 *Midland Bank Ltd v Seymour* [1955] 2 *Lloyd’s Rep.* 147; *Soproma SpA v Marine and Animal By-Products Corp* [1966] 1 *Lloyd’s Rep.* 367; cf. *Bank Melli Iran v Barclays Bank DCO* [1951] 2 *Lloyd’s Rep.* 367.
- 1782      1782 A discrepancy as to description of the goods in the invoice cannot be cured by the fact that a compliant description is given in another tendered document: *Bulgrains & Co Ltd v Shinhan Bank* [2013] *EWHC* 2498 (*QB*) at [25]. But even in the invoice the correspondence need not be literally identical: *Glencore International AG v Bank of*

- 1783      *China* [1996] 1 *Lloyd's Rep.* 135. And see *Kreditbank Antwerp v Midland Bank Plc*, above.  
 1783      And see *Kydon Compania Naviera SA v National Westminster Bank Ltd (The "Lena")* [1981] 1 *Lloyd's Rep.* 68, 75–77; and note that in *Glencore International AG v Bank of China*, above, it was held that a packing list need not include a detailed description of the goods.  
 1784      In such cases two bills out of a set of three are a bad tender: *Donald H Scott & Co Ltd v Barclays Bank Ltd* [1923] 2 K.B. 1. See now art.19(a)(iv) and ISBP para.70.  
 1785      As regards the title conferred by the possession of the bill of lading on the consignee where there was no intention that title should pass to him, see "*The Future Express*" [1994] 2 *Lloyd's Rep.* 542, CA.  
 1786      As to delivery of a mate's receipt and a mercantile usage establishing its negotiability in the trade between Sarawak and Singapore, see *Kum v Wah Tat Bank Ltd* [1971] 1 *Lloyd's Rep.* 439. And note that the transport documents must be dated, a requirement which remains intact notwithstanding the words "to be accepted as presented": *Credit Agricole Indosuez v Credit Swisse First Boston* [2001] 1 All E.R. (Comm) 1088.  
 1787      *Credit Agricole Indosuez v Generale Bank* [2000] 1 *Lloyd's Rep.* 123.  
 1788      A notation on a received for shipment bill of lading, certifying shipment on board is not a notation rendering the instrument unclean: *Westpac Banking Corp v South Carolina National Bank* [1986] 1 *Lloyd's Rep.* 311.  
 1789      UCP 600 art.27. Note that under art.26(b) of UCP 600 a bill of lading is not rendered unclean by reason of clauses such as "shipper's load and count" or "said by shipper to contain".  
 1790      The tender of a combined transport bill of lading is, however, good.  
 1791      But a received for shipment bill of lading is a good tender if the letter of credit does not provide for a bill of lading but a multimodal or combined transport document: art.19(a)(ii) of UCP 600.  
 1792      UCP 600 art.20(a)(ii). cf. *Diamond Alkali Export Corp v Bourgeois* [1921] 3 K.B. 443, concerning the position at common law.  
 1793      UCP 600 art.20(d), states that clauses in a bill of lading stating that the carrier reserves the right to tranship will be disregarded.  
 1794      *Diamond Alkali Export Corp v Bourgeois* [1921] 3 K.B. 443; *Donald H Scott & Co Ltd v Barclays Bank Ltd* [1923] 2 K.B. 1.  
 1795      UCP 500 art.34(c).  
 1796      UCP 600 art.28(i).  
 1797      Except as provided for in UCP 600 art.38 (transferable credits).  
 1798      Except as provided in subart.38(g).  
 1799      UCP 600 art.18(b).  
 1800      UCP 600 art.14(d).  
 1801      UCP 600 art.14(h), provides that non-documentary conditions are to be ignored. See also J. Zhang, "Disregarding non-documentary conditions in letters of credit: Is it as easy as it appears to be?" [2018] L.M.C.L.Q. 527. As regards the nature of a certificate of inspection, see *Commercial Banking Co of Sydney v Jalsard Pty Ltd* [1973] A.C.

279; note that the bank is not liable for the genuineness of a certificate: *Gian Singh & Co Ltd v Bank de L'Indochine* [1974] 1 Lloyd's Rep. 56; affirmed [1974] 2 Lloyd's Rep. 1. As regards the conformity of a certificate, see *Astro Exito Navegacion SA v Chase Manhattan Bank NA* [1986] 1 Lloyd's Rep. 455. As regards false certificates presented without the tenderer's knowledge of fraud, see *Montrod Ltd v Grundkotter Fleischvertriebs GmbH* [2001] All E.R. (Comm) 368; affirmed [2001] EWCA Civ 1954, [2002] 1 W.L.R. 1975.

