Neutral Citation Number: [2022] EWHC 2163 (QB)

Case No: QB-2021-001312

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/08/2022

Before :

MR JUSTICE FREEDMAN

- -

Between :

GEORGE GABRIEL BITAR **Claimant**

- and –

BANK OF BEIRUT S.A.L **Defendant**

- -
- -

James Cutress QC and Daniel Carall-Green (instructed by **Rosenblatt Law**) for the **Claimant**
Barry Issacs QC and Donald Lilly (instructed by **Howard Kennedy LLP**) for the **Defendant**

Hearing dates: 19, 20, 21, 22 & 26 July 2022
Judgment handed down in draft 11 August 2022

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Approved Judgment

This judgment will be handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 11.00am on Monday 15 August 2022

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MR JUSTICE FREEDMAN :

II Introduction

1. This is the third case tried before the High Court in London arising out of the failure or refusal of Lebanese bankers to pay to depositors sums alleged to be owing on their accounts. The Banks have said that the issues arise out of difficult financial conditions faced by Lebanese banks. The previous cases were *Khalifeh v Blom Bank SAL* [2021] EWHC 3399 (QB) (Foxton J 17 December 2021) (*"Khalifeh"*) and *Manoukian v Banque au Liban SAL and another [2022] EWHC 669 (QB)* (Picken J 25 March 2022) (*"Manoukian*"). The Lebanese bank prevailed in *Khalifeh*, whereas the depositor prevailed in *Manoukian*. There was an application for permission to appeal in *Manoukian*, which has been rejected.

2. By this claim, the Claimant seeks repayment of money in two bank accounts (the "First Account" and the "Second Account") he holds with the Defendant (the "Bank"). The Accounts are held under two contracts (the "First Account Agreement" and the "Second Account Agreement") which are in materially the same terms. The amount of the indebtedness between the accounts is a sum of US$7,790,624 plus interest.

3. The Claimant claims that the Bank is obliged to make international transfers to transfer money to the Claimant's UK bank account. Such obligation arises from the terms of the accounts and/or from banking custom and practice. The Claimant claims specific performance, alternatively damages together with interest at the rate of 9% per annum.

4. The Bank says that the terms of the agreements do not as a matter of construction contain an obligation to make international transfers. Although there was a custom to make international transfers from inception subject to an "acceptable reason" exception, it says that by the time the Claimant gave his instructions, the custom had come to an end due to the political and banking crisis in Lebanon and to guidance given by the Association of Lebanese Bankers ("ABL"). In any event, the Bank says that in these circumstances, it had an acceptable reason not to make an international transfer.

5. In the alternative, the Claimant claims repayment of the debt which the Bank owes him. As to the claim in debt, the Bank says that it has discharged the debt by mean of a Banqu du Liban ("BdL") cheque using the Article 822 or "tender and deposit" procedure, a Lebanese procedure whereby a debtor can seek to discharge a debt by payment via a notary. If this occurred, it was not before January 2022. It is common ground that in the event that the Claimant was entitled to an international transfer, whether by contract or by custom, that occurred before January 2022, and the Article 822 procedure would not apply.

II Factual background

(a) The parties and their relationship

6. The Claimant is a consultant radiologist at Chelsea and Westminster Hospital. He was born and educated and has always lived and worked in England, and is a UK national, but he and his parents are also Syrian nationals. He does have Lebanese connections

and ties. His parents are also Lebanese nationals, and his mother has lived in Lebanon for over 20 years; and his father has split his time between Nigeria (where the family's business is located) and Lebanon. He considers himself to have "*Lebanese connections and ties*".

7. The Bank is a Lebanese joint stock company formed under the laws of Lebanon, and carries on business as a retail bank. In December 2006, the Claimant opened an account (numbered 466150) with his father and brother. Later, he opened a personal account (numbered 469020) in his sole name, but in June 2015 he asked for that account to be closed. In July 2015, the Claimant opened the accounts which are now in dispute, namely:

    (1) the First Account (numbered 469770) with his wife; and

    (2) the Second Account (numbered 469775) with his parents and brother.

8. The First Account and the Second Account have a number of sub-accounts, the names and functions of which the Claimant explains in his written evidence. Three of those sub-accounts are the subject of the present proceedings. They are:

    (1) the First USD Current Account, which is a sub-account of the First Account and is a form of current and checking account called a "*winner*" account;

    (2) the Second USD Current Account, which is a sub-account of the Second Account and is also a "*winner*" account; and

    (3) USD Fixed Deposit Account, a sub-account of the Second Account.

9. The funds in the USD Fixed Deposit Account have, since the beginning of these proceedings, been transferred by the Bank to the Second USD Current Account. Therefore, this claim now simply concerns sums sent to and/or contained in the First USD Current Account and the Second USD Current Account.

10. The obligation in respect of a loan under Lebanese law is that absent some clause to this effect, a bank receives a money deposit to use those funds as its own. As in the case of English law, the bank becomes the owner of the funds and has an obligation of retuning the deposited funds by providing the equivalent quantity of the sum in the same currency.

(b) The Claimant's residence

11. An issue which has arisen is whether the Claimant represented in certain forms that he was resident in London. It is not apparent to what this issue goes to in the determination of this litigation. If it goes to credit, I am satisfied, having seen the Claimant give evidence, that he is an honest witness who did not intend to mislead the Bank. He was hampered in his ability to fill out forms because he was not able to understand forms in

Arabic. Further, as Mr Georges Assaf acknowledged, the Claimant's personal information form was completed by the Bank. The Bank also completed some forms erroneously: on one of them, it referred to his being a self-employed contractor with an income of zero yet depositing income from his work of $100 per month.

12. In another, it provided his address as being in Nigeria. This was despite the Claimant having stated to the Bank in 2017 that his tax residence was in the UK. The Claimant had declared by 24 December 2017 at the latest that his "*Residence Address*" was in the UK and "*Country of Tax Residence*" was the UK. He wrote letters and emails to the Bank giving his address as Lennox Gardens.

13. It was apparent from a statement of one of his relationship managers, Mr Haddad from an interlocutory hearing, that he and Mr Chidiac were aware that the Claimant lived in England. Mr Assaf accepted in his evidence that he knew that the Claimant worked at the Queen Elizabeth Hospital (in fact, it was the Queen Alexandra Hospital, Portsmouth, but that simply reflected an inexactitude in the question, and it was obvious that it was a UK hospital). Mr Assaf said that he had known that the Claimant's brother lived and worked in Nigeria and that Mr Chidiac had known that the Claimants father worked there. Having seen that the Claimant ticked the "Outgoing transfers" box on one of the forms, Mr Assaf accepted that it was clear from the account forms that the Claimant would want international transfers including transfers to and from England. The account opening documents from December 2006 show that the Claimant was British and had a UK passport. Further, his account 469020 (the one that the Claimant asked to be closed in 2015) was or included a GBP account for use in the UK. He requested transfers to his UK account, and he corresponded regularly with Mr Kanzaria of Bank of Beirut UK. The Bank sent hundreds of texts over the years to the Claimant's UK mobile number.

14. The Claimant was taken to documents (in Arabic) showing that the Bank had a Rabieh address on file for him. He does not own a Rabieh address (he does own a property in Baabda), but his brother did. It is possible that this was some correspondence address or that there was some confusion between the Claimant's address and members of his family.

15. If and insofar as the Bank wished to prove that the Claimant has represented that he was despite the above in fact a person resident in Lebanon, then it called the wrong witnesses. The primary witness for the Bank was Mr Assaf who accepted that he had no role in the process of filling in the account opening forms or in the account opening process after the forms had been filled in. He was not a relationship manager, the relevant ones being Mr Haddad and Mr Chidiac, neither of whom were called, despite having given evidence in the jurisdictional challenge. Mr Hikmat El Bikai, a senior executive of the Bank responsible for legal and credit affairs was called to give evidence, but he candidly admitted that he took no role in handling customer complaints, and he had no role in handling customer complaints and was not responsible for the Bank's policy in relation to transfers. The Court was then left with the straightforward evidence of the Claimant and the deficient evidence of the Bank about overseas transfers. I shall refer more fully below to the evidence of the witnesses.

16. I am satisfied from the evidence as a whole that the Bank knew at least from the relationship managers and from information provided by the Claimant to the Bank that the Claimant lived and worked as a doctor in England. The Bank's understanding that

the Claimant was either resident in England or, at very least, that he was non-resident in Lebanon to the extent that he worked in the UK and paid his tax there, have some significance. They form part of the background against which the Account Agreements fall to be construed. In the words of Picken J in *Manoukian* at [63], "*The expectation of the parties must surely have been that an expatriate such as Mr Manoukian would have the international transfer right which he asserts*".

(c) Use of the accounts for international transfers

17. The Claimant had made international transfers on his previous accounts. In the four years after opening the accounts referred to above, the Claimant made transfers of varying sizes (including one of almost £200,000), in different currencies (GBP, USD and Euros) and to various international destinations (London, New York, Paris and Italy). He gave examples in his evidence of more than 12 transfers.

(d) The crisis in Lebanon

18. In late 2019, Lebanon entered a severe economic crisis, the effects of which were then compounded by the global pandemic that began in early 2020. The value of the Lebanese currency (LBP) has collapsed, and Lebanon has defaulted on its sovereign debt. The way in which the matter was expressed by Mr Justice Picken in *Manoukian* was as follows at [20-22]:

> *"20. The crisis's immediate catalyst was nationwide political unrest in the autumn of 2019, triggered by a proposal by the government to tax calls made by WhatsApp. Due to that unrest, which included protests, street riots and roadblocks, Lebanese banks were closed for two weeks between 18 October 2019 and 31 October 2019. During this time, SGBL issued a blanket directive to refuse all requests for international transfers and Bank Audi directed employees not to process any new cross-border requests until after the Bank reopened and resumed business. When the banks reopened on 1 November 2019, there was a run on all Lebanese banks, with large numbers of clients attempting to withdraw all their foreign currency or transfer it all abroad.*
>
> *21. Anticipating such a run, SGBL issued a directive to its employees that, from 1 November 2019, no international transfers were to be made for any purpose. Bank Audi similarly imposed severe restrictions on international transfers, directing staff that foreign exchange transactions exceeding US$10,000 must not be accepted unless approved by Bank Audi's central Treasury Unit. Such international transfers were only to be permitted for personal expenses. These initial directives were intended as temporary, stop-gap measures. At the time, the Banks thought that the crisis would be shortlived and that clients'*

> *loss of confidence resulting from the protests and the October 2019 bank closures would be restored. Instead, the crisis deepened, due to problems at a macro-economic level in Lebanon.*
>
> *22. Systemic issues within Lebanon's banking sector mean that Lebanese banks are highly exposed to fiscal issues with the Lebanese state. This is because Lebanese banks rely heavily on the Banque du Liban ('BdL'), the central bank, for their foreign currency liquidity. As the crisis unfolded, however, it meant that BdL could in practice 'turn off the taps' by restricting Lebanese banks' access to their foreign currency deposits for international transfers. The net result is that the Banks (along with all other Lebanese banks) have been operating with severe foreign currency shortages since October 2019. Lebanon's economic turmoil and political unrest have worsened since then, the Lebanese pound (LBP) having lost 90% of its value amid dwindling confidence in the Lebanese economy, which has itself shrunk by 40%".*

19. A notable feature of the response by Lebanese banks to the crisis has been an attempt to restrict what customers may do with any money—even USD—held with them. According to Mr El Bikai:

(1) Mass protests commenced in Beirut against a Lebanese bank on 17 October 2019.

(2) On 21 October 2019, most Lebanese banks closed.

(3) On 1 November 2019, the Bank reopened, but sought to impose "*informal restrictions*" on withdrawals and transfers. The purpose of these informal restrictions was said to be to prevent "*a run on the banks*". Other Lebanese banks sought to impose similar measures, but there were inconsistencies among those measures.

(4) On 17 November 2019, apparently in response to those inconsistencies, the Association of Banks in Lebanon ("the ABL"), a professional trade association of banks in Lebanon, issued a circular in which it advised all member banks to impose uniform capital controls, which it called "*temporary directives*" restricting withdrawals and transfers from Lebanese banks. There was an exception for dollars transferred to Lebanon after the start of the crisis. In *Manoukian*, Picken J found at [24] that *"the ABL Circular did not have legal force."* This was accepted by Professor Najm at [391] of her report and expanded upon at [390-406] to the effect that a such a circular cannot put any restriction on financial transfers or affect or limit the contractual and legal obligations of banks. It does not provide the banks any valid basis for failing to comply with their contractual obligations, such as international transfer instructions of their customers.

(5) Mass protests continued in December 2019 and thereafter. Lebanon defaulted on a $1.2 billion Eurobond in March 2020 and the Beirut port explosion occurred in August 2020.

20. According to Picken J's judgment in *Manoukian* at [22]:

> *"The net result is that the Banks (along with all other Lebanese banks) have been operating with severe foreign currency shortages since October 2019. Lebanon's economic turmoil and political unrest have worsened since then, the Lebanese pound (LBP) having lost 90% of its value amid dwindling confidence in the Lebanese economy, which has itself shrunk by 40%."*

(e) Transfer requests of the Claimant

21. The Claimant's evidence is that some transfers were honoured by the Bank even after the crisis began. There was a transfer of £155,000 in November 2019 and also seven transfers from 26 December 2019 to 21 July 2020 each to the UK, the largest being for £15,031. They related mostly to payments for building works. Mr El Bikai provided two further examples of payments. However, the effect of the restrictions was to cause difficulties for the Claimant during 2020 who was dependent on the transfers to pay for his household expenditure which exceeded his income from his medical practice, particularly the costs of education of his children.

22. The Claimant then decided to instruct the transfers of the full balances. The transfer instructions which are the subject of this dispute are as follows:

(1) on 6 September 2020, the Claimant instructed the transfer of $470,000 to his UK account;

(2) on 20 October 2020, the Claimant (by solicitors) instructed the Bank to transfer the full balance then standing to the credit of the USD Current Accounts to his UK account;

(3) on 3 November 2020, the Claimant (himself) instructed the Bank to transfer the full balance then standing to the credit of the USD Current Accounts to his UK account;

(4) on 9 March 2021, the Claimant instructed the Bank to transfer the balance of the fixed deposit accounts to his UK account on maturity;

(5) on 7 April 2021, the Claimant instructed the Bank to transfer $459,771 and $4,275,773 from the respective USD Current Accounts to his UK account;

(6) on 20 August 2021, the Claimant instructed the Bank to transfer the balance of the USD Fixed Deposit Account to his UK account on maturity; and

(7) on 21 October 2021, the Claimant instructed the Bank to transfer $459,603 and

$7,331,021 from the respective USD Current Accounts to his UK account.

23. The Bank did not comply with any of these instructions. It is the dispute arising out of the Bank's failure or refusal to comply with these instructions that has given rise to these proceedings.

(f) The tender and deposit procedure

24. The English proceedings were started on 9 April 2021. In January 2022, the Bank sought to begin the "*tender and deposit*" procedure in Lebanon. The procedure is designed to allow a debtor to discharge a debt by leaving payment with a notary public, and then seeking a court order to the effect that the payment gives good discharge.

25. On 25 January 2022, the Bank commenced "*validation proceedings*" in Lebanon to procure such an order. There were questions about service and jurisdiction in respect of those proceedings. The Bank has given undertakings to this court not to move ahead with the proceedings while this claim is pending, and to accept this court's determination of the dispute as final. Ms Aida Abou Hanna for the Bank says that the Bank has not taken steps in the validation proceedings since 28 January 2022.

