Neutral Citation Number: [2023] EWHC 17 (KB)

Case No: QB 2021 000430

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/01/2023

Before :

MR JUSTICE KERR

- -

Between :

GEORGE GABRIEL BITAR	**Claimant**
- and -	
BANQUE LIBANO-FRANÇAISE SAL	**Defendant**

- -
- -

Mr James Cutress KC and Mr Daniel Carall-Green (instructed by **Rosenblatt** (a trading name of RGB Legal Services Limited) for the **Claimant**
Mr Rajesh Pillai KC and Mr Philip Hinks (instructed by **Dechert LLP**) for the **Defendant**

Hearing dates: 8, 9, 10, 11 and 16 November 2022

- -

Approved Judgment

This judgment was handed down remotely at 10.00am on 16 January 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives (see eg https://www.bailii.org/ew/cases/EWCA/Civ/2022/1169.html).

....

Mr Justice Kerr :

Introduction

1. The claimant is a British and Syrian consultant radiologist. He lives and works in London with his family. He seeks specific performance of an obligation he says is owed by the defendant bank (**the Bank**) based in Beirut, Lebanon, to transfer to his US dollar (**USD**) account in London the sum of USD 4,245,829 plus interest at 9 per cent. Alternative claims are made in debt or for damages.

2. The Bank is a joint stock Lebanese company which carries on business as a retail bank. It says it is not obliged under the contract of deposit (**the agreement**), governed by the law of Lebanon, and under Lebanese law, to make international transfers in USD. The gist of the defence is that the Bank is entitled to pay the balance to the claimant in Lebanon, in Lebanese pounds (**LBP**) or in US dollars that are exchangeable at only about 15 per cent of their normal market value.

3. The action was tried before me in London from 8 to 16 November 2022. I received written and oral evidence from the claimant, two officers of the Bank, Mr Walid Gebrane and Mr Walid Raphael, and an expert in Lebanese law instructed by each party. The written and oral opening and closing submissions were very detailed and most helpful to the court.

4. The experts were Professor Marie-Claude Najm, instructed by the claimant, and President Mouhib Maamari, instructed by the Bank. I regard both as eminent jurists in Lebanon. I am most grateful for their assistance and that of Ms Sandra Coade, the French language interpreter who translated the oral testimony of President Maamari, given in French.

5. Shortly after receiving closing submissions, in advance of this judgment I informed the parties of the outcome: that the claim succeeds. I issued an order for specific performance of the Bank's obligation with interest at 9 per cent. If I had prepared my full judgment before issuing my order, there was a risk that capital controls legislation in Lebanon would frustrate the success of the claim.

6. The jurisdiction of this court was established in a judgment of Mr Michael Kent KC (as he now is) sitting as a deputy High Court judge, refusing to declare that the court lacked jurisdiction (*Bitar v. Banque Libano-Française SAL* [2021] EWHC 2787 (QB)). He accepted that the contract was a consumer contract and that the consumer, Dr Bitar, could therefore sue in the court of his own domicile.

Issues

7. The issues raised concern the interpretation of the agreement and points of law; principally, Lebanese law. The facts were mostly not in dispute, but some factual issues did arise, mainly concerning the content and effect of oral communications between officers of the Bank and the claimant's parents and what was passed on to the claimant by his parents.

8. Some of the issues have previously been considered in three decisions of this court involving other Lebanese banks, considered further below: *Khalifeh v. Blom Bank SAL* [2021] EWHC 3399 (QB) (Foxton J); *Manoukian v. Société Générale de Banque au Liban and Bank Audi SAL* [2022] EWHC 669 (QB) (Picken J); and *Bitar v. Bank of Beirut SAL* [2022] EWHC 2163 (QB) (Freedman J). Both parties relied on aspects of the reasoning in those cases.

9. The issues for determination were agreed at the case and costs management conference, in the form of a list of 12 questions to be answered by the court. These were set out in a helpful table, carefully cross-referenced to the pleadings. However, the claimant then sought to reframe the issues in his detailed opening written submissions, substituting six questions, some with sub-questions. These were proclaimed to be "[t]he questions for the court to decide".