- 1802 UCP 600 art.14(f). On certificates generally, see Benjamin's Sale of Goods, 11th edn (2021), paras 23-194 et seq.

## **(viii) - The Nature and Effect of the Trust Receipt**

**Chitty on Contracts 34th Ed.**

**Consolidated Mainwork Incorporating First Supplement**

**Volume II - Specific Contracts**

**Chapter 36 - Bills of Exchange and Banking**

**Section 2. - Aspects of Banking Law**

**(i) - Bankers' Commercial Credits** <sup>1518</sup>

**(viii) - The Nature and Effect of the Trust Receipt**

### **Nature of trust receipt**

- 36-554 If the buyer is able to reimburse the issuing banker on the arrival of the goods at their destination then the shipping documents are surrendered absolutely by the issuing banker to the buyer who is thus enabled to collect the goods from the ship and deal with them thereafter in the ordinary course of business. Frequently, however, the buyer looks to his dealings with the goods to provide him with the means of reimbursement and is anxious therefore to obtain the shipping documents before discharging his debt. A banker, willing to extend the credit facilities beyond the period of shipment, obtains such protection as he can by requiring the buyer, in return for the shipping documents, to execute a trust receipt, variously described as a letter of trust or of lien. This is sometimes little more than an acknowledgment that the shipping documents and thence the goods and ultimately their proceeds will be held by the buyer on behalf of the banker; it usually, however, sets out various conditions as to insurance and storage of the goods pending disposal and in particular is likely to contain an undertaking to isolate the transaction in order to assist the earmarking of the proceeds of sub-sale. The buyer does not upon executing the receipt become a strict trustee, but he does thereby entitle the banker in the event of the buyer's insolvency to recover the goods or their proceeds in preference to ordinary creditors. <sup>1803</sup>

### **Registration**

- 36-555

The trust receipt steers a delicate course among the dangers of non-registration as either a bill of sale or a mortgage or charge under [s.8 of the Bills of Sale Act 1882](#) or [ss.859A–Q of the Companies Act 2006](#). Particular phraseology that has found favour with the courts was that before Astbury J in *Re David Allester Ltd*<sup>1804</sup> where the trust receipt there considered had not been registered but was held to be nonetheless effective. It was emphasised that the rights of the banker over the goods had arisen originally under the pledge effected by the initial transfer to the banker of the bill of lading and the trust receipt was construed as but an authority stating the terms on which the pledgor was to realise the goods on the banker's behalf. The decision does much to safeguard a banker parting with a bill of lading initially received by way of security. Exceptionally, where some other document such as a delivery order is, instead of a bill of lading, initially received by the banker there is no pledge of the goods in the absence of attornment<sup>1805</sup> and the reasoning of Astbury J is not then applicable. In those limited circumstances a trust receipt, contrary to the general rule, may perhaps wither without registration, but a banker is unlikely to extend credit facilities in the first place unless offered either the bill of lading, and accordingly the status of pledgee of the goods, or sufficient collateral security.

## Effect of the trust receipt

- 36-556 Whilst the trust receipt gives the banker priority over the ordinary creditors of the insolvent buyer, it does constitute the buyer a mercantile agent and thus enables him to pass a valid title under [s.2\(1\) of the Factors Act 1889](#). In *Lloyds Bank v Bank of America National Trust and Savings Association*<sup>1806</sup> the plaintiffs had received from Strauss & Co Ltd bills of lading as securities for advances. Subsequently, upon Strauss & Co Ltd undertaking to sell the goods and hold the proceeds on trust, the bills of lading were released, but Strauss & Co Ltd then fraudulently pledged them with the defendants who took them in good faith and without notice of the plaintiffs' rights. Both Porter J and the Court of Appeal rejected the plaintiffs' claim to recover the documents. Greene MR expressed the view of the court that Strauss & Co Ltd, for the purpose of the Factors Act, had been not only mercantile agents but, together with the plaintiffs, the owners of the goods, and that there was no invalidity in their disposition to the defendants merely because of their dual capacity. The rights of the banker accordingly do not prevail in such circumstances against those of the bona fide third party purchaser for value.

## Footnotes

- 1518 See, in particular, Benjamin's Sale of Goods, 11th edn (2021), Ch.23 ; R. King, Gutteridge and Megrah's Law of Banker's Commercial Credits, 8th edn (2001) ; R. Jack, A. Malek and D. Quest, Documentary Credits, 4th edn (2009) ; P. Ellinger and D. Neo, The Law and Practice of Documentary Letters of Credit (2010) ; D. Horowitz, Letters of Credit and Demand Guarantees: Defences to Payment (2010) .