IV Questions for the Court to decide

26. The questions for the court as set out in the opening of the Claimant are as follows:

> **Question 1:** Do the terms of the Account Agreements on their proper construction (leaving aside custom) require the Bank to comply with the instructions in this case?
>
> **Question 2:** What is the relevant custom/practice for the purposes of assessment the Bank's obligations: (a) that prevailing at the time when the contracts were entered into, or (b) that prevailing when the instructions were given?
>
> **Question 3:** If the answer to question 2 is (a) (i.e., the custom prevailing at the time of contracting), is/was the custom/practice subject to an "*acceptable reason*" exception?
>
> (It will not be strictly necessary to answer questions 2 and 3 if the answer to question 1 is "*yes*".)
>
> **Question 4:** If the answer to question 2 is (a) (i.e., the custom prevailing at the time of contracting) and the custom/practice is/was subject to an "*acceptable reason*" exception, did such an "*acceptable reason*" exist at the time when the instructions were given?

> **Question 5:** If the answer to question 2 is (b) (i.e., the custom prevailing at the time of the instructions), has the custom existing at the time of contracting been replaced, by the time when the instructions were given, with a new custom under which banks were not required to effect transfers on instruction?
>
> **Question 6:** If there is no obligation to transfer, can a BdL cheque give good discharge of the Bank's debt to the Claimant?
>
> **Question 7:** Is specific performance available to the Claimant? If not, what damages is the Claimant entitled to?
>
> **Question 8:** Is the Claimant entitled to interest at 9% *per annum*?

V The cases of *Khalifeh* and *Manoukian*

27. It is worthy of note how the issues arose in the case of *Khalifeh* and *Manoukian*. It provides a context to the issues to be determined in the instant case as well as to the difference in the outcomes of the case. In *Khalifeh*, it was not contended either as a matter of construction of the contract or custom that there was an obligation on the part of the bank to honour a request for an international transfer.

28. At [136], Foxton J said:

> ***"…****Mr Khalifeh does not contend that a bank which holds a foreign currency deposit account is obliged to effect an international foreign currency transfer at the customer's request, and, to that extent, does not seek to support the reasoning in the summary procedure cases which have made that finding (which, in addition to the Nakad case, include the Judge of Summary Procedure in Metn, Decision no 27/2020 dated 10 January 2020, Salah Abdel Al Jamil v Banque Libano-Suisse SAL and the Judge of Summary Procedure in Zahle, Decision no 5 dated 13 January 2020, Mohamad Ismail Abdul Rahman v Credit Libanais SAL).*"

29. *Khalifeh* was then decided on the basis that the Article 822 tender and deposit procedure prevailed. On that basis a cheque in Lebanon gave a good discharge of the Bank's debt to Mr Khalifeh.

30. By contrast, in *Manoukian*, it was stated as follows:

> *"39. At least at the start of the trial, the parties were agreed that the following issues arose: (i) whether an international transfer right exists under the contract with each of the Banks (the 'Contractual Transfer Right Issue') - and, in the case of Bank Audi, whether a particular exclusion clause is applicable; (ii) further or alternatively, whether an international transfer right*

> *exists as a matter of Lebanese law (the 'General Transfer Right Issue') - and, again in the case of Bank Audi, whether a particular exclusion clause is applicable….*
>
> *….*
>
> *41…it should be noted that in* ***Khalifeh*** *the claimant accepted that no international transfer right existed under Lebanese law. Foxton J did not, therefore, address either of the first two issues set out above."*

31. In *Manoukian*, it was found that an international transfer right arose and was exercised, and the customer prevailed. It was then not necessary to decide any question arising out of the Article 822 tender and deposit procedure.

32. It should also be noted that the English law relating to reliance on previous English decisions concerning foreign law. The Civil Evidence Act 1972 s.4(2) reads as follows:

> *"Where any question as to the law of any country or territory outside the United Kingdom, or of any part of the United Kingdom other than England and Wales, with respect to any matter has been determined (whether before or after the passing of this Act) in any such proceedings as are mentioned in subsection (4) below [which includes proceedings in the High Court], then in any civil proceedings (not being proceedings before a court which can take judicial notice of the law of that country, territory or part with respect to that matter)—*
>
> *(a) any finding made or decision given on that question in the first-mentioned proceedings shall, if reported or recorded in citable form, be admissible in evidence for the purpose of proving the law of that country, territory or part with respect to that matter; and*
>
> *(b) if that finding or decision, as so reported or recorded, is adduced for that purpose, the law of that country, territory or part with respect to that matter shall be taken to be in accordance with that finding or decision unless the contrary is proved:*
>
> *Provided that paragraph (b) above shall not apply in the case of a finding or decision which conflicts with another finding or decision on the same question adduced by virtue of this subsection in the same proceedings."*

VI The witnesses

(a) The factual witnesses

33. The Claimant gave evidence. In my judgment, his evidence was measured and calm. The Bank suggests that his case was given through a prism which he knew that he had to argue. In my judgment, it was the evidence of an honest witness of obvious intelligence. Far from being an implied criticism as appears from the Bank's submissions, his evidence was "well-prepared": this was inevitable given the obvious importance of the case to him and his family. The evidence about the signing of the forms was not "somewhat incredible" but is illustrative of the difficulties of signing standard form documents in a country whose language is not understood by the customer. The summary of the evidence above shows that the Bank, which would be expected to be careful in the preparation of these documents, was rather lackadaisical in this regard.

34. The relevant relationship managers of the Bank were Mr Chidiac and Mr Haddad at the time of the making of the contracts. They provided written evidence at an earlier stage of the proceedings but were not used as witnesses for trial. Mr El Bikai said that he had no role in handling customer complaints and was not responsible for the Bank's policy in respect of transfers, or in deciding whether to accept or decline transfers. He was not involved in the restrictions of transfers, he was not part of the COD approvals group, and he was not copied in to an email of 25 November 2019 about the restrictions.

35. Ms Hanna, the Bank's commercial credit manager, accepted that she did not have any dealings with the Claimant before he brought the claim. She was not responsible for applying the policy on transfer.

36. Mr Assaf, the manager of the Antelias branch of the Bank, gave his evidence through an interpreter. Although it is necessary to make allowances for any limitations caused by his giving evidence through an interpreter, his evidence was of limited assistance. His written evidence purported to give evidence as to the various accounts of the Claimant and his family. It made particular criticisms about information regarding his residence, and particularly highlighting documents referring to residence in Lebanon.

37. In fact, Mr Assaf's detailed written evidence was undermined for a number of reasons including the following, namely:

    (1) He had made a number of substantive errors about accounts in previous witness statements which he had to correct.

    (2) He said that he never met with the Claimant and the other members of his family who were account holders. He was not involved in the filling in of the forms. He did not speak to the Claimant's wife when she went to the Bank's branch in 2021.

    (3) He believed that the Claimant spoke Arabic, but if he had dealt with the Claimant in respect of any documents, he would have known that the Claimant cannot read or write Arabic and therefore was not able to understand the forms of the Bank in Arabic.

(4) His evidence about what non-resident meant to the Bank was confusing in that it appeared to be a reference to having a business address outside Lebanon provided that they paid their tax outside Lebanon.

(5) When asked to explain the numerous inconsistencies in the Bank's documents, it was evident that he had little or no direct knowledge, and generally was not able to explain matters outside the documents.

(6) It followed that insofar as he made criticisms of the Claimant in his witness statement, he had no ability to substantiate them. For example, there was a suggestion that the Claimant had provided an address in Lebanon in order to obtain a "winner" account, but that collapsed in his oral evidence. There was nothing to suggest that the Claimant had ever asked for a winner account as such and in any event, non-residents could have a winner account.

38. At best, the evidence of the Bank's witnesses is therefore of limited assistance in respect of the issues to the Court. The attempts to be critical of the Claimant were not substantiated. The internal documentation of the Bank left a lot to be desired. Those witnesses who could have given evidence about the relationship with the Claimant were not called to give evidence, and their absence was not explained.

(b) The expert witnesses

a) Professor Marie-Claude Najm, expert witness for the Claimant

39. Professor Najm is a Lebanese professor of law specialising in private international law and civil law, holding the position of Professor at Saint-Joseph University of Beirut and having been a visiting professor at the Sorbonne in Paris and at the Pantheon-Assas University in Paris collectively for over a decade.

40. It was suggested that her expertise from her published articles focus on conflict of laws and family law, and that she had no specific expertise in banking law. She said that the questions which she was asked to consider were about contract law, obligations law and sources of the law which were areas of her expertise as a lecturer at university over the last 20 years and as an attorney until 2005 and as a consulting lawyer since then.

41. I was concerned from that line of questioning as to the expertise of Professor Najm. However, having heard her answers in detailed and probing cross-examination from Mr Isaacs QC, I am satisfied that she has a mastery of the subject matter. Having reviewed her expertise again, I am also satisfied that she is well qualified to be able to give this evidence.

b) Dr Fadi Moghaizel, expert witness for the Bank

42. Although a practitioner and not an academic, he qualified at the Saint Joseph University in Beirut and then obtained LLM and PhD degrees in the University of London. His practice includes litigation, arbitration, contract law and banking law. He refers to 850 lawsuits covering banking and financial activities. He has acted as an expert in foreign courts. He was the expert for the banks in the recent cases of *Khalifeh* and *Manoukian* referred to above. In *Khalifeh,* he was appraised by Foxton J as [122] "the more persuasive expert when arguing at a level of principle rather than simply by reference to what cases have decided." In *Manoukian*, he received a less complimentary assessment from Picken J. In a number of respects, he referred to aspects of his evidence as 'unconvincing' [85], 'extreme' [92], not realistic [103] and 'difficult to follow' [115]. The favourable and unfavourable treatment of his evidence by other judges is not the point: what is in point is how I deal with his evidence and how he came over to the Court.

43. Although qualified to give expert evidence about Lebanese banking law, there were times when I was concerned about his tending towards being an advocate which impaired the independence of his evidence. He had particular difficulties in dealing with matters in point to the issues in the instant case which had been considered in *Manoukian* in a way contrary to the bank's case in *Manoukian* and contrary to the case of the Bank in the instant case. Despite this, Dr Moghaizel sometimes took different positions from his position in *Manoukian* or from the position as found by Picken J.

44. Dr Moghaizel could have confronted the point up front. He could have pointed out the nature of the difficulty, and in a measured way explained why he was now taking a different position. Instead of doing this, the inconsistencies had to be extracted from him in cross-examination. As he rejected what was being put to him, from time to time seeking to argue the case in an unconvincing and unrealistic way, there were real questions about his objectivity or reliability bearing in mind that he had so recently been grappling with these issues. As an expert, it behoved him to give measured responses and expressly take into account contrary views. In the event, he had a tendency to veer towards the approach of an advocate by arguing for the different position rather than assisting the court as to how and why it could prefer that position.

45. A particular example which is more germane to the nature of the evidence of Dr Moghaizel than to the issues in the case concerned Article 26 of the Consumer Protection Law ("CPL"). Dr Moghaizel relied on writings of Nammour of 2006 for a proposition that the CPL did not apply to bank contracts with consumers. He did not refer to the same author's writings in 2007 which corrected the relevant sentence. This mistake would have been easy to understand, but for the fact that this issue had arisen in the evidence in the *Manoukian* case. This omission showed a lack of attention to detail in respect of a matter which would have been expected to have been within the immediate recall of Dr Moghaizel. I shall refer to other instances of concern about Dr Moghaizel's evidence later in this judgment. For the main part, I found the evidence of Professor Najm more helpful, measured and ultimately more informative than the evidence of Dr Moghaizel.

VII How to deal with foreign law

46. It was common ground that there was a good summary of how the Court should determine questions of foreign law given by Simon J (as he then was) in *Yukos Capital SARL v OJSC Oil Company Rosneft* [2014] EWHC 2188 at [25-29] as follows:

> *"25. First, the Court is required to determine the foreign law as a question of fact on the basis of the evidence deployed by the parties, according to the usual civil standard, see for among many examples, Islamic Republic of Iran v. Berend [2007] EWHC 132, Eady J at [50].*
>
> *26. Secondly, […] it is not the Court's function to interpret the codified provisions. The Court's task is to determine how the [relevant foreign] Courts have (or would) interpret them, see Lazard Brothers & Co v. Midland Bank [1933] AC 289, Lord Wright at 298.*
>
> *If the law is contained in a code or written form, the question is not as to the language of the written law, but what the law is as shown by its exposition, interpretation and adjudication: so in effect it was laid down by Coleridge J in Baron de Bode's case (1845) 8 QB 208, 266; in the Sussex Peerage case (1844) 11 Cl. & F. 85, 116, Lord Denman stated his opinion to the same effect as he had done in Baron de Bode's case. He said that if there be a conflict of evidence of the experts, 'you (the judge) must decide as well as you can on the conflicting testimony, but you must take the evidence from the witnesses.' Hence the Court is not entitled to construe a foreign code itself: it has not 'organs to known [sic] and to deal with the text of that law' (as was said by Lord Brougham in the Sussex Peerage case). The text of the foreign law if put in evidence by the experts may be considered, if at all, only as part of the evidence and as a help to decide between conflicting expert testimony.*
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> *27. In A/S Tallinna Laevauhisus and others v. Estonian State SS Line and another (1947) 80 Lloyd's Rep 104, at pp.107l-109r Scott LJ set out four further points. (1) The burden of proving the foreign law rests on the party seeking to establish that law. (2) The task of the expert evidence is,*
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> > *... to interpret its legal effect, in order to convey to the English Court the meaning and effect which a Court of the foreign country would attribute to it, if it applied correctly the law of that country to the questions under investigation by the English Court.*
>
> *(3) The degree to which the English Court can put its own construction on the foreign code arises out of and is measured by its right to criticise the oral (or written evidence) of the*

> *expert witness; and once the foreign law is before the Court, the Court is free to scrutinise the witness and what he says as it can on any other issue of fact. (4) If there is a clear decision of the highest foreign court on the issue of foreign law other evidence will carry little weight against it, see also Lord Sumner in Bankers and Shippers Ins Co of New York v. Liverpool Marine & General Ins Co (1926 24 Ll. Rep 85 (HL) at p.93.*
>
> *28. Thirdly, in determining the question of foreign law the Court is entitled, and may be bound, to look at the source material on which the experts express their opinion. This is true of any expert evidence which comes before the Court, and if authority were required for the proposition in relation to foreign law it can be found in Dicey(see above) at 9-017 and the cases at footnote 91.*
>
> *29. Fourthly, the Claimant…submitted that the relevant issue would have to be resolved in the 'Supreme Court' of the foreign jurisdiction; and that therefore the relevant question is: what would the 'Supreme Court' decide if the matter were before it?... I accept that this may be the right approach in some circumstances, but it will not be the right approach in every case. The legal issue may, for example, have been plainly decided by a court which is inferior in jurisdiction to the 'Supreme Court'. I have concluded that the law is correctly stated in Dicey at 9-020.*
>
> > *Considerable weight is usually given to the decisions of foreign courts as evidence of foreign law ... But the court is not bound to apply a foreign decision if it is satisfied, as a result of all the evidence, that the decision does not accurately represent the foreign law. Where foreign decisions conflict, the court may be asked to decide between them, even though in the foreign country the question still remains to be authoritatively decided."*

VIII Sources of Lebanese law

(a) The relevant codes

47. There was a useful summary of the relevant codes in the judgment of Foxton J in *Khalifeh* at [124]. It is useful because it is consistent with the evidence in the instant case. Foxton J said:

> *"124. Lebanon has a civilian legal system. The main instrument of Lebanese private law is the Code of Obligations and Contracts ("the [L]COC"), derived from the French Code Civil and adopted in 1932. Like the Code Civil, the [L]COC is*

> *supplemented by a number of specialist laws including, for present purposes:*
>
> *i) The Lebanese Code of Commerce ("LCC").*
>
> *ii) The Lebanese Code of Money and Credit ("CMC").*
>
> *The procedural rules which apply in civil actions are set out in the Lebanese Code of Civil Procedure ("LCCP")…"*

48. It ought to be added that there is a hierarchy of codes. As in other areas, the special prevails over the general. So here the experts are agreed that the LCC as the specific code prevails over the general code the LCOC, and the CPL similarly prevails over the LCOC. There ought also to be taken into account in the instant case the Consumer Protection Law (no.695/2005) ("CPL"). This would apply to banking in a non-business context.