10. Generally, a party who agrees to a formulation of the issues does not promote the overriding objective by unilaterally departing from it, without asking the court or the other side. The Bank in its closing written submissions, inevitably criticised the revised formulation, suggesting the claimant sought advantage from it. And I am now left without an agreed formulation of the issues.

11. One purpose of agreeing the issues beforehand is to determine a uniform structure for the parties' submissions which is likely to be followed in the court's judgment. It is an efficient way of proceeding. If a party changes its mind about the wording of the issues, that efficiency is undermined. A party seeking a change should raise this with the other side and, if necessary, the court.

12. That did not happen here. However, I accept that the list of 12 questions is unwieldy. It could usefully have been revisited. I think the best course now is to formulate the issues in my own way. I will address the following questions:

    (1) Does the agreement on its true construction, aside from any custom, confer on the claimant a right to require the Bank to make a transfer in USD to a bank outside Lebanon (an **international transfer right**)?

    (2) For the purpose of assessing the effect of any custom, is the relevant time the date when the agreement was entered into or the date on which a relevant instruction was given to transfer funds outside Lebanon?

    (3) Does the agreement include an international transfer right, or does the claimant have an international transfer right, because of a custom among banks in Lebanon at the relevant time or times?

    (4) Did the Bank, by communications with the claimant's parents, or by reference to an email dated 8 September 2020 or otherwise, terminate or modify or suspend any obligation to effect international transfers?

    (5) Has the claimant validly requested or instructed the Bank to make, or validly demanded that it make, one or more relevant international transfers? If so, what was its or their nature and effect?

(6) Did the Bank discharge its debt by providing a cheque drawn on the Banque du Liban (**BDL**) and depositing it with a notary, using the procedure in article 822 ff. of the Lebanese Code of Civil Procedure of 1983 (**LCCP**)?

(7) To what remedy or remedies, if any, is the claimant entitled? In particular, what is the relevant interest rate if the claimant is entitled to specific performance or an equivalent remedy in debt or damages?

Facts

13. The claimant was born in London in 1983 and has always lived in this country. He was educated here, studied medicine here and has worked for various NHS bodies. His parents are Syrian born. He has dual British and Syrian nationality. His mother and father have both British and Lebanese nationality. His mother lives in Lebanon. His father and brother live and work in Nigeria.

14. The Bitar family's dealings with the Bank's subsidiaries began in around 2010. The group includes Banque SBA SA in Paris (**SBA**), owned by the Bank; and SBA's Swiss subsidiary, LF Finance (Suisse) SA (**LFF**), in Geneva. In about 2010, the claimant, his father and brother opened a joint account with LFF in Geneva. The claimant regarded LFF as a branch of the Bank.

15. He planned to place about USD 3 million with LFF. He went to Geneva to meet LFF officers and later that year placed funds with LFF. The amounts placed amounted to at least USD 500,000 in value, in a combination of pounds sterling (**GBP**), euros (**EUR**) and USD. He expected the funds to be kept in "LF Beirut" (as he wrote in an email in 2012), i.e. deposited with the Bank.

16. From 2012 to 2014, LFF sent marketing communications to the claimant, encouraging him to place further funds. The claimant was living and working in London as a doctor. He married in 2014. He and his wife now have two young children. He was sporadically engaged in correspondence with LFF about the placing of funds. He continued to regard LFF as a branch of the Bank.

17. In about October 2014, the claimant and his family, through their trust company, Egerton Holdings Ltd (**Egerton**), borrowed EUR 6 million from SBA (**the SBA loan**) to fund a property purchase in Paris. The SBA loan was later increased to EUR 8 million and was or became secured on funds placed with LFF. Various transfers took place over the years in the course of these dealings. I will refer to some below; not all the detail can be or need be reconstructed.