- 1803     *North Western Bank v Poynter [1895] A.C. 56*. See generally, *E.P. Ellinger, "Trust Receipt Financing"* [2003] *J.I.B.L.R.* 305.
- 1804     *[1922] 2 Ch. 211*.
- 1805     *Dublin City Distillery Ltd v Doherty [1914] A.C. 823*. See also Lord Wright's analysis of the common law of pledge in *Madras Official Assignee v Mercantile Bank of India Ltd [1935] A.C. 53*. In that case, railway receipts had been surrendered but the decision itself is not of wide application for their efficacy depended upon a local statute.
- 1806     *[1938] 2 K.B. 147*.

## (j) - The Banker's Lien

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

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Chapter 36 - Bills of Exchange and Banking

Section 2. - Aspects of Banking Law

### (j) - The Banker's Lien

#### Extent of lien

- 36-557 By mercantile custom the banker has a general lien over all forms of commercial paper deposited by or on behalf of a customer in the ordinary course of banking business. The custom does not extend to valuables lodged for the purpose of safe custody and may in any event be displaced by either an express contract or circumstances which show an implied agreement inconsistent with the lien.<sup>1807</sup> Thus in *Re Bowes*,<sup>1808</sup> where a policy of life assurance was deposited with a memorandum which expressed the deposit as security for all sums due up to a limit of £4,000, North J held that a lien would not be implied so as to extend the effect of the security beyond the agreed overdraft. The most frequent example of circumstances inconsistent with the general lien is in the case of a deposit expressed to cover an advance for a specified purpose.<sup>1809</sup> However, once the original purpose has been fulfilled by repayment of the specified advance, if a customer knowingly permits the banker to retain the security, a general lien may ultimately be implied and its protection then claimed in respect of other advances.<sup>1810</sup>
- 36-558 The lien is applicable to negotiable instruments which are remitted to the banker from the customer for the purpose of collection. When collection has been made the proceeds may be used by the banker in reduction of the customer's debit balance unless otherwise earmarked.<sup>1811</sup>

#### Third party interests

36-559

A banker may not claim the protection of the lien in respect of advances made after notice that the security belongs to or is subject to some interest of a stranger.<sup>1812</sup> Cozens-Hardy MR had made the wider suggestion that the lien prevails over the property of the customer only,<sup>1813</sup> but, at least with regard to negotiable instruments, this may be doubted.<sup>1814</sup>

## Power of sale

- 36-560 Unlike other common law liens, that of the banker is not merely possessory in nature but is thought to carry with it a power of sale. Such a power over negotiable instruments is fortified by statute, for the banker is deemed to be a holder for value to the extent of the sum for which the lien exists.<sup>1815</sup>

## Footnotes

- 1807 *Branda v Barnett* (1846) 12 Cl. & F. 787.
- 1808 (1886) 33 Ch. D. 586.
- 1809 *Wilkinson v London and County Banking Co* (1884) 1 T.L.R. 63.
- 1810 *Re London and Globe Finance Corp* [1902] 2 Ch. 416.
- 1811 *Re Keever* [1967] Ch. 182. Note that the banker's right to combine the customer's accounts—discussed above, para.36-326—is distinguishable from the banker's lien. As the banker "owns" the money standing to the credit of the customer's account, he can have no lien over it: *National Westminster Bank Ltd v Halesowen Presswork and Assemblies Ltd* [1972] A.C. 785; *Re Charge Card Services Ltd* [1989] Ch. 497. Nevertheless, the credit balance on an account can be charged to the bank: *Re BCCI SA (No.8)* [1998] A.C. 214.
- 1812 *Jeffryes v Agra and Masterman's Bank* (1866) L.R. 2 Eq. 674; *Siebe Gorman & Co Ltd v Barclays Bank Ltd* [1979] 2 Lloyd's Rep. 142.
- 1813 *Cuthbert v Robarts, Lubbock & Co* [1909] 2 Ch. 226, 233.
- 1814 *Branda v Barnett* (1846) 12 Cl. & F. 787, 805–806.
- 1815 Bills of Exchange Act 1882 s.27(3). See also Cheques Act 1957 s.2. But the banker cannot be the holder of a crossed cheque marked "account payee" or "account payee only" which is paid in for collection: see above, para.36-385.