(b) Case law

49. There were more controversies in the instant case about the law of precedent. As will be recalled, Dr Moghaizel was the expert for the Bank in *Khalifeh*. Foxton J took into account the opinion of Dr Moghaizel in reaching this summary at [125 - 129]:

> *"125. Lebanon has no doctrine of precedent as such, but the jurisprudence of the Lebanese courts is capable of establishing (as well as evidencing) legal principles, particularly when a particular principle is endorsed by a number of cases, so as to give rise to a jurisprudence constante . The civil courts operate in a triarchy of courts of first instance, the Court of Appeal and the Cassation Court. In addition to what might be termed the ordinary courts, Lebanon also has courts of summary jurisdiction in which a single judge (sometimes referred to as the "Urgent Matters Judge" but who I shall refer to as "the Summary Procedure Judge") presides. The jurisdiction of these courts is concerned with granting urgent relief in cases in which this can be done without determining the merits of the rights and obligations of the parties (Articles 579 to 588 of the LCCP). When an issue that is seriously disputed is submitted to the Summary Procedure Judge, the Judge is required to rule that they have no jurisdiction.*
>
> *126. Thus Article 579 of the LCCP provides:*
>
> *"The Sole Judge may look, in his capacity as an urgent matters judge, into applications to take urgent measures in civil and commercial matters without addressing the basis of the right, and without prejudice to the special jurisdiction of the President of the Enforcement Court. He may, in the same capacity, take*

> *measures aiming at removing manifest assaults on rights or on lawful situations. In situations where the debt's existence cannot be the subject of a serious dispute, the Urgent Matters Judge may grant the creditor a provisional advance on account of his right."*
>
> *127. Article 583 of the LCCP provides:*
>
> *"The Urgent Matters Judge gives his decision in the lawsuit submitted to him without delay".*
>
> *128. Article 584 of the LCCP provides:*
>
> *"The decision of the Urgent Matters Judge does not have the force of res judicata in relation to the basis of the right. However, he may not amend or cancel it except if new circumstances arise that justify it".*
>
> *129. Decisions of Summary Procedure Judges can be appealed. I accept Dr Moghaizel's evidence that when such appeals are brought, it is very rare for a stay of the decision of the Summary Procedure Judge to be ordered (not least because that would be inconsistent with the urgent and essentially interim nature of the jurisdiction). A stay is only to be granted when it appears clear to the relevant court (the Court of Appeal, or if that court has refused a stay and a further appeal is brought, the Cassation Court) that the consequences resulting from enforcement would be unreasonable or if there is a likelihood that the appealed decision will be overturned."*

(c) Status of Urgent Matters Decisions

50. There is a controversy in the instant case about whether Urgent Matters Decisions can have any weight. Dr Moghaizel for the Bank says that there is no weight to be given such decisions for the following reasons:

(1) they are a summary procedure and therefore carry no weight unlike a case of the Court of Cassation.

(2) they are generally not relied upon as a source of law and are therefore not cited by higher courts;

(3) on the subject of whether or not there is a right to have an international transfer and/or whether such right has come to an end in view of the banking crisis in Lebanon, the cases do not speak as one, and it largely depends which judge is hearing the matter.

51. The Claimant through Professor Najm says that:

(1) the decisions do not carry the same weight of the Court of Cassation, but

they are nevertheless decisions which inform as to the relevant law and as to the existence of custom;

(2) there are so many cases in point that it would be wrong to ignore them, particularly absent a case of the Court of Cassation;

(3) although some decisions have been stayed pending appeal to the Court of Appeal or the Court of Cassation, the last five cases have not been stayed. Those which are stayed may indicate not that the law supports the Bank's case, but that the courts of summary procedure have no jurisdiction because the matter cannot be decided without getting into the merits.

52. I am satisfied that it is appropriate to look at Urgent Matters Decisions for the following reasons:

(1) In *Manoukian*, Dr Moghaizel's evidence started by saying that Urgent Matters Decisions could not be cited, and indeed not even in the Court of Appeal. Picken J in *Manoukian* rejected this submission in that a body of decisions pointing in the same direction must serve as some sort of indication as to what Lebanese law should be taken to be.

(2) In *Manoukian*, Dr Moghaizel himself cited a decision of an Urgent Matters Judge. He also modified his position in respect of a Court of Appeal decision by saying that it carried "less weight" rather than "no weight". In the end, Counsel for the Bank in *Manoukian* did not adopt the evidence of Dr Moghaizel: see the judgment of Picken J at [86-106] and [115].

(3) It is consistent with the decision of Simon J in *Yukos* above and the extract from Dicey in the above quotation that decisions which provide evidence as to Lebanese law may carry at least some weight, particularly in an area where there is no Court of Cassation authority.

(4) According to Article 3 of the LCC, *"In the absence of any applicable legal provision, the judge can draw upon previous test cases for guidance as much as he may let himself inspired by the strictures of commercial equity and loyalty."*

(5) I am fortified by Picken J's conclusion in *Manoukian* at para. 115 that decisions including Urgent Matters Decisions are appropriately taken into account when seeking to derive assistance as to what Lebanese law is. I The decisions of the lower courts, absent evidence from the Court of Cassation, provide evidence for the English court as to the content of Lebanese law on the issues which they cover.

53. It is necessary not to give too much weight to such decisions by themselves, bearing in mind that (a) any matter which requires an analysis of the merits will not be suitable for that Court, (b) even although there was a preponderance of decisions, there was not uniformity, and (c) even at Court of Appeal level, there was a case in favour of a bank,

albeit that it was about the jurisdiction of the Urgent Matters Judge rather than determinative of the point. That is not to say that it is not appropriate for an English court to have any regard to such decisions, especially where the cases are prevalently in one direction, albeit not necessarily uniformly so.

54. I regard it as significant that there is a preponderance of cases in the Court of Appeal affirming the decision of the Urgent Matters Judge against banks. The cases will be referred to below. Whether it is four cases to one case or three cases to one case (on the basis of a distinguishing feature in one of them), as contended for by the Bank, it is a significant preponderance. It is wrong to say, as does the Bank, that "there is a wide divergence of opinions of the judges of the lower courts": as the Claimant submits, there is a broad uniformity in the decisions, as illustrated in the opening argument at [102-104]. There is no single decision against the Claimant: there are only decisions that other customers are not so right as to engage the urgent matters jurisdiction.

55. By way of summary only of the Claimant's opening at [102-104] and the cases referred to in the Schedule to the opening:

(1) The cases are all concerned with depositors who have been trying to withdraw their money from Lebanese banks by way of transfers to other countries.

(2) None of them support either the proposition that the custom was or is subject to an "acceptable reasons" exception, or that the custom has changed so as to release banks from their transfer obligations.

(3) No decision has been found that holds that banks are not under transfer obligations. Where the application failed, this was because the point in dispute was not so obvious and thus the jurisdiction requirements for urgent matters were met.

(4) Of the substantive decisions in evidence, 27 out of 37 of them are to the effect that the claimants were clearly right that there was an obligation to effect transfers.

(5) In at least 22 of those cases, the banks were ordered to carry out the transfer requested.

(6) Of the 10 decisions holding that the court had no jurisdiction, at least 5 are partially helpful to the Claimant in that 3 recognise a customary transfer right, and 2 say that a transfer right arises under the contract (by implication or the Lebanese-law equivalent).

(7) 7 of the 13 sole judges whose decisions were surveyed have decided in favour of claimants on the basis that the transfer obligation exists, and only 2 of them have expressly held that the customary transfer right is seriously disputed. Some of the judges in the minority have expressed sympathy with aspects of the majority reasoning.

There is in the cases a significant trend in the Lebanese cases towards recognising a transfer right and granting customers specific performance of that right. The cases are

inconsistent with the "acceptable reason" exception and do not suggest the existence of a relevant new custom under which the transfer obligation no longer exists.

56. Although there were points of detail which arose in cross-examination regarding particular cases, it is not necessary for that to be examined closely in that the point of principle as to whether they should be considered at all was in issue. I am satisfied that Picken J did not err in having regard to such cases. The precise weight that he may have attached to them is not the issue for this Court. The approach of Dr Moghaizel to attach no weight to any of these decisions is exceptionable both because they do provide at least some assistance absent any relevant Court of Cassation case, and because this represents a different position from the one which he came to adopt in *Manoukian*.

(d) Construction of contracts under Lebanese law

57. In *Manoukian*, Picken J said at [43] as follows:

> *"[…] as to the principles concerning the construction of contracts, these were also largely (if not entirely) common ground between [the experts]. They are also, it may be noted, in many respects similar to the applicable principles under English law. Accordingly:*
>
> *(i) contracts are to be construed and implemented in good faith, in accordance with the principles of fairness, and consistently with prevailing customary practices: Article 221 of the Lebanese Code of Obligations and Contracts (the 'LCOC');*
>
> *(ii) Lebanese law requires the ascertaining and giving effect to the parties' joint intention, and not just the words used by the parties in the written contract interpreted literally: Article 366 of the LCOC;*
>
> *(iii) contractual provisions that are ambiguous and require interpretation are to be interpreted in light of other contractual provisions, the general organisation of the document, its coherence and its purpose: Article 367 of the LCOC;*
>
> *(iv) Lebanese law requires the taking into account of the meaning of the contract as a whole and the other provisions in the contract in interpreting each provision: Article 368 of the LCOC;*
>
> *(v) a judge must apply established 'customary provisions' into the contract, even if these are not expressly incorporated into the contract, unless they*

> *are contradicted by the terms of the contract: Article 371 of the LCOC;*
>
> *(vi) furthermore, in the case of ambiguity in certain contracts involving consumers, Article 18 of the Lebanese Consumer Protection Law (the 'Consumer Law') provides those ambiguous clauses are construed in favour of the consumer."*

58. Prof Najm confirmed that Picken J's description is "*a correct summary of the relevant principles*": see [73] of her report. It does not appear to be disputed by Dr Moghaizel.

IX Construction of the Account Agreements

(a) The express terms

59. The Claimant submits that an obligation to effect an international transfer arises from the terms of the Account Agreements (leaving aside custom). I shall refer to the contractual provisions and then to the Claimant's and the Bank's respective submissions. The Claimant relies on a range of such terms. In particular:

(1) Article 4(c) of the fourth part of the General Terms provides as follows (emphasis added):

> *The Second Party agrees that withdrawals from these accounts shall be made by virtue of cheques, bonds, or transfer orders issued by the Bank in the currency of the account."*
>
> Claimant's submission
>
> This expressly entitles (and indeed, requires) the Claimant to make withdrawals by one of three means, one of which is transfers in the currency of the account. This gives rise to a contractual right to withdraw by way of transfer.
>
> The Bank's submission
>
> That provision does not concern the obligations of the Bank, but rather the agreement of the Claimant to the forms of withdrawals available to him. Moreover, the clause does not impose any obligation on the Bank to perform the particular mode of withdrawal requested by the Claimant.

(2) Article 4(c) of the fourth part of the General Terms goes on to state as follows:

"The Second Party declares that the Bank shall be discharged, in the event of closing and liquidating the account, upon delivering [to the Second Party] a cheque or a bond or a transfer order drawn by the Bank [on a correspondent] in the country of the account currency and in the same currency."

The Claimant's submission

This sets out the means by which the Bank is entitled to repay the Claimant upon closing and liquidating the account, namely by providing a cheque, bond or transfer in USD drawn by it on a correspondent bank in the USA. The term "*transfer order*" therefore refers to or includes an international transfer.

The Bank's submission

The clause concerns when the Bank is discharged, not whether or not it is obliged to execute a transfer order made by the Claimant. This does not confer any right of the Claimant to elect between the different modes of discharge identified. In any event, if it were definitive of the ways in which the Bank could be discharged, then that would only be in relation to a US dollar account by a payment through a correspondent bank in the United States.

Article 2 of the fourth part of the General Terms also provides as follows (emphasis added):

"In regards to payment orders, foreign exchange transactions, the purchase of stocks and bonds and other values, whether in Lebanon or abroad, the Bank shall perform such transactions in favour of the Second Party and at the expense, liability, and responsibility of the Second Party, and the Bank shall not be liable in this regard for any reason whatsoever."

Claimant's submission

A "*payment order*" is a payment to a third party. This provision states that the Bank is required to perform payment orders, including abroad. If the Bank is required to make international payments to third parties abroad, the Bank must be under an obligation to effect international transfers abroad on instruction.

The Bank's submission

The words " the Bank shall perform such transactions" cannot be construed in isolation. The Clause is not imposing a liability, but saying that if there is a transfer, it is at the risk of the customer.

The clause is in the context of limitations of the Bank's liability. The Clause is not defining the scope of services that the Bank is obliged to execute.

(3) Article 2 of the fourth part of the General Terms also provides as follows (emphasis added):

"*The Second Party exempts the Bank from any liability in the event of delay in executing any transfer, or the freezing of the transferred amounts or their return by the Bank or the correspondent bank. The Second Party authorises the debiting of any additional expenses in relation to the transfer from its account at the Bank*."

Claimant's submission

This provision seeks to exempt the Bank from liability in the event of delay in executing a transfer. The fact that there is an exception in respect of delayed performance shows that there is an obligation to perform.

The Bank's submission

Such a wide exculpation clause for delay would, on its face, deprive an obligation to execute transfers of any content. The inclusion of this clause therefore suggests that the parties' intention was that there was no obligation upon the Bank to execute transfers.

(4) The seventh part of the General Terms deals with instructions given by telephone, telex, fax or email. Article 1 of the seventh part of the General Terms provides as follows:

"*The Second Party confirms its explicit request to the Bank to carry out all instructions it may issue to the Bank by phone, unconfirmed telex, unconfirmed fax, or email, which may include any banking transaction of any kind, including but not limited to: transfer orders, foreign exchange in any currency, the sale and purchase of stocks, bonds, etc*."

(5) Article 6 of the seventh part of the General Terms then provides as follows:

"*The Second Party confirms that the Bank may refuse to execute such instructions and that this refusal shall not, in any case, bind the Bank. The Bank shall also have the right to refuse to execute some*

instructions and not others and shall have the right to assess the status of each transaction separately."

Claimant's submission

Taking these provisions together, they confer upon the Bank a discretion to refuse instructions to transfer given by certain specific means (i.e., "*phone, unconfirmed telex, unconfirmed fax, or email*"). They do not allow the Bank to refuse instructions by other more secure means e.g. a signed letter. Absent an unfettered right to refuse instructions, the ability to refuse in limited circumstances suggests that there is an obligation in other circumstances.