18. In 2014, it is common ground that the Bank was interested in attracting deposits from outside Lebanon in foreign currencies, particularly USD. Many transactions of substance in Lebanon, such as buying a house, are done in USD. The Bank's website at the time included a section dedicated to the expatriate market, the allure of favourable interest rates and the availability of accounts denominated in non-Lebanese currencies.

19. At trial, the Bank emphasised the Lebanese diaspora and the importance of remittances from outside Lebanon to relatives at home, suggesting the flow of funds would be mainly inwards not outwards. I agree that the Bank was keen on inward rather than outward flows of USD, but I accept the claimant's point that the website entries said

nothing about restrictions on withdrawal; and that depositors generally expect to be able to withdraw money as well as deposit it.

20. I come to the opening of the account at the heart of this case (**the joint account** or **the account**). The claimant visited Beirut for three days in mid-October 2014 specifically in order to open it. He, his mother Rania Bitar, his father Gabriel Bitar and his brother Joseph Bitar, all personally attended the Bank's Achrafieh branch in Beirut to sign the relevant documents.

21. The joint account was in USD and has been described as a "sub-account" because the family held various other sub-accounts in other currencies. The documents were provided in English and French; at least some were translations from the original Arabic into French. The claimant knows French but not Arabic. The documents he saw at the time were in French, but I will refer to the English versions.

22. There was a request to open the account in the name of the four joint holders, on a sole signatory basis. There was a "multi package account agreement" (**the MPAA**) stating the terms of the agreement in 12 articles numbered I to XII. I will need to come back to these terms. There was an "addendum" supplementing the terms in the MPPA; and a document stating the "client's rights and duties".

23. There were also documents called client profiles, and a joint account profile. These contained personal details of the names, ages, nationalities, residence and occupations of the four account holders. For the most part, the creation and signature dates are 17 October 2014, indicating that is the probable date of the visit to the branch to open the account. The joint account profile indicated that the family wealth was considered to be over USD 5 million.

24. Broadly speaking, the documents included client obligations of the usual kind: to be vigilant against fraud and not to disclose the account details carelessly; to comply with regulatory requirements; and to be open with the Bank about assets and about transactions and their purpose. The addendum to the MPAA included the Bank's right to decline a transaction if it would infringe foreign exchange control or anti-money laundering requirements.

25. Forecasts of annual payments in and out of the account were recorded. For the claimant, the amounts recorded for "living expenses" were payments in of USD 500,000 and payments out of USD 450,000 each year. For the claimant's father, Mr Gabriel Bitar, the annual forecast was USD 1 million entering the account and USD 100,000 leaving it. The claimant's brother Joseph was not expected to use the account. For their mother, Mrs Rania Bitar, the annual estimates were USD 500,000 entering and USD 100,000 leaving the account.

26. Substantial USD deposits into and withdrawals from the account were made. Mr Gebrane was asked to provide the claimant with paper and electronic statements at his home in London. Transaction instructions to pay out money from the account in USD to banks outside Lebanon were executed by the Bank in the period from October 2014 to September 2019. This accorded with Lebanese banking practice during that period, absent any compliance issue such as risk of fraud, money-laundering or exchange controls.

27. In December 2016, Egerton executed an account pledge (*nantissement de compte*) in favour of the Bank, signed by the claimant, to secure the indebtedness of Egerton to "your Bank" or any other "interested agencies" (which I take to include Egerton's creditor SBA, and LFF) (**the 2016 pledge**). The Bank was, therefore, authorised under the 2016 pledge to use any balance in the joint account towards discharge of Egerton's liability to SBA.

28. In May 2019, the claimant's parents borrowed from LFF (**the LFF loan**) the sums of 1.78 million Swiss francs (**CHF**) and EUR 1.58 million, mainly to help fund the purchase of a property in London for Joseph Bitar, the claimant's brother. The LFF loan was secured on an investment portfolio held by Egerton. Later that year, the well known financial crisis in Lebanon began. The LBP collapsed and Lebanon defaulted on its sovereign debt.