The Bank's submission

It is not an answer to say that the rights of the Bank under that provision should be limited to refusals when instructions were *"not properly or authoritatively confirmed":* there is nothing within the provision to support such a limitation.

(6) Article 2 of the And/Or Terms provides as follows (emphasis added):

"*Each member of the Second Party, as a joint creditor, shall have the absolute authority to operate the account through his sole signature without any limitation or reservation, including but not limited to, the right to deposit or withdraw any amount in or from the account, to dispose of the balance, to request closing the account, and to discharge the Bank in a comprehensive and final manner. The right to operate and dispose of the account shall also include the right to give the Bank all instructions related to payment, transfer, and investment.*

[…]"

Claimant's submission

This provision is primarily aimed at giving each account holder individually the powers of the account holders as a party to the contract. Those powers are said to "*include*" the right to give instructions related to "*payment*" and "*transfer*". The right to give an instruction to transfer implies a corresponding obligation on the part of the Bank to comply with the instruction.

(7) Article 3 of the And/Or Terms provides as follows (emphasis added):

"*Each member of the Second Party shall be entitled to issue a power of attorney or as per the form approved by the Bank in favour of any third party enabling it* [the third party] *to access the joint account which is the subject of this contract, as well as operate it, deposit, withdraw, and transfer funds from it* […] *provided that all other members who are holders of the joint account grant their prior written approval which is considered effective upon their signature of the mentioned power of attorney.* […]"

Claimant's submission

This provision allows account-holders to give powers to attorneys to (*inter alia*) transfer funds from the accounts. If the account-holders can confer such powers on attorneys, then logically they must have those powers themselves. It follows that this provision once again demonstrates that the Claimant has a right to transfer funds from his accounts.

The Bank's submission

The and/or terms allow any member of the Second Party to give the Bank instructions for payments, transfers or investments, but does not provide that the Bank is obliged to make transfers. The reference to the *'right'* is the right to give instructions, not a right to transfers. The provisions speak to whether or not one joint accountholder can exercise rights on behalf of all other accountholders – it does not define the scope of those underlying rights.

(8) Paragraph 1 of article 1 of the "*General Conditions and Provisions Relating to Banking Services through Electronic Means*" provides as follows (emphasis added):

"[…] *the Applicant has fully acknowledged the risks that result from the use of the banking services through electronic means, such as:*

- Impersonation of the electronic ID resulting from the hacking of the Applicant's computer system or from its Personal mobile theft for the purpose of effecting transfers or banking operations and/or acquiring information or accounts' balance(s) of the Applicant, through the violation of the latter's password and its use for fraudulent purposes […]"

> Claimant's submission
>
> The premise behind this provision is that a hacker or thief might assume the customer's identity in order to effect transfers. The bank would not cater for such a risk in its contractual terms if the customer had no right to effect transfers.
>
> The Bank's submission
>
> This article is in a part of the contract concerned with the authorisation of the Bank to act upon electronic instructions. In this context, it is not intended to make a general provision as to the obligation of the Bank to execute transfer requests generally, but simply to provide authorization to act upon instructions made in those forms. This construction is supported by Art. 6 of the same Seventh Part (above, confirming the Bank's right to refuse the execution of *"such instructions"*).

(b) Discussion

60. The above submissions are far from easy to unravel. They involve a textual exegesis. Submissions of this kind found favour with Picken J in *Manoukian.* It is to be borne in mind that the terms of each contract are different, and so nothing which was stated in *Manoukian* is directly relevant as regards construction.

61. The contractual terms are far from direct. It could have been provided in very clear terms either that there was a right for an international transfer or the converse, namely that the Bank had no obligation to provide an international transfer.

62. The Bank submits that the fact that a provider of a multitude of potential services sets out in a standard form contract the terms of providing each of those services does not necessarily mean that the provider has an obligation to provide them. They involve specific issues such as inadequate methods of giving instructions and the position of the Bank or how to take instructions on a joint account or how to deal with termination of an account or the Bank's wish to exclude or limit liability. The Bank submits that the terms refer to generic services rather than creating specific obligations to provide transfers.

63. In the first of the eight questions posed by the Claimant, the Claimant seeks to advance a case where there is established a contractual right, without resort to custom. The advantages of this course of action are that they are not dependent on the vagaries of whether the custom is subject to refusal for an acceptable reason or the possibility that the custom will cease and be replaced by another custom (which have given rise. This is the way of avoiding some of the complications of the second to the fifth questions. This reflects the approach of the Court in *Manoukian* faced with a submission from Mr Toledano QC for the claimant that there was no necessarily bright line between a right in contract and an independent right based on custom. That is because the contract needs to be construed not only by reference to general principles of construction but also in line with Article 18 (ambiguities construed in favour of the consumer) and with custom. At [46], Picken J stated:

> *"…even were the Court to conclude that SGBL's and Bank Audi's respective terms and conditions do not contain express wording providing for the existence of an international transfer right, if nonetheless a relevant custom is made out, then, the Court would nonetheless still conclude that there is such a right as a matter of contract. Secondly, because if a relevant custom is made out, then, it becomes unnecessary to have resort to the general law and so to determine the General Transfer Right Issue. I propose nonetheless, in the first instance, to put the issue of custom to one side and instead to seek to construe the respective terms and conditions by applying the other principles of construction identified at [43] above. I will subsequently (and separately) turn to the issue of custom."*

64. Here lies the precedent for the approach of separating custom and contract, but in it also lies the artificiality, which Picken J accepted, of attempting to separate two aspects which are inextricably linked.

65. Whilst the motivation is good, it is artificial to construe the contract without regard to context and to custom. The written terms seen against the factual matrix (to use a term familiar to English contract law) come to life. The provision that "*Lebanese law requires the ascertaining and giving effect to the parties' joint intention, and not just the words used by the parties in the written contract interpreted literally"* appears to do that. The Court must therefore have regard (as Picken J did in *Manoukian* at [57]) to the context in which, and the expectations against which, the Account Agreements were entered into. In the instant case, there are various matters relevant to context to be taken into account including:

(1) When opening both of the Accounts, the Claimant marked the boxes on the "*KYC*" forms indicating that the "*Type*[s] *of Transaction*" for he would use included "*Outgoing Transfer*".[431] Therefore it was at least envisaged in relation to each Account Agreement that the Claimant would be using the accounts for outgoing transfers and that the Bank would perform "*Outgoing Transfer*" services;

(2) The Bank entered into the Account Agreements in the knowledge that its customers party to those agreements lived or worked abroad and would therefore expect to be able to perform international transfers;

(3) The Bank performed international transfers in respects of account previously operated by the Claimant since 2006. The Claimant's "*clear understanding and expectation*" (no doubt informed by experience of being a Bank customer since 2006) on opening the Account was that he "*would be entitled to access and us* [his] *funds in whatever was* [he] *saw fit, including by effecting international transfers to* [himself] *in England*" (the Claimant's third statement at [37])

(4) In the "*Welcome Note*" from Mr Chidiac dated 23 July 2015, the Bank provided an international telephone number, account numbers, and IBAN

and SWIFT details, thus showing an expectation that the account holders would make international transfers.

(5) On its 2015 website, the Bank:

(a) advertised customers' ability to use the "*iMobile - Mobile Banking Application*" to "*perform various operations* […] *such as* […] *transfer of funds*" and to "*Conduct personal and third party local and international account to account transfers*" (indicating *a fortiori* that such operations could be completed by non-mobile banking as well);

(b) advertised its correspondent bank network for various currencies, including EUR, GBP, and USD;

(c) expressly stated that time deposit accounts were available to non-residents, and assumed that holders of time deposit accounts would also hold current accounts too;

(d) advertised itself as providing "*Banking Beyond Borders*".

66. According to Lebanese law, subsequent conduct is relevant to construction of the contract. It is significant that following the contract and at least until the time of the banking crisis in Lebanon, requests for international transfers were routinely acceded to. There were at least 12 examples of the Bank complying with international transfer requests prior to November 2019 and even after that, there were examples of the Bank complying with international transfer requests. The first time the Bank even alleged that it was not obliged to make a transfer on instructions was in its solicitors' letter dated 20 January 2021. Thus, the parties' conduct confirms that the Account Agreement required the Bank to effect international transfers on request.

67. Given the above factors, the circumstances indicate that the joint intention of the parties was that the Bank expected and intended to contract on the basis of providing to the Claimant international transfers and the Claimant intended to contract on the basis of making use of international transfers. Against this background, the contractual terms can be more readily understood as being obligations to provide an international transfer service. This particularly applies to the first of the terms, namely "*The Second Party agrees that withdrawals from these accounts shall be made by virtue of cheques, bonds, or transfer orders issued by the Bank in the currency of the account.*" This was described by Mr Cutress QC in submissions as "the key clause".

68. This clause appears in the context of the contract as whole to indicate a facility and a requirement to allow withdrawals from any of the methods contemplated, namely cheques, bond or transfer orders. I reject the submission that it provided a range of methods of withdrawal which could be selected by the Bank. It makes no commercial sense that a customer could seek an international transfer and that the Bank could choose to provide a cheque. This is especially so in an international context, where it would take much longer for the customer or a third party to obtain the money with potentially serious consequences.

69. Seen in the context of a joint intention of the parties to offer and use international transfers, this clause confers a right on the part of the Claimant to have the benefit of an international transfer. It also imposes a corresponding obligation on the part of the Bank to provide an international transfer. The other clauses in this context (but not necessarily by themselves) do seem to be predicated upon the same right/obligation. Any other construction would appear to offend against commercial common sense, bearing in mind that this service was essential for the Claimant, and likewise the Bank appeared to attract people in the position of the Claimant by providing an international transfers' service.

70. A part of the factual matrix is the custom which was prevalent. That does not as a matter of Lebanese law live outside the contract. The admissions include that a Lebanese Court must or may adhere or have regard to custom when applying Lebanese law to construe a contract governed by Lebanese law. Another admission is that at the time of the contract and until 4 November 2019, there was a custom among banks in Lebanon to make international transfers of funds when instructed to do so, subject to an acceptable reason not to do so. There will be a more detailed discussion below as to what is an acceptable reason. For the moment, pending that discussion, the existence of the custom adds to the context argument such that the provisions of the contract relating to transfer are to be construed as giving rise to a contractual obligation to effect an international transfer pursuant to customers' instructions.

71. I am therefore satisfied that the contract falls to be construed on the basis that there was a contractual obligation on the part of the Bank to accede to requests for international transfers.

72. It is therefore not necessary to determine a secondary submission of the Claimant that if the clauses were not sufficiently clear to give rise to an express obligation to effect international transfers, then they were ambiguous, and ambiguities ought to be construed in favour of the customer since it was a consumer contract: see Article 18 of CPL. The Court was not provided with assistance as to how an ambiguity was to be identified in Lebanese law. Absent this assistance, the Court will not rush to find an ambiguity unless there appear as a matter of language or context to be two meanings, and the Court has to choose between the two. Despite the repeated reference to ambiguities as an alternative submission, they were not instances of the words or phrases with two meanings.

X Custom

(a) Custom as a source of the law

73. Case law can acknowledge and record custom and thereby document and elucidate custom. The jurist Tyan writes, *"The decisions of the courts, repeated and similar, serve to attest the existence of customs in a concrete and authentic manner. It is thus being said, in this respect, that case law is the registrar of customs".*

74. The importance of custom is enshrined in the Lebanese codes. Specifically:

(1) Article 221 LCOC provides as follows:

> "*Agreements that are validly formed bind the parties. They must be understood, interpreted and performed in accordance with good faith,* [fairness / equity] *and customs.*"

(2) Article 371 LCOC provides as follows:

> "*The judge must also rely on customary clauses even when they are not expressly included in the content of the deed.*"

(3) Article 4 LCC provides as follows:

> "*When determining the effects of a commercial operation, the judge must apply well established custom, unless it appears that the contracting parties intended to derogate from such custom, or that the custom conflicts with the mandatory legal provisions. Special and local custom prevail over general custom.*"

(4) Article 4 LCCP provides as follows:

> "*In the absence of statutory provisions, the judge shall rely on general principles, custom, and* [fairness/equity]."

75. Thus, custom is source of law, and contracts must be interpreted in accordance with it. This view is supported by the writings of Fabia and Safa, and Prof Barsa adds that custom is "*superior*" to case law. Dr Moghaizel agrees that customs rank higher than "*provisions of general law (civil law)*" in the hierarchy of norms.

76. There is a matter on which there were different opinions. Referring to Article 371 of the LCOC above, Dr Moghaizel says (at [28] and [70] of his report) that the customary clauses are express clauses which actually and customarily exist in other contracts. That is a strange construction because it is difficult to imagine whole clauses which would customarily go into a contract. It means that the Court will not imply a term to reflect a custom, except in the very limited range of cases where other contracts contain an express term reflecting that custom. It leaves no room for the court to imply a term in other cases, such as where the term is so obvious as to go without saying.

77. It seems more plausible, as Professor Najm suggests, that the custom would inform as to the construction *"either by the process of contractual interpretation or by an implied term"*: see her report at [101(1)]. This all seems consistent with the word *"usages"* in the French, referring to customary practices rather than customary clauses. Even if the Claimant cannot rely on Article 371, he ought also to be able to rely on the other provisions and especially Article 221 LCOC which states that *"contracts are to be "understood, interpreted and performed in accordance with…customs".* The case of the Bank is that Article 371 must be interpreted as meaning customary clauses: otherwise Article 221 would add nothing. I prefer the construction of the Claimant that

clauses can partially overlap rather than having a strained and unwarranted construction so as to avoid this consequence. In cross- examination Dr Moghaizel sought to support his construction of Article 371, saying that it was what *"we call in French 'clauses de style'"* He said it three times at [T3/187:23]–{T3/188:6]; [T3/191:24]–[T3/192:1]; [T3/201:4]–[T3/201:6]. That was wrong because the expression which is used is *'clauses d'usage'* (*'usage'* being normally translated as custom). This was not an interpretation of Dr Moghaizel in *Manoukian*, and there is no reason to support this gloss.

78. The Bank also relies upon a discussion about bank transfers in *Khalifeh* especially at [172-173], and in particular that the expert for Mr Khalifeh conceded that there was no obligation on a bank to effect international money transfers at all, let alone that it was common practise within the banking community to include such a written express term. This reliance on *Khalifeh* does not assist in this case. *Khalifeh* was not a case in which there was reliance on a transfer obligation. It has not been possible to discern why that was the case or why it was that it was asserted to be the case in *Manoukian*.

79. The decision in *Manoukian* turned upon Mr Manoukian's case that there was a transfer obligation in the contract, and he established this on the facts of the case both by reference to the terms of the contract and to the custom at the time. In this case, there are also admissions made on behalf of the Bank to the effect that there was an obligation to effect an international transfer obligation. It is the scope of those admissions that I now turn. In view of those admissions, the differences regarding Article 371 and 221 and that which was mentioned by Foxton J in *Khalifeh* in respect of a point not before him appear to be insignificant for the purpose of the decision in this case.

(b) Admission about custom

80. In the instant cases, there is an admission in the Defence about using custom as an aid to construction of a contract or a provision of Lebanese law. The Re-re-amended Defence provided as follows:

> *"16A.2 "It is further admitted that a Lebanese Court must (or alternatively may) adhere (or alternatively have regard) to Custom when applying Lebanese law, interpreting a provision of Lebanese law, and/or construing a contract governed by Lebanese law."*

81. There was also an admission as to the existence of a custom of banks in Lebanon to make international transfers as follows:

> *16D.1 "It is admitted that, as a matter of fact, there existed the time of entry into the Agreements (and until 4 November 2019) a Custom among banks in Lebanon under which they made international transfers of funds (including in non-Lebanese currencies to non-Lebanese bank accounts) upon their*

> *customers' instructions to do so, subject to an acceptable reason not to do so."*

82. It will be noted that this has two qualifications, namely:

(1) It was up to 4 November 2019 (temporal limit);

(2) It was subject to an acceptable reason not to do so (exception).

83. The dispute between the parties is about whether there exists a customary acceptable reason exception to the admitted custom requiring banks to make international transfers. By a letter dated 8th June 2022, the Bank confirmed that it was not seeking to resile from its admission after service of Dr Moghaizel's report. At times during the trial, the Bank has made allegations inconsistent with the admission, such as by contending that there was only a custom to offer transfers and not to provide transfers.

84. In accordance with the temporal limit, it was denied in the Re-re-amended Defence that that custom still existed at the time of the transfer requests: see [16D.2]. The qualifications will be considered in due course, but at least up to 4 November 2019, the custom was accepted. Further, there was never an occasion at that point of time of an acceptable or legitimate reason arising as a reason for rejecting a request for a transfer: on the contrary, every request for a transfer was acceded to.

XI Related Issues

85. The admissions then give rise to related issues, namely:

(1) Whether a change of a custom after the time of the contract may excuse a bank from following a custom in existence at the time of the contract (change of custom);

(2) Whether there was an acceptable reason exception to the obligation to provide an international transfer, and if so, what was its scope? If so, did such exception extend to a refusal to honour an instruction to avoid a rush on the banks (acceptable reason exception);

(3) Other reasons excusing the Bank for refusing to perform an international transfer (other reasons).

XII Change of custom

86. It will be apparent from *Manoukian* that the Judge held that the relevant time to follow a custom is the time when the Bank first entered into the contract and not a later time such as the time of the transfer instruction. Dr Moghaizel reluctantly agreed in that case that it was the former and not the latter time. This is reflected at [13] of the judgment of Picken J who said:

> *"…the suggestion made by Dr Moghaizel that a particular custom (as will appear, custom is important in this case) was a custom which had come into being since November 2019 (and so, again as will appear, after Mr Manoukian had made his first transfer requests). As Mr Toledano QC rightly submitted, that simply cannot be relevant as a matter of Lebanese law (and, indeed, common sense) since what matters is the custom which existed at the time that Mr Manoukian first entered into a contractual relationship with the Banks. Notwithstanding this, it was only with a marked reluctance that Dr Moghaizel ultimately accepted that the alleged new custom which he had identified was of no relevance at all."*

87. There are other indications which point to the inability for the purpose of the construction of a contract to have regard to the change of the custom after the time of the contract. This includes the following:

(1) contractual interpretation looks to the intention of the parties at the time of the contract. Professor Najm referred to the writings of Terre, Simlar and Lequette who wrote *" this common intent [of the parties] can only be determined through placing oneself in the circumstances in which the parties were at the time when they have entered into the contract. This intent is the one that the parties actually had at the time when they entered into the contract."* This is a scholarly writing in respect of French law, but in respect of provisions which have been adopted into Lebanese law (e.g. LCOC Article 366 which is taken from the French Code Article 1156 as set out below).

(2) There was also evidence of a Belgian scholar Frankignoul that the rationale for the incorporation of custom is assumed knowledge of the custom and intention to incorporate it at the time of contracting. Frankignoul was commenting on Articles 1135 and 1160 of the Belgian Civil Code. which corresponded with the French code pre-2016 which in turn corresponded with Article 221 of the LCOC and Article 371 of the LCOC. Dr Moghaizel, after at first refusing to engage with a Belgian commentary, then was driven to concede that the Belgian provisions were comparable to the Lebanese equivalents. Frankignoul's analysis is that *"the Civil Code assumes that the persons who enter into an agreement are aware of the customs, and that by not excluding them from their contract - even if only implicitly - they demonstrate their intent to incorporate them."*

(3) This is supported by Dr Nammour since he says that customs are binding between professionals, but only binding against the customer to the extent he was aware (or can be assumed to be aware) of the custom at the time of contracting. The focus on the time of contracting shows that this is the relevant date for assessing custom. As Nammour wrote**:** *"custom is opposable to the customer only to the extent that he was aware of it at the time of the conclusion of the contract. Otherwise, custom will be unenforceable."*

(4) The prevalence of Lebanese sources is that a bank's obligation to perform transfers arises at the time of contracting, and by virtue of the express or implied contract, according to 12 urgent matter decisions and three Court of Appeal decisions identified at footnotes 207 and 208 and beneath [80.2] of the Claimant's opening skeleton argument[1].

88. A further matter of assistance in this regard is the code provisions. In Article 366 of the LCOC, it was provided:

> *"In legal deeds, the judge must inquire about the true intention of the person who made a commitment (unilateral deed) or of the common intention of the parties. (agreement) rather than stopping at the literal meaning of the terms."*

89. In cross-examination, Dr Moghaizel was cross-examined about this provision. It was put to him that this provision was based on article 1156 of the French Code, and the citation above from Terre, Simlar and Lequette was put to him to the effect that under Lebanese law the relevant time to ascertain the intention of the parties was the time when they entered into the agreement. Dr Moghaizel accepted this: see T4/72/1 - T4/73/16. He later sought to say that the position was different with custom because if the custom changed, then the contract changed: see T4/73/17-T4/76/8.

90. I have expressed reservations above about the evidence of Dr Moghaizel. In this regard, Dr Moghaizel has sought to move from the evidence which he provided in *Manoukian*. I reject his qualification. I accept that a custom may change, but the interpretation of the intention of the parties of a contract is under Lebanese law to be determined at the time that the parties entered into a contract. If the common intention of the parties is then to follow customs from time to time thereafter, then the change in the custom may change the contractual obligation. However, if the common intention of the parties is apparent from the contract and from the contractual context including or excluding a custom prevalent at the time, then in my judgment that obligation is not altered because of a subsequent change in custom. In coming to that conclusion, I do so based on the evidence of Professor Najm whose evidence I prefer over the evidence of Dr

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[1] The cases are with reference to their item number in the Schedule of Lebanese decisions attached to the Claimant's skeleton opening:

(i) 3 Court of Appeal decisions

Byblos Bank v Rizk **[C/21]** (item 18 in the Schedule); *Traboulsi v Fransabank* (item 24); and *Bank Audi v Abdelkader* (item 30).

(ii) 12 Urgent Matters Decisions

Abou Zeid v Bank Byblos (item 2); *Rahman v Crédit Lib* (item 4); *Makhlouf v Bank Audi* (item 11); *BLOM Bank v Antonios* (item 13); *Traboulsi v Fransabank* **[C/256]** (item 14 in the Schedule); *S&C Khalifeh v Bank Audi* (item 16); *Mahfoud v Bank Audi* (item 17); *Gougassian v Bank Audi* (item 19); *E Khalifeh v Byblos Bank* (item 27); *Bank Audi v Abdelkader* (item 30); *Farjane v Bank Audi* (item 31); and *Akl v Bankmed* (item 34). The significance of, and weight to be afforded to, urgent matters decisions has been discussed above.

Moghaizel. I have also had regard to the scholarly writings and the case law. I am also following the underlying reasoning in *Manoukian* to like effect.

91. Dr Moghaizel suggested that custom is applied to a contract in a similar way to jurisprudence. If the prevailing view of judges changes from the time of the contract to a later stage (e.g. because of a subsequent decision of the Court of Cassation), that is a risk taken by the parties and the prevailing jurisprudence at the time of the dispute or the court case applies. It was submitted that the same applies to new customs. Insofar as it is suggested by Dr Moghaizel that the contract is varied by the operation of a subsequent custom, I have found little or nothing in the scholarly writings and case law to support this assertion. It may be that the custom changes, but it does not follow that the contract changes. By contrast, I accept the learning of Professor Najm to the effect that the contract stands to be construed at the time of the making of the contract. The Bank relied on the writings of Paul Roubier to the effect that there are no questions of conflicts in time: just as the understanding of the law changes, so does custom. In my judgment, Professor Najm was right to say that jurisprudence and custom are not the same. The sentence that there are no conflicts in time is entirely consistent with the relevant custom being the one at the time of the contract. In any event, even if the statement of Roubier bore the meaning given to it by the Bank, this statement is to be weighed against the large amount of material to contrary effect.

92. The Bank submitted that if the time of contracting was treated as the operative time, then an interpretation might be different on the basis of identical terms and conditions depending on what custom existed at the time of the contract. I reject the notion that this "is likely to create chaos" (the Banks's closing [70.3]): it simply recognises that contract interpretation (including subject to Lebanese law) is not simply the construction of words in abstract, but is an iterative process moving between the words and anything else which assists regarding the joint intention of the parties. It puts the words into a context at the time of that particular contract between those particular parties to the contract. The difficulty is perhaps exaggerated because it ignores the fact that contracts are often updated. Mr Assaf at [11] of his second witness statement, stated that it was the Bank's practice to obtain newly signed contractual documents every two or three years.

93. In any event, there is nothing simpler about the Bank's construction because this would involve having to consider when a custom changed and whether at a particular point of time, it operated on facts such as this case so as to excuse a bank for failing to make a transfer. That has a practical application to the facts of this case because it is not apparent on the Bank's case when the custom changed and in particular which instructions for a transfer were before or after the custom change. This is referred to below at [113] in respect of instructions before and after 26 October 2020.

94. Professor Najm was cross-examined to the effect that Article 4 of the LCC (quoted above) was such that it imposed on the parties to the contract the prevalent custom not only at the time of contracting but also from time to time: see [T3/114/10-T3/115/17]. It is far from clear that Professor Najm agreed to this from a reading of the questions and answers. It would have been an answer in contradiction with much of her other evidence. I read her answers as saying that custom was a source of Lebanese law: see Article 4 and that the contracts were to be understood, interpreted and performed in accordance with customs: see Article 221 of the LCOC. In the context of her evidence

as a whole, she was not intending to say that the effect of these provisions was that a consumer would contract on the basis of the custom from time to time.

95. In the light of the above, I am satisfied that the relevant time to determine the intention of the parties is the time of the contract and not at the time of the request for an international transfer. I am satisfied that the intention of the parties at the time of the contract can be determined from the words of the contract seen in context either without custom or with custom prevalent at that time. If it were the case that the custom thereafter changed, then that does not affect the construction of the contract. If it were the case that it was the intention of the parties that they were agreed that something in the contract would yield to a subsequent change in custom, that might then affect the obligations of the parties.

96. In my judgment, that is not the case here. First, I have found the obligation about international transfers to arise without reference to custom in any event. Second, to the extent that that construction of the contract was reinforced by the existence of a custom at that time, it does not follow that a change in custom can alter the meaning of the contract. I accept the evidence of Professor Najm that *"an amendment to the contract, requiring the agreement of both parties, would be required in order for a new custom to be incorporated"* see her report at [101(1)]. As the Court of Appeal of Beirut said in *Byblos Bank SAL v Marie Rizk* 11 February 2021 *"the bank cannot unilaterally refuse to perform the transferor's order without obtaining the acceptance of the other party, as long as the contractual relationship between the parties is not terminated by agreement or in court."*

97. Customs are only enforceable against a customer where the customer knows about the custom at the time of contracting: see the reference to Nammour above. Thus, even if the custom changes, the changes will be irrelevant, at least against the customer. Dr Moghaizel also sought to rely on the recent student law to the effect that the law compels banks to make transfers, but only in certain limited circumstances. The legislation did not contain any recitals to the effect that the banks were entitled to withhold transfers generally. The Bank's case is that this was a tacit recognition of the restrictions put in place by the Lebanese banks. This does not imply that it was lawful, but seeks to address a particular problem affecting students. Further, it does not follow from the student legislation that no bank transfers are available outside the circumstances for which that law provides.

98. This is all subject to other arguments which will be considered such as whether a change of custom provides an acceptable reason or reasonable excuse for a bank to refuse the request for an international transfer. It also begs the question as to whether there was a change of custom at all, which will be considered below.

XIII Acceptable reason exception

99. The Bank puts forward answers which do not depend upon the time when the custom is established. It states that even if it were the case that the custom was established at the time of the contract, it was subject to an exception of "an acceptable reason.".

100. In *Manoukian* at [86-93], Picken J held the following:

"86. Mr Wilson QC, for his part, clarified in closing that the Banks accept that incorporated into their terms and conditions is a custom or practice whereby (like other banks) they would routinely offer transfer services to their clients. However, and importantly, he explained, the Banks do not accept that they were under (or are under) an absolute obligation to perform transfer services. He observed that the practice that banks will provide international transfer services is (and always has been) subject to well-known limitations, such as insufficiency of funds, insufficient information to identify the beneficiary, anti-money laundering and counter-terrorism funding regulations and policies, suspicions of fraud (whether fraud on the client or a third party) and sanctions or restrictions on the transfer of sums to particular countries.

87. It follows, Mr Wilson QC submitted, that any custom concerning international transfers is at least subject to similar limitations. Mr Toledano QC did not quibble with this. Mr Wilson QC went further, however, submitting that Mr Najjar had himself acknowledged in cross-examination (not that the Banks' own expert, Dr Moghaizel, put things this way) that the circumstances which may constitute a legitimate or valid reason for refusing to perform transfers are not defined or closed. Accordingly, he suggested, the right way to view the custom which exists is as one which entails banks complying with transfer requests save where they have valid or 'legitimate reason' not to do so. What will constitute a valid or 'legitimate reason', he submitted, is an elastic concept which falls to be determined at the time of the refusal since the factual scenarios that might permit refusal cannot sensibly be said to have been fixed for all time at the point of entry into the banking contract since a banking contract may last for many years, even decades. The custom is, therefore, inherently flexible, allowing a bank to refuse to effect a transfer when, taking account of the circumstances at the time of the request, it is legitimate to do so.

87 I cannot agree with Mr Wilson QC about this. There is nothing in the Lebanese doctrinal writings which supports his submission. On the contrary, as previously explained, even Nammour, on analysis, does not support the submission which was made. Nor, to repeat, did Dr Moghaizel put matters in the way which by the time of closing Mr Wilson QC did. Nor is it right to characterise Mr Najjar as having agreed that it is legitimate, in principle, for a bank to refuse a transfer request on some looser concept of 'legitimate reason' which would embrace, as matters have turned out, a concern that complying with a transfer request would risk a run on the banks, the collapse of the Lebanese banking sector and losses to all depositors.

…

92. I conclude, therefore, in line with Mr Najjar's evidence and rejecting Mr Wilson QC's submission (and so also Dr Moghaizel's more extreme evidence) that, as a matter of Lebanese banking custom, a bank's obligation to effect a transfer pursuant to a client's request is not subject to some looser concept of 'legitimate reason' which would embrace a concern on the part of a bank that complying with a transfer request which would risk a run on that bank and other banks. I agree in this context with Mr Toledano QC when he submitted that not only is there no support for the type of custom described by Mr Wilson QC, but furthermore that, if there were a 'legitimate reason' exception, there would be a real risk that the custom would find itself so watered down as to mean that there was, in effect, no obligation at all. This would run counter to Article 221 of the LCOC and the good faith requirement that there be balance, fairness and equity as between banks and their clients.