29. I will follow Freedman J's example (in *Bitar v. Bank of Beirut SAL* at [18]) by citing part of Picken J's description of the crisis in his judgment in *Manoukian*, given in March 2022, 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. ….. 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. ….. 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%."

30. Mr Raphael gave evidence about how the Bank reacted to the crisis after the two week closure in the second half of October 2019. Mr Raphael has since 2014 been the chairman and general manager of the Bank, founded by his father in 1967. He owns about 9 per cent of the Bank's shares. He sits as a board member of the Association of Banks in Lebanon (**ABL**), an industry body representing the interests of its member banks in Lebanon.

31. On 30 October 2019 the governor of the BDL asked the banks to reopen not later than 1 November 2019, the Friday of the same week. On 31 October, the Bank held an internal meeting attended by, among others, Mr Raphael and Mr Gebrane, manager of the Achrafieh branch. The theme of the meeting was "business as usual" but there were about 50 transfer requests on 1 and 2 November, on reopening.

32. A further meeting was held on Sunday 3 November 2019. Mr Raphael and Mr Gebrane were both there. There is a note of that meeting. Local transfers within Lebanon would be maintained; but international transfers out, in respect of deposits made before 17 October 2019, would be restricted to cases where personal or family expenses or tuition fees were needed urgently; or where business, professional or personal invoices needed paying urgently. Committees would consider transfer requests on a case by case basis.

33. Like other Lebanese banks, the Bank's policy after 3 November 2019 was that USD funds caught by its restrictions on transfers out of Lebanon would be available to the client only in "lollars" – USD held in Lebanese accounts subject to the restrictions agreed between the banks. These would be available for withdrawal in Lebanon but are, or were in late 2019, worth only about 15 per cent of their value in USD outside Lebanon.

34. The Bank's new policy was informal and not in writing, but staff were instructed to implement it. They did so from early November 2019. The Bank says it could not otherwise meet its obligations to clients, should all seek to withdraw their money at once. Mr Raphael said he did not consider the bank contractually obliged to effect USD transfers outside Lebanon; it had regularly done so until the crisis began but not, his evidence was, because it felt bound to do so.

35. On 17 November 2019, the ABL issued a press release about a "list of temporary banking directives" it had decided upon in consultation with the BDL. The list, it was stated, "does not impose restrictions on the movement of money…". Yet, the seven points that followed did include restrictive measures of the same ilk as the Bank's new policy: for funds placed before the crisis "[o]verseas transfers are only made to cover urgent personal expenses" (item 2).

36. From about that time the Bitar family, like many others, started making efforts to move their USD out of Lebanon. The first step was an attempt from 25 November 2019 onwards by Joseph Bitar to transfer USD 1.9 million from the joint account to LFF, to pay off (in part) the LFF loan. Joseph Bitar demanded the transfer robustly with a threat of legal action, but the transfer was not made.

37. After a flurry of internal emails within the Bank, Gabriel and Rania Bitar went to the branch and demanded strongly of Mr Gebrane that the USD 1.9 million transfer be made at once. Mr Gebrane sought instructions from Mr Raphael and his sister, Ms Raya Raphael, the general manager of the Bank. Mr Raphael met the claimant's parents at his office on 12 December 2019. Mr Raphael's evidence is that he informed them at that meeting of the Bank's new restrictions on international transfers.

38. I accept that it is very likely he must have said something to that effect. It is inconceivable that he would not have mentioned the unusual circumstances. He had to explain to the Bitars why the transfer request was not going to be straightforwardly complied with. The context was the financial crisis, social unrest and the recent two week closure of the banks.

39. The next day, Mr Gabriel Bitar emailed Mr Raphael thanking him and saying he would contact Mr Gebrane the following Monday to finalise the documents to be signed. Mr Raphael's evidence was that while the Bank would not transfer the USD 1.9 million to

Geneva as requested, it "could transfer the pledge account of €2 million to Geneva instead of being called by Banque SBA".