93. It follows... that the conclusions which I have reached concerning the construction to be afforded to [the banks'] respective terms and conditions are further underlined by the custom which I have found exists (emphasis added).*"*

101. At [118] of Manoukian following a detailed analysis of Lebanese decisions, Picken J concluded as follows:

> *"It follows, for this and the other reasons which I have given, that I am strengthened in my conclusion that, as a matter of Lebanese banking custom, a bank's obligation to effect a transfer pursuant to a client's request is not subject to a loose concept of 'legitimate reason' which would entitle a bank to refuse to comply with a transfer request which would risk a run on that bank and other banks. I am clear, on the contrary, that the custom is as asserted by Mr Toledano QC on Mr Manoukian's behalf. Accordingly, in line with the construction principle described at [43(v)] above and the concession made by Mr Wilson QC, even had I decided that the Banks' respective terms and conditions do not give Mr Manoukian an entitlement to have international transfers effected by the Banks without taking account of custom, nonetheless that is how the terms and conditions should be understood given my conclusion that there is such a custom (and not the custom for which Mr Wilson QC and the Banks have contended)."*

102. The foregoing is a recognition that the obligation to transfer is not absolute, as accepted by the banks in *Manoukian*. However, this does not admit an elastic legitimate reason

qualification and/or it is not so elastic that it could extend to a risk of a run on the bank concerned or other banks.

103. Thus, the obligation is qualified by established matters such as insufficiency of funds of the account holder, insufficient information to identify the beneficiary, anti-money laundering and counter-terrorism funding regulations and policies, suspicions of fraud (whether fraud on the client or a third party) and sanctions or restrictions on the transfer of sums to particular countries.

104. The argument was run in *Manoukian* that the qualification to the absolute obligation could be extended to a concern on the part of a bank that complying with a transfer request would risk a run on that bank and other banks. In *Manoukian*, neither Dr Moghaizel, nor the expert for the customer Dr Najjar, went so far as to say that it could extend to a concern about a run on the bank. Picken J in *Manoukian* therefore rejected this as a reason not to accede to a request for an international transfer.

105. There are other reasons for rejecting the attempt to widen the acceptable reason exception. First, there was no evidence to the effect that the acceptable reason extended to a concern about a run on the Bank. In my judgment, it is for the Bank to prove this exception and to state how and when it arose. The Bank failed to adduce evidence to this effect.

106. Second, it is not contended that this reason would come within force majeure: see the Bank's opening at [80]. That is because there is no evidence that it would be impossible to make the transfers. Mr Bikai accepts in his witness statement that the Bank "could, hypothetically, satisfy an individual customer's international transfer request": see Mr Bikai's second witness statement at [14]. Thus, the requirement of impossibility is not met. I accept the evidence of Professor Najm that there is no reason to lower the bar of force majeure through an acceptable reason exception. The circumstances relied on by Dr Moghaizel could not amount to force majeure. Professor Najm is right in her assessment that there is no good reason to have a dilution of force majeure, *sub silentio*, through an acceptable reason exception.

107. If there was an exception to force majeure, one would expect it to be referred to in the Lebanese cases. There is none. Instead. the Lebanese cases have been to contrary effect. Force majeure has been said in cases in Lebanon not to be a basis to excuse a bank seeking to excuse itself by reference to the current banking crisis: see the cases cited in *Manoukian* at [107] Decision no. 17/2020 dated 17 January 2020 Urgent Matters Judge Rola Chamoun, at [108] Decision in *Rahman v Lebanese Credit Bank SA, Decision no. 5/2020 dated 13 January 2020* Urgent Matters Judge Rita Herro and at [109] *Makhlouf, Decision no. 240/2020 dated 30 July 2020*, Urgent Matters Judge' Carla Shwah.

108. At [112] in *Manoukian*, reference was made to *Byblos Bank v Rizk*, a decision of the Court of Appeal in Beirut (Third Chamber) dated 11 February 2021, in which the decision of an 'Urgent Matters Judge' requiring the bank to perform a transfer of AED 136,000 to the UAE was upheld, the bank had challenged the Urgent Matters jurisdiction on the basis that, so it was suggested, there was a serious dispute as to the existence of any custom such as that alleged in the present case. The Court of Appeal said the following relevant to force majeure:

> *"Whereas the Appellant Bank refused to make the required transfer from the Appellee based on the exceptional circumstances the country is going through and its need to maintain a reserve of foreign currency, not to lose liquidity, and the duty to ensure equality between all depositors, in addition to securing the interest of the appellate and third parties[.]*
>
> *In view of the exceptional circumstances, the circumstances do not constitute a justification for the Contractor's abstention from the enforcement of the contractual obligations, unless the evidence is submitted that it collects force majeure requirements as expressly indicated in the provisions of article 342.*
>
> *Whereas it has been agreed that the situation of force majeure assumed for the contractual obligations arises from an unexpected external event that cannot be paid or avoided, provided that it has a foreign nature, meaning that its source is not linked to the contractor's person or conditions[.]*
>
> *Whereas there is no evidence in the present file of an emergency event that prevented the Appellant from making the transfer for reasons beyond its scope.*
>
> *In fact, the statements made by the latter in relation to the value of his deposits of foreign currency and his desire to preserve them indicate that the factors invoked or not of a foreign nature but are linked to the person of the Appellant and to his personal conditions, which negates the realization of the force majeure as a reason for dropping the contractual obligations and failing to comply with them.*
>
> *Whereas the Appellant's argument about the economic crisis and the exceptional circumstances accompanying it does not, therefore, constitute a justification for his refusal to complete the required transfer, especially since no legislative provision was issued to that date to prevent the transfer of funds abroad or limit the possibility of transfer.*
>
> *Whereas the conclusion reached in the appealed decision to oblige the Appellant Bank to complete the required transfer in favour of the Appellee is legally valid and proper[.]"* (emphasis added)

109. It was submitted that Professor Najm accepted that whatever the scope of force majeure, she accepted that acceptable reasons were the same test as legitimate reasons: see [119] of the Bank's closing submissions. However, the context in which that question was asked was not by reference to the acceptable reason for not honouring a request for an international transfer, but to Article 181 of the LCOC which reads as follows:

> *"In principle, the addressee of an offer is free to decline it. By refusing to contract, he shall not be liable. The position is different if he had himself created a situation that causes offers (merchant vis-à-vis the public, hotel owner, restaurant owner, employer vis-a-vis the workers); in such a case, his refusal to contract must be based on legitimate reasons, otherwise it would have an abusive character and may as such make him liable."*

110. As has been submitted correctly on behalf of the Claimant, that is referring to the position before a contract is entered into. In this case, the contracts were entered into when the Bank agreed to take on the Claimant and others as customers, and not at the time of the relevant requests for international transfers. In the context of certain relationships there must be a legitimate reason to refuse to contract. That does not apply where the contract is already in existence. In the context of a banking contract which required the bank to accede to requests for international transfers, I reject the submission that Article 181 enabled the Bank to rely on a legitimate reason to refuse to provide consent to the transfer.

111. Third, reliance on the risk of insolvency is misconceived. The cases do not countenance that the possibility of insolvency can be an acceptable reason. The consequence would be to prefer the Bank's shareholders over depositors. It was submitted on behalf of the Bank that the Bank was seeking to protect its deposit holders. To send a large sum to one depositor might prevent sending money to "small customers". The Bank cannot fall back on some procedure different from insolvency or some other procedure recognised under Lebanese legislation. The submission was by reference to the evidence of Ms Abou Hanna [T2/10/25-T2/11/13]. When asked if any analysis had been done as to the effect of payment on other depositors, Ms Abou Hanna admitted that there was no analysis, simply that liquidity at banks abroad was limited. In my judgment, this does not give rise to a defence to a legal obligation to honour a request for an international transfer. Likewise, guidance by an association of Lebanese Banks (the ABL) does not provide a reason not to honour such a request.

112. This attempt to invoke a process whereby the Bank or a group of Banks can decide whether to honour requests for transfers is to allow a unilateral action as an excuse for not honouring obligations. It is tantamount to an imposed moratorium falling outside the agreement of the parties or statutory provisions. It bears no relationship to the provisions which entitle a bank not to make the transfer e.g. where there are insufficient funds or where a bank would be assisting or facilitating illegality of some kind.

113. Even if the above were wrong, there would still have been very significant problems about timing. In order to distinguish this case from *Manoukian*, the Bank submits that the failure of the bank in that case was because the instructions in that case were before the change in custom. The last of the instructions in that case was 26 October 2020: see *Manoukian* [26-34]. On this basis, if the change of custom was 26 October 2020, the earliest time after the instructions in *Manoukian*, that would be after the first two instructions to transfer in the instant case (6 September 2020 and 20 October 2020). On this basis, the first two instructions in this case would have been before the change of custom, and so transfer instructions of $470,000 and the full balance then standing to the USD Current Accounts would have fallen outside the change of custom.

114. For all these reasons, the reliance on acceptable reasons makes no difference. There must be exceptions to the scope of the obligation to effect international transfers e.g. where there are not sufficient funds, so as not to assist money laundering or fraud and the like. There is no basis for an acceptable reason because some banks consider that there will be a run on the banks. Likewise, it is not an acceptable reason because a lot of banks have ceased to provide this service.

XIV The Bank's submission that no international transfer obligation exists due to the Lebanese law of agency

115. The Bank seeks to say that there is no obligation to honour the request for an international transfer for a different reason. Dr Moghaizel's evidence is that the Bank does not provide the facility of the international transfer pursuant to the original banking contract, but in its position as an agent. An agent cannot be compelled to act as such. The relationship of the banker in connection with international transfers was that of agent for the customer. His position is that each transfer represented a separate mandate to which the Bank must consent: see his report at [82]. He said that the bank transfer of funds is not mentioned in Article 314 of the LCC and they are governed by Articles 769-822 of the LCOC. He relied on Article 769 of the LCOC which provided:

> *"The mandate is a contract whereby the principal entrusts the agent, who agrees, with the task to manage one or more matters or to perform one or more actions or facts. The mandate's acceptance, can be implied and result from its performance by the agent."*

116. Dr Moghaizel said that the banking contract was not the source of the obligation to provide the international transfer, but it was an offer of cashier services, and not an obligation to execute all cashier services requested. The case of the Bank is that the French law prior to 1941 was that consent was required prior to each transfer, and that more recent French doctrine is to that effect: see the Bank's opening at [34.2]. Thus, cashier services were offered only at the time of the opening of the account, but each order required the specific consent of the Bank: see Bank's opening at [34.3]. The Bank's position is that Article 181 of the LCOC referred to above applies in that there is no pre-existing obligation to act on the mandate, but the Bank, having offered to provide banking services, cannot refuse it without a legitimate reason.

117. The evidence of Dr Moghaizel was also that an agent can terminate the mandate as a matter of general law even if there is an express term to require the transfer to take place. He relied on Article 808 of the LCOC that an agency comes to an end among other things due to revocation of the agent. He said that an acceptable reason exception arises because the agent is the principle only if such termination is sudden, untimely and without an acceptable reason and as stated in Article 822 LCOC: see Dr

Moghaizel's report at [109].[2] At one point during his evidence, Dr Moghaizel abandoned this theory, twice conceding that, if a bank was under a contractual obligation to make a transfer, and there were sufficient funds in the account, and the bank had successfully made all compliance checks, it would not be able to refuse to make the transfer (absent *force majeure*).[176] He was then shown that this was inconsistent with his report, at which point he sought to resile from this evidence: see [T4/111/4-T4/112/7]; T4/113/16 – T4/114/8]; [T4/114/9-T4/115/10]. It was common ground that Article 808 can be excluded and so it must be the case that it could yield to custom or to contractual terms.

118. In oral opening, the Bank relied on Bonhomme (Dalloz), and in particular paragraph 122 thereof, for the proposition that banks only agreed to offer transfer services, and therefore that a fresh consent is needed for each transaction.

119. The Bank also submitted that it can elect in consenting to provide cashier services to decide how to pay e.g. by cheque or by transfer or by cash.

120. Dr Moghaizel relied especially on Dr Nammour's writings. The Bank's evidence was that a bank transfer was a consensual transaction that takes place by agreement of the transferring bank, the transferee bank and the customer which is separate from the bipartite banking contract. Reliance was placed on Dr Nammour in his specialist banking doctrine who observed that:

> *"Transfer instructions are a mandate given by the client to his bank to debit his account by a specific amount and to credit another account with the same amount. The ordering client may not validly claim his 'right to transfer' except after the bank's acceptance of the order so given. Such contract is governed by the principle of mutual consent."*

121. Each of these points has been answered on behalf of the Claimant. As regards the general mandate and the suggestion that the Bank acted as agent with a discretion on each transfer, I reject that suggestion. The sources (including *Byblos Bank v Rizk*, Bonhomme (Dalloz), and Hamel) all say that the bank gives general undertakings upon opening the account, and that the bank's ability to refuse to perform transfers is thereafter tightly circumscribed. Therefore, the concept of consent is being used not to describe contractual consent, but rather:

    (1) the practical requirement for the bank to comply with its instructions, having made the necessary compliance checks; and/or

    (2) the need for certain limited additional criteria or pre-conditions (i.e., that the instruction must be properly given, that the transfer must be lawful, and that the customer must have sufficient funds) to be met and/or verified.

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[2] Article 822 LCOC provides, "*When the principal or the agent terminates the contract abruptly, untimely, and without acceptable reason, he may be held liable for damages to the other contracting party, due to the abusive use of his right*".

122. As regards the suggestion that there could be selective termination of elements of the mandate without a termination of the relationship between banker and customer, this too is rejected. The suggestion has been expressly rejected by the Court of Appeal in Beirut, which said as follows in *Byblos Bank v Marie Rizk* (referred to above) as follows:

> *"[…] describing the transfer petition as a proxy granted to the Bank for completing the funds transfer operation does not deny that this operation is an integral part of the main contractual relationship between the Bank and its customer, which is represented by the account opening contract and as such, there is no possibility for the bank's withdrawal individually from the commitment to request the transfer without the other party's approval as long as the existing contractual relationship between the two parties did not end consensually or judicially,*
>
> *[…] the appellant's uphold of the provisions of article 808 Obligations and Contracts which authorize the agent to withdraw from the proxy does not constitute in itself a justification for its abstention to make the transfer which the appellee requests, because withdrawal from the proxy as per the foregoing article entails the termination of the contractual relationship […]"*

123. The above is consistent with numerous urgent first-instance decisions in which it was said that there was no discretion on the part of the bank to refuse the transfer: see the Claimant's closing at [45] and his opening at [86.2].

124. As regards the contention that the bank is merely offering to provide cashier services at the time of the banking contracts, that owes its origin in part to a misleading translation of the relevant sentence (as Dr Moghaizel agreed). he word which has been translated "*offer*" is in fact "*rendre*", which means "*to deliver*" or "*to provide*". Further, as Prof Najm explained in her oral evidence, the totality of the passage including at [120-121] in fact supports her view that the bank generally undertakes to perform transfers upon opening the account. The better explanation is therefore that Bonhomme and the other sources use the concept of consent in the manner suggested above.

125. I accept the evidence of Professor Najm that a transfer is the implementation of the prior commitment of the Bank upon opening the account to perform as the client's agent the current cashier services requested by the client. It therefore follows that:

(a) the bank is obliged to carry out the customers local or international transfer orders unless that obligation is explicitly excluded in the contractual documentation;

(b) the bank's consent is not required or needed prior to the issuance of each transfer order;

(c) an alternative way of saying the same thing is that a consent must be provided to the bank transfer by the Bank, but it is obliged to provide that consent because of the banking contract, unless it comes within the cases where it is excused from the transfer such as want of funds in the account of the customer or facilitation of fraud, money laundering or other illegality. Put this way, there may be consent to the bank transfer, but that does not mean that the Bank is able to refuse the transfer. This is because of its prior obligation in the banking contract;

(d) the obligation to perform the transfer is an obligation of result and must be discharged without delay: see Professor Najm's report at 107-124;

(e) the Bank could not unilaterally refuse to make a transfer, whilst retaining the money deposited by the client As she said in the joint report in her column in point 2 of areas of disagreement in respect of question 8: "*Under Lebanese law, and as a matter of good sense, the bank is not allowed to keep the contractual relationship, while derogating from its main obligations (cashier services). Terminating one of the bank's main casher services, while maintaining the bank deposit contract* […], *would deprive the customer of part of what he had contracted for.*"

126. Were it otherwise, the admission of the Bank about the custom relating to international transfers would be so watered down as to be of little use to a customer in a controversy with a bank. The Bank would be able to terminate the agency at any time unilaterally and thereby remove the content of its obligation. Even if it was by reference to a legitimate reason, it would still undermine the basis on which the customer contracted, namely to be able to use the cashier services at any time subject to the customer having money in the bank to cover the transfer and not being involved in or facilitating fraud or money laundering or other illegality. Essential to the banking relationship was that the Bank would honour the instruction of the customer during the banking relationship. The conduct of the Bank does not honour that essential obligation.

127. I reject the case to the effect that the mandate could be honoured by an election on the part of the Bank to provide a cashier service of its election. It makes no commercial sense, and I do not accept that this alleged entitlement of the Bank has been demonstrated by any of the materials placed before the Court. If such an election could be made, it would have far-reaching implication. If there was urgency about an international transfer, a payment by cheque may take a long time to process. The payment of say £10,000,000 in cash rather than by way of an international transfer would provide very challenging difficulties in an age when even a small fraction of such a sum would be difficult to deal with having regard to concerns about money laundering. It would simply be not the service for which the customer has contracted.

128. More generally, Professor Najm relied in particular on scholarly writings including:

(1) Ali Addine Awedh, an Egyptian scholar, but whose writings have been cited in the Lebanese Court of Appeal, including his publication "Banking Operations from a legal perspective 1993 no. 158 pp.202-203 who said:

> *"Undertaking to execute cashier services: It has been an established banking custom that the bank undertakes implicitly to execute all cashier services at the same time upon opening a bank account for a client. These services are made through different operations such as the settlement of cheques that the client has drawn on the bank, the collection of his cheques and the execution of the client's transfer orders if the client has an account in another bank. The bank must be considered as an agent for the client in these cases.*
>
> *The consent of the bank during the execution of an order is required. Such consent is understood through its execution of the order i.e. affecting the necessary records in its books.*
>
> *It is noticeable that the consent of the bank is not usually free because, when the bank accepts to open a bank account, it undertakes implicitly to execute cashier services including the acceptance of the execution of cheques and transfer requests addressed to the bank, as long as there is a remuneration for such transfer request and its other conditions for execution exist.* (emphasis added)"

The above was quoted by the Lebanese Court of Appeal decision no.685/2021 of 16 December 2021 in *Traboulsi v Fransabank* (not published), stating (and albeit a decision against the customer in that case):

> *"the Appellee Bank's opening the accounts with it in the interest of the Appellant creates between the two parties a contractual relationship which grants the Appellant the role of client with regard to the Appellee along with all the rights and obligations necessary for this role, including in principle the right to request a bank transfer, beginning with the Bank's obligation to carry out counter services for clients, including accepting cheques and transfer orders."*

(2) Salman Bou Ziab Bank Transfer, Operations of Local and International Transfers, Comparative Study for Lebanese and French law, 1985 p.88:

> *"The issuance of a transfer order is not an offer to contract in itself; it is the implementation of a previous commitment towards the beneficiary. The execution of a bank transfer does not mean that the bank has consented to contract the object of the execution of the transfer. It is just the execution of the previous contractual commitment towards the ordering client resulting from the opening of the account."*

(3) *Cabrillac* in 'Le cheque et le virement' (5th Ed.) said:

> *"... the transfer order is a mandate ... [which] is part of the cash service that the banker tacitly undertook to provide when the account was opened",*

Adding later that :

> *"Each order constitutes a special mandate which the banker must accept. However, because of the tacit commitment he has made by opening the account he cannot, under penalty of incurring liability, refuse or omit to execute an offer without valid reason; it is admitted that he could be forced to do so by legal proceedings."* [This was cited by Picken J in *Manoukian* at [79])

(4) *Encyclopedie Dalloz*, another French work, states that it has *"always"* been the case *"that the banker who has accepted to open an account has therefore undertaken towards the client to effect the transfers that the latter asks him to operate; he cannot therefore refuse to make a transfer"*. [This too was cited by Picken J in *Manoukian* [82] who pointed out that this passage has been applied in recent decisions in Lebanon, including, for example, the 'Enforcement Judge' decision in ***Bank of Beirut SAL v Hasan Makki, Decision no. 54/2021 dated 30 November 2021***.

(5) Lebanese jurists have relied upon the *Encyclopedie Dalloz.* It was cited by Thus, *Fabia* and *Safa* said the following:

> *"In accordance with the agreement or established practice, the banker in charge of the deposit account shall provide the depositor with a cash service by paying, up to the amount deposited, the amounts set out in summonses, cheques, requests for transfer or any other acts of disposal."*

129. The reliance on Dr Nammour was misplaced in that it failed to take into account Dr Nammour's writings as a whole and in particular:

(1) Nammour's Instruments de Paiement et de Crédit (from 2008)[197] *says "the bank is not required to execute a transfer order […] unless at the date of the order, the funds are available"* and *"The transfer order is part of a general mandate related to the collection to which the bank committed"*.[198] Picken J relied on this passage in Manoukian, but, despite that, Dr Moghaizel did not provide a translation of it for these proceedings. (There are further examples of Dr Moghaizel's selective translations of Nammour's works.)[199]

(2) Nammour's *Droit Bancaire* (from 2012)[200] contains no suggestion that the bank's consent is required, but on the contrary says, "*The banker shall execute the transfer as soon as he has received the order*".[3]

130. The evidence of Professor Najm comprised court decisions including the following:

(1) Lebanese court decisions over the last two years including numerous Urgent Matter Decisions of which the preponderance support the Claimant's right to an international transfer. There was no decision denying the bank's obligation to perform the transfer. The "widespread majority" of the decisions of the Urgent Matter Decisions that they have jurisdiction because the customers right to obtain the execution of the transfer is not seriously disputable. The same conclusion has also been reached by enforcement courts. Three decisions issued by urgent matter courts have simply considered that the issue is disputed and should be addressed by the Court's ruling on the merits. These decisions have not taken a position on whether there is a banking transfer obligation or not.

(2) Decisions of the Lebanese Court of Appeal from the Urgent Matters Decisions. In *Traboulsi v Fransabank SAL*, the Court of Appeal decided that the depositor's claim was one of serious dispute going to the jurisdiction of the Urgent Matters Judge. In the following cases, it was found that the bank had an obligation to provide transfers in *Blom Bank SAL v Khalil Nakad* and others 26 April 2021 Court of Appeal in Mount Lebanon; *Byblos Bank v Marie Rizk*, 11 February 2021 Court of Appeal in Beirut; and *Chucri Kurban and Randa Chahine v Bank of Beirut, SAL*. 31 March 2022 Court of Appeal in Beirut. In the last case *of Kurban and Chahine*, the bank in that case had accepted the mandate to transfer, which is a distinguishing feature. Nevertheless, the Court of Appeal stated the following in general terms and germane to the instant case:

> *"Whereas the Appellee's [Bank] allegation that it cannot be bound to perform a banking service without its consent does not stand, because the bank's consent to open the account for his customer tacitly implies its obligation to provide the cashier services, including accepting the cheques and transfer orders;*
>
> *(…) Whereas it can be concluded that all the defences presented by the Appellee do not raise any serious dispute on the right of the Appellant to request the*

[3] As Prof Najm explained in oral evidence, (i) the partial quotation from Nammour 2012 that Dr Moghaizel has provided is incomplete, because Nammour goes on to say "*very clearly* […] *that the bank cannot refuse to perform a transfer order*" **[T2/87:24]–[T2/89:4]**; and (ii) the partial quotation from Nammour 2008 that Dr Moghaizel has provided is incomplete, because Nammour goes on to say that the bank's ability to decline the transfer are limited to factual or legal impossibility **[T2/90:10]–[T2/91:18]**.

> *transfer, and do not revoke the clearness and legitimacy of such right, hence the refusal of the bank to execute constitutes an obvious and illegitimate infringement on the right and justifies the interference of the urgent matters courts to cease this infringement pursuant to the provisions of Article 579, paragraph 2, LCCP (…)".*

There are quotations of parts of the other Court of Appeal decisions at [145-151] of Professor Najm's report. She also cited to like effect the case of *BankAudi SAL v Abdelkader* 31 March 2022 Court of Appeal in Beirut.

(3) In *Byblos Bank v Marie Rizk* (referred to above), the Court of Appeal in Beirut said the following:

> *"Whereas the appellant's allegations that it is not permissible to oblige it to provide any banking service to its customers without its consent are not legally established, because the bank's acceptance of opening the account for its customer implies its obligation to perform the service of the customer's service fund (service de ca[is]se), including acceptance of checks and transfer orders[.]*
>
> *Whereas it is known that the banking services provided by the banks to their customers include, for example, without limitation, withdrawals and deposits of funds and collection of checks in addition to the bank transfer[.]*
>
> *The banker is the cashier of his client; he receives his funds in deposit, makes payments, makes collections; he can also make remote transfers of funds.*
>
> *For a bank, cash transactions include transactions carried out by its customers, in physical or automatic counters. This includes cheque remittances, cheque book or bank card withdrawals, cash payments and withdrawals, transfers, and currency exchange transactions."* (emphasis added)

The Court of Appeal went on, however, to acknowledge that, in principle, there are circumstances where a bank is entitled to *"refuse to perform the requested services"*, as follows:

> *"Whereas the banks acceptance of opening the account for the benefit of his customer does not substitute for its satisfaction with respect to each individual transaction, including the transfer transaction, However, the consent required in this case is limited to the mechanism*

> *of conducting the required transaction and not to the principle of its completion, The bank's consent to contract with its customer and accept its deposit gives the latter the right to benefit from the banking services provided by the bank in general, and the latter is right to refuse to perform the requested service is limited to the absence of the objective conditions of this service, which were excluded from the terms of the contract, or its value was inconsistent with the condition of the customer's account or any other reasons not arising from the arbitrary will of the bank[.]*
>
> *Whereas in this respect, it is noted that the bank may not ask about the reason for the customer's desire to request a transfer, as he may not originally interfere in the affairs of his customer or inquiry [sic] about the reasons for his actions, especially when he is not asked about the safety of these actions or their results[.]*
>
> *Whereas, on the other hand, it is evident that the Appellant – the Plaintiff at the beginning – has clearly identified the number of the account to which the transfer is requested, and there is no legal obstacle that prevents the transfer of the funds to the mentioned account. The account of the transfer applicant is full, and the Appellant does not deny the legitimacy of this account and does not express any doubt about the source of the funds deposited therein.*
>
> *Whereas the Lebanese law does not, on its side, include any provision prohibiting the required transfer or giving the Appellant Bank the right to participate in fulfilling or not meeting the request of its client to this entity[.]*
>
> *Based on the foregoing, it follows that the right of the Appellee to request a bank transfer exists and exists and that the Appellant's statements of the violation are refutable."* (emphasis added)

(4) Three of the academic commentaries cited by Professor Najm concern Lebanese law (Awad, Bou Ziab and Gannage) and Awad has been relied upon in a Court of Appeal decision on the question of transfer rights: see *Traboulsi v Fransabank* (16.12.21), albeit one which decided that the depositor's claim was the subject matter of a serious dispute and therefore excluding the conditions for the intervention of the judge for Urgent Matters;

(5) There was also a French work of Hamel (Banques et operations de banque, Avant-propos) from 1943 which states the law as at the spring of 1939, which proves that the transfer right existed before the 1941 codification. It was therefore about a practice which was part of the jurisprudence incorporated into Lebanon at the point of it becoming an independent state: see the joint of the experts report at page 35.

(6) A large part of Professor Najm's sources (decisions of the Court of Appeal, Urgent Matter Decisions and various commentaries) were referred to in the Claimant's opening at [86] and at footnotes [231-241].

131. It is to be noted that there are no relevant substantive decisions of the Court of Cassation. I have rejected the submission that absent a decision of the Court of Cassation that this Court must decide the matter without reference to the case law of other courts in Lebanon. It is accepted that they are less authoritative than decisions of the Court of Cassation, but they provide some guidance particularly as here where there is a preponderance of case law for certain propositions.

132. It is still significant to note that there have been challenges by banks in recent cases where they have been ordered to carry out international transfer requests which has led to rulings by the Court of Cassation on requests for a stay. There were identified four decisions where there were orders for stays, but there have been five recent decisions issued on 11 January 2022 where the Court of Appeal decided to confirm decisions taken by Courts of Appeal rejecting the claims for the stay of enforcement. They are referred to at page 42 of the report of Professor Najm at footnote 74. Dr Moghaizel's evidence is that it is very rare for a stay of the decision of the summary procedure judge to be ordered, not least because that would be inconsistent with the urgent and essentially interim nature of the jurisdiction (as found by Foxton J in *Khalifeh* at [129], and quoted above). A stay is only to be granted when it appears clear to the relevant court (whether the Court of Appeal or the Court of Cassation) that the consequences resulting from enforcement would be unreasonable, or if there is a likelihood that the appealed decision will be overturned.

133. I take all of the above into account, but I bear in mind that if and to the extent that the decision about a stay indicates that a likelihood that the decision will be overturned (unless it is on the unreasonable consequences ground), it is only in the context of a decision which is a jurisdictional determination about the judge of urgent matters and not a substantive ruling. I also have regard to the more recent decisions where no stay was ordered.

134. In the circumstances, I am satisfied on the basis of the evidence as a whole about the following matters:

(1) The custom, insofar as it is relied on, against which the contract is to be interpreted, must be determined at the time of the contract and it does not suffice if there was a different custom at the time of the instruction to transfer.

(2) There is no acceptable reason in a loose sense on which a bank can rely. There are acknowledged and limited reasons for a bank not to act on the instructions of its customer comprising reasons such as lack of funds or involvement in an illegal transaction (referred to more fully above), but a desire to avoid a run on the banks is not a reason not to make an international transfer pursuant to a contractual obligation. Nor is any other characterisation of the desire of the Bank to refuse to make an international transfer in response to the current banking crisis.

(3) There is no reduced concept of force majeure capable of application to the concern about a run on the banks.

(4) Nor is there any analogous loose concept of acceptable reason capable of justifying the refusal to provide a bank transfer for reasons such as avoiding a run on the banks or to avert insolvency or to distribute money between customers in a way that it would regard as fairer.

(5) The Bank is unable to refuse to execute the instruction on the mandate by reference to being an agent because the pre-existing contractual obligation took priority.

XIV Is there a new custom?

135. In any event, I am not satisfied that the alleged new custom satisfies the requirements of a custom under Lebanese law. The experts agree in this case that for a custom to be binding, it must meet the following two requirements, namely:

(1) repetitio – it must have been repeated over a reasonable period of time: it requires a general and longstanding and constant action, practice or other behaviour; and

(2) opinio necessitatis – it must be subjectively regarded as a binding norm: it a psychological element referring to a general acquiescence to the factual element in that it must be followed: see the Bank's opening skeleton at [58]..