40. That evidence suggests the Bank was prepared to forego its own rights under the 2016 pledge and cede them to its subsidiary, LFF, subject to the pledged funds being in turn subordinated to SBA's security, to persuade SBA not to call in the SBA loan. Whether or not the Bitars correctly understood Mr Raphael, his evidence is to the effect that the Bank was unwilling directly to perform the instruction to transfer the whole USD 1.9 million to LFF; and it did not do so.

41. The weight of the evidence is that Mr Raphael agreed with Mr and Mrs Bitar to make the USD 1.9 million transfer to LFF in instalments. I so find on the balance of probabilities. I accept the claimant's evidence that his parents told him after the 12 December 2019 meeting that Mr Raphael had agreed to transfer the USD 1.9 million by instalments, provided they agreed to the transfer of EUR 2 million to LFF, under pledge to SBA.

42. That is consistent with Mr Gebrane's email to Mr Raphael on 20 December referring to further transfer requests from Mr Bitar to pay two invoices in GBP of GBP 11,047 and 1,664 respectively. Mr Gebrane asked Mr Raphael if he could set them against "the first tranche" of the USD 1.9 million Mr Raphael was intending to make. It is also consistent with Mr Bitar senior's later email of 2 January 2020 to Mr Gebrane referring to "[p]art transfer of $1,900,000".

43. Mr Gebrane's evidence was that it was Mr Gabriel Bitar, not Mr Raphael, who gave him to understand that Mr Raphael was prepared to make the USD 1.9 million transfer to LFF in tranches. Mr Bitar (senior) was not called and the Bank's evidence was confusing and not properly documented. Mr Bitar senior emailed Mr Raphael on 22 December 2019 clearly referring to an agreement to transfer the USD 1.9 million to LFF in tranches of USD 500,000 every two weeks.

44. He complained in that email that no transfer had yet been made. He referred to the transfer of "2 million pledge in favor of SBA to be transferred to LF Suisse" as an *additional* transaction. He continued: "[a]ll documents related to these transactions were signed and are in the possession of Mr. Walid Gebrane". However, no such documents were disclosed or before me at the trial.

45. Mr Raphael did not respond to correct any misapprehension; it slipped his mind, he said. It was a very busy time for the Bank. Whatever exactly was said or agreed at the meeting on 12 December 2019, no transfer of the USD 1.9 million to LFF was made. There is no doubt that an instruction to make that transfer was issued by Mr Bitar senior in December 2019. Mr Raphael does not assert that the Bank performed that instruction.

46. Mr Bitar senior was annoyed. He expressed his displeasure in an email of 6 January 2020 to Mr Dory Hage of LFF, copied to Mr Raphael, asking for a prompt response. Mr Raphael did authorise, on 7 January, transfers to pay the two invoices in GBP (already mentioned) and a transfer of EUR 90,000 to SBA to pay an instalment of or interest payment for the SBA loan that had fallen due.

47. On 18 and 20 February 2020, the claimant emailed Mr Gebrane seeking a meeting with Mr Raphael. Instead, Mr Raphael met Mrs Bitar on 26 February 2020. She repeated the request for transfer of the USD 1.9 million. Mr Raphael said the Bank could not agree to that but had recently transferred the EUR 2 million pledge to LFF as previously agreed.

48. I accept Mr Raphael's uncontradicted evidence, though not supported by any contemporary document, that he told Mrs Bitar the Bank would only make transfers to cover urgent expenses due to the difficult situation in Lebanon, the restrictions "imposed" by the BDL and the policy agreed by the ABL. However, the BDL and the ABL had not "imposed" these restrictions in any legal sense. I accept that he told Mrs Bitar that the Bank had to treat all its customers fairly.

49. I infer that the gist of what Mr Raphael told Mrs Bitar on 26 February 2020 was passed on by her or her husband, or by the claimant's brother Joseph, to the claimant. He does not recall the specifics but does not positively dispute this inference and thinks it likely he would have been informed about the meeting.

50. In early June 2020, Gabriel and Joseph Bitar made further efforts to persuade Mr Raphael to transfer USD from the joint account outside Lebanon. Joseph Bitar sent a strongly worded email complaining that GBP 150,000 had not been transferred to renovate his brother's (the claimant's) property. Mr Raphael accepts that this transfer had been requested and was not made.