136. Given the admission that there was a custom until at least November 2019 to effect international transfers (subject to an acceptable reason referred to above), there is still the question as to whether the requirements of repetitio and opinion necessitates were satisfied such as to change the custom.

137. I am not satisfied that these conditions were satisfied. As regards repetitio, it had to be of long standing. In older times, particularly before modern communications and especially the internet, it would have required a very long time to replace a custom of long standing. Dr Moghaizel's view was that a custom could be overtaken almost instantaneously. In cross-examination, he accepted that the emergence of a custom "*cannot be overnight*", but rather *"it must be a matter of months"* at least rather than

weeks or days. He referred to it taking "*long months*" [T4/181/9-20]. The question in this case was whether it had changed.

138. The Bank's case was that there was a constant practice in accordance with the ABL press release. This was a circular of a body of Lebanese banks dated 17 November 2019 in which members were advised to impose uniform capital controls to avoid a collapse of the Lebanese banking system. International transfers were not to be executed unless they fell into permitted categories such as education purposes, urgent personal expenses or were from funds introduced into the Lebanese banking system after November 2019. The effect of this, as submitted by the banks in *Manoukian* at [25] was that *"implicit in these circulars is the acknowledgement that banks are not obliged to provide international transfer services in amounts or for reasons other than those stipulated."*

139. There are problems about demonstrating that this gave rise to a custom. Although there was an internal email of 25 November 2019 about a process for accepting instructions for payments, there is no document evidencing the Bank's acceptance of the ABL press release. In any event, the Bank did depart from the press release in that it refused to pay amounts which might fall within the permitted categories (family health insurance, payments to the landlord for refurbishment work). It would pay only some urgent expenses, and not others. Mr Bikai indicated that payments would be made for the Claimant's father, evidently a wealthy customer on the basis that his requests would be granted exceptionally and on the basis that he had been a customer for a long time.

140. Dr Moghaizel accepted in oral evidence that the banks' practice was not consistent but started in phases and took several months with transfer instructions being honoured less and less over time. This was the result of a bank run in October 2019, of the default of sovereign debt in March 2020 and of COVID becoming serious in Lebanon in about May 2020. In short, the position was changing over a period of time and there was no consistency in approach. This was confirmed by the Claimant. There was a newspaper article from the Financial Times of 13 July 2020 indicating that some customers were preferred over others. This was inconsistent with the agreed requirement of a general longstanding and constant (unchanging) practice.

141. As regards opinio necessitatis, there must be a belief in the legally binding force of the custom. The case for the Claimant was that this could not be the case in view of how widespread were protests and objections including a series of press articles and FCO documents, objections by associations of liberal professions, the volume of litigation (there were 340 cases in 2020 and 279 in 2021, and 88 commenced by 20 May 2022). The Bank said that the custom did not have to be universally accepted, and it sufficed if it was generally accepted. In my judgment, those numbers are not negligible numbers: it is not a natural inference that all others accepted the position: they might have been watching for the result of those cases and hoping that they could follow a successful result for themselves. That does not connote acquiescence. At least one of the members of the ABL, namely AM Bank objected to ABL's action on the basis that it should have safeguarded the depositors and rectified matters in their best interests.

142. The Bank's argument is that opinio necessitatis is not akin to acceptance, but that it is sufficient if there is a general feeling that the practice is inevitable. Even if that were right, and the authority for the point is sparse (see the reference to a commentary from

Deumier referred to at [70] of the Claimant's closing skeleton), the evidence of protests, objections and hundreds of lawsuits contradict such a feeling of acceptance Dr Moghaizel agreed that people were not happy [T4/197/10-202/12]: it is hard to see how this amounts to general acceptance.

143. In *Manoukian*, there was a particularly apposite part of the judgment of Foxton J at [131] in the following terms, namely:

> *131. Finally, it is important to note that, at least on the evidence before me, the restrictions imposed on banks in relation to payments out of foreign currency accounts have not taken the form of legislative provisions which directly affected the contractual relationships between banks and their customers. Rather, banks have been subject to informal regulatory pressure in the form of circulars addressed to them by the BdL or the Association of Banks. The position is, in my view, well-summarised by a decision of the Judge of Summary Procedure sitting in Zahle (Decision no 5 dated 13 January 2020, Mohammad Ismail Abdelrahman v Banque Credit Libanais SAL) where the judge noted:*
>
> > *"The aforementioned circulars do not have any binding capacity towards the clients and it is not possible in any way to limit their right to carry out any banking operation that meets the accepted banking conditions within the laws and regulations …Any Capital Control by the Association of Banks needs legislation and this is not the case in Lebanon to date, noting that no circular was issued by the Central Bank of Lebanon represented by its Governor aiming to impose such restrictions … Such measures require exceptional powers to be granted to the [BdL] pursuant to a specific regulation".*

144. I respectfully adopt the foregoing. It follows from the discussion above that the Bank has failed to establish that there was a change in the custom. A circular of the ABL was not sufficient to end a custom or to create a new custom. There was no evidence of constant practice. There was no evidence of sufficient acceptance of it from customers of Lebanese banks or outside the banking community in Lebanon.

145. For all these reasons, I am not satisfied that an acknowledged custom at the time of the making of the contracts ceased to operate. This is at least for the following reasons:

(1) the Bank has failed to show and/or it has not been demonstrated how or when the custom which it acknowledged to exist before the banking crisis came to an end;

(2) The evidence does not satisfy the twin requirements of repetitio and opinio necessitatis;

(3) the desire to avoid a run on the banks was not an acceptable reason insofar as this was an exception to the pre-existing custom;

(4) A custom incorporated into a contract could not be replaced by a different custom without the assent of the parties to the contract;

(5) The Bank was unable to avoid the obligation to transfer by relying upon a right not to accept the request because it was acting as agent or to terminate the mandate as agent because the obligation to transfer was pursuant to the contract itself.

146. Professor Najm did not accept that there was any such concept as an acceptable reason exception (insofar as it was any wider than the refusal to provide a transfer for want of funds/illegality etc referred to above): see [84, 96 and 103-104] of her report. Nor was this accepted in any of the scholarly commentaries on which she relies: see footnote 221 to the Claimant's opening (at [83.3]).

XV The effect of the tender and deposit procedure

147. It is common ground in this case that if the Court were to decide that the transfer obligation had arisen prior to the tender and deposit procedure in January 2022 that the claim (subject to questions of remedy, that is to say specific performance or damages) should succeed. This follows the acceptance by the banks in Manoukian that article 822 would be inappropriate in those circumstances. In Manoukian at 130, Picken J said as follows:

> *"It is obvious that any tender and deposit would need to match the object of the debtor's obligation. If that obligation is (as I have determined) to effect an international transfer as requested by the client, then, tendering and making a deposit in Lebanon, rather than internationally, entails a mismatch. This means that the tender and deposit made by the Banks in Mr Manoukian's case has to be ineffective".*

148. In the light of this, the tender and deposit cannot assist a bank that is under an accrued obligation to transfer. It therefore follows that it is not necessary to consider the submissions which would have arisen for determination in the event that I had not found that there was an accrued obligation to transfer.

XVI Specific performance

149. In my judgment, specific performance is available to the Claimant for breach. It is the evidence of Professor Najm that it is available, even that it is the primary remedy. I take into account that Professor Najm is supported by the following:

(1) three scholarly commentaries: see Bou Ziab, Bou Nassif and Eid: see footnote 376 to the Claimant's opening skeleton argument at [120]. (The fact that this was not mentioned by other scholars does not affect the overall position, as explained by Professor Najm);

(2) at least 22 urgent matter cases referred to in the expert evidence;

(3) a very recent decision of the CFI (i.e. a full merits decision), namely *Traboulsi v Fransabank* (of 21 June 2022).

150. Dr Moghaizel's attempt to argue otherwise is less impressive for the following reasons:

(1) his original report at [173] seemed to agree, but he then said that there was missing word "not" such as to express the opposite view;

(2) he did not cite any case or doctrine in support of his position, and as regards the case law, his case must therefore be premised either on the fact that case law is irrelevant or inadmissible or in the instant case wrong, neither of which is satisfactory;

(3) the bank cannot be compelled to act as an agent for the customer. This is not accepted generally. More particularly, when the court makes an order for specific performance the action is being done to fulfil an order of the court and not to act pursuant to the agency.

151. As noted above, in *Manoukian*, it was common ground in the pleadings that specific performance was available, despite Dr Moghaizel having given evidence for the banks. Having found against the banks, Picken J ordered specific performance.

XVII Damages

152. If specific performance had not been available, it is agreed that subject to liability, damages would have been an appropriate remedy. On the basis that the customer has been deprived of an international transfer, there was a suggestion that the value to the customer of the cheque in Lebanon might have to be the subject of a credit, that is 13.6 per cent of the value on an international transfer. This was apparent in an exchange between the Court and Mr Isaacs QC [T5/177/21-T5/180/12] In my judgment, there is no need to give any credit against the full value of the sum which would have been transferred. There is some doubt as to whether the cheque with the notary public is still available to the Claimant. If the cheque is still available, it is circuitous that the Claimant should make use of this instrument at the expense of the Bank rather than have the full sum in damages without a deduction. In order to avoid double recovery, the Bank would upon payment of the damages be able to cancel the cheque.

XVIII Interest

153. It is common ground that the statutory rate for interest under Lebanese law is 9% *per annum*. I am satisfied that this applies to decisions awarding foreign-currency payments. This was established by the Court of Cassation in 2019: see Court of Cassation, 4th Chamber, Decision no.10/2019 of 21 February 2019. Dr Moghaizel's statement that "*Lebanese courts have applied lower interest rates for decisions awarding payment in foreign currency*" is not supported by cases and cannot be sustained. The Claimant is therefore entitled to interest at 9% per annum according to Lebanese law. The point has not been addressed as to whether the amount of interest may be governed by domestic law in respect of an interest on a debt the subject of litigation in England and Wales. The question is whether the lex causae (Lebanon) applies or the lex fori (England and Wales), and if it is the latter, does it make any difference to the rate to be paid? There is a useful discussion in Dicey, Morris & Collins on the Conflict of Laws 15th Edition especially at paras. 7-103 – 7-105.

154. It may in the end make no difference because either interest in the context of specific performance may be substantive law (as is alluded to at the end of the joint report of the experts) or the interest rate under section 35A of the Senior Courts Act 1981 may be sufficiently flexible to allow the court to fix an appropriate rate having regard to the relevant law of the lex causae. This consideration was not in the draft judgment which I handed to the parties, but the point ought not be ignored. I therefore shall do the following, namely (i) make the part of the order about interest a payment on account, (ii) leave open the amount of interest to the consequentials to be heard in the week commencing 22 August 2022. In addition to considering interest on this basis, there is also to be considered interest by reference to offers made to date.

XIX Conclusions

155. It follows from all of the above that I have concluded that:

(1) the Bank had a contractual obligation to make international transfers as sought by the Claimant and which it failed or refused to make;

(2) The contractual obligation is established from the combination of the words used and the intention of the parties having regard to the context of the agreement of the parties.

(3) It is not necessary to consider custom as part of that context, and so the construction would be arrived at without reference to custom.

(4) The contractual construction is reinforced by reference to the custom which existed at the time.

(5) It therefore follows that it is not necessary to consider whether there would have been an international transfer obligation if the matter had depended entirely on custom.

(6) The transfer obligation is not absolute, but it is not so loose as to incorporate what was described as an acceptable reason beyond inadequate funds and

established reasons such as not assisting fraud, money laundering or illegality.

(7) In coming to these conclusions, I have considered all of the evidence before the Court. That includes (without limitation) especially the following:

(i) The expert evidence and my findings which are to accept the evidence of Professor Najm and, where there has been conflict, to prefer the evidence of Professor Najm to the evidence of Dr Moghaizel.

(ii) I have found the evidence of the Claimant to be honest and reliable and have referred to a number of deficiencies in the factual evidence on behalf of the Bank. All of this is relevant to the context within which the contract is to be construed and in assessing the joint intention of the parties.

(iii) I have been assisted by the decision of Picken J in Manoukian. However, I have been careful to avoid simply following Manoukian, mindful that the contractual terms are not identical and that the evidence was different in the two cases.

(8) I am satisfied that the current crisis in Lebanon and/or a desire to follow any advice of the ABL and/or a desire to avoid a rush on the banks or to treat depositors according to some notion of fairness of the banks does not provide a legitimate reason or an acceptable reason (if there is such an exception to the obligation on the part of the bank to transfer money to the order of the Claimant) for not acceding to the requests for the international transfers in this case.

(9) The Bank is liable to the Claimant for not acceding to his requests for transfers.

(10) The appropriate remedy is specific performance.

(11) If the remedy had been to pay damages, it would have been to pay the full sum requested to be paid by way of damages without deduction.

(12) In either event, interest is payable at the rate of 9% per annum from the date when each transfer ought to have been made.

156. That suffices for the purpose of the judgment, but I shall now revert briefly to the eight questions.

Question 1: Do the terms of the Account Agreements on their proper construction (leaving aside custom) require the Bank to comply with the instructions in this case?

Yes. There is no need to elaborate.

Question 2: What is the relevant custom/practice for the purposes of assessment the Bank's obligations: (a) that prevailing at the time when the contracts were entered into, or (b) that prevailing when the instructions were given?

The Court is entitled to use custom as an aid to construction. The contract is to be construed by reference to the custom or practice prevailing at the time when the contracts were entered into rather than that prevailing when the instructions were given.

Question 3: If the answer to question 2 is (a) (i.e., the custom prevailing at the time of contracting), is/was the custom/practice subject to an "*acceptable reason*" exception?

(It will not be strictly necessary to answer questions 2 and 3 if the answer to question 1 is "*yes*".)

The obligation was not absolute. Insofar as there was an acceptable reason exception, it was not one which allowed the latitude sought in this case.

Question 4: If the answer to question 2 is (a) (i.e., the custom prevailing at the time of contracting) and the custom/practice is or was subject to an "*acceptable reason*" exception, did such an "*acceptable reason*" exist at the time when the instructions were given?
No.

Question 5: If the answer to question 2 is (b) (i.e., the custom prevailing at the time of the instructions), has the custom existing at the time of contracting been replaced, by the time when the instructions were given, with a new custom under which banks were not required to effect transfers on instruction?

It has not been established that a new custom had replaced the custom at the time of the contracting. In my judgment, having regard to the admissions in this case, it was for the Bank to establish that there was a new custom prevailing at the time of the transfer instructions. The Bank has failed to establish the same. Even if that were not the case, there was no change of custom in this case. The requirements for a new custom of repetitio and opinio necessitatis are not present for the reasons set out above.

Question 6: If there is no obligation to transfer, can a BdL cheque give good discharge of the Bank's debt to the Claimant?

Not applicable

Question 7: Is specific performance available to the Claimant? If not, what damages is the Claimant entitled to?

Yes. If there is no entitlement to specific performance, then damages are payable in the same amount as the international transfers not made together with interest at the rate of 9% per annum.

Question 8: Is the Claimant entitled to interest at 9% *per annum*?

See the answer to question 7.

XX Disposal

157. For all these reasons, there will be judgment for the Claimant in the form of an order for specific performance in the sum of USD7,790,624 together with interest at an annual rate of 9%. The periods of interest will be from the date of the transfer obligation until payment. The parties shall draw up an order to reflect the foregoing.

158. It remains for the Court to thank all Counsel and solicitors for the very high standard of preparation and presentation, both in writing and orally, which has been of great assistance to the Court.