51. The claimant joined the chorus of protest with a more detailed complaint by email to Mr Hage at LFF, copied to Mr Raphael, on 18 June 2020. Mr Raphael, though strongly criticised and accused of "making false promises to my father", did not respond. In an email of 22 June, Gabriel Bitar opted for a more conciliatory tone. A call with Mr Raphael was arranged for 24 June.

52. Gabriel and Joseph Bitar took part in the call from Nigeria. Mr Raphael advised them to restructure their financing in Paris and Geneva. Other than a payment of school fees in London, the only transfer following from the call (as Mr Raphael explained in an email to Mr Gebrane) was a transfer to SBA of an instalment or interest payment of EUR 90,000, in respect of the SBA loan.

53. I accept Mr Raphael's evidence that he referred during that conversation to the Bank's policy of restricting international transfers and reiterated that the Bank was unwilling to do more and in particular was unwilling to transfer USD 1.9 million to LFF towards payment of the LFF loan. I accept the evidence in Mr Raphael's witness statement that "the Bitar family well understood the limitations on international transfers and the Bank's position in that respect".

54. On 31 August 2020, first Joseph Bitar and then the claimant emailed Mr Raphael and Mr Gebrane attaching a written instruction to transfer immediately the sum of USD 3.5 million to the joint account of their parents at LFF in Geneva, for the purpose of settling the LFF loan. The covering email asserted that in late 2019, Mr Raphael had agreed with their parents to "transfer the funds to clear this loan". I have already addressed that issue.

55. In his response dated 8 September 2020, Mr Raphael belatedly protested at the language used in previous emails, which had indeed been strong. He added that he had in several meetings and communications with the claimant's parents "explained the restrictions that were imposed on us by the [BDL] and its implications on international banking transactions". He proposed a further discussion "to settle the issue and be constructive".

56. The claimant continued to protest but agreed to speak by telephone to Mr Raphael. The call took place on 16 September 2020. There is not much dispute about what was said during the call. Mr Raphael described the restrictions on overseas transfers as a decision of the BDL that was (as he put it in his witness statement) "effectively the imposition of a capital control". This was similar to what he had told the claimant's parents in late 2019.

57. The claimant considered, as he put it in an email the next day, that Mr Raphael was saying "the monies will continue to be illegally withheld, that the USD 3.5 million transfer will not be performed and that a (worthless) 'cheque in Lebanon' will be provided …". Mr Raphael confirms in his witness statement that he did indeed refer to issuing "a banker's check for the total amount to their account with Bank of Beirut".

58. After a similar conversation between Mr Raphael and Joseph Bitar on 23 September 2020, on 5 November 2020, the claimant emailed a "transfer request" to Mr Raphael and Mr Gebrane, demanding payment in USD of the full balance in the joint account to the claimant's account, held jointly with his wife, at Barclays Bank in London.

59. That was followed on 9 November 2020 by a letter before claim from the claimant's solicitors. The balance in the joint account was stated to be about USD 4.5 million. To avoid litigation, the letter stated, the Bank should transfer the whole balance to the joint account of the claimant and his wife in London by 4pm Lebanon time on 16 November 2020. All the claimant's rights were reserved.

60. The Bank's response was to issue a cheque dated 12 November 2020, payable to the claimant in the sum of USD 4,244,000 (stated to be the net balance after certain deductions) drawn on the BDL. The cheque could be collected at the Achrafieh branch or at the mailing address provided in the client profile document. The joint account was to be closed and all credit cards cancelled. In a letter of 18 November 2020, the claimant rejected the offer of payment by cheque in Lebanon.

61. On 16 November 2021 (nearly a year later), the Bank formally notified the claimant that as he was refusing to take delivery of the cheque just mentioned (and another cheque for a small amount to be added to the net balance), the Bank had cancelled the two cheques and executed the payment by a cheque payable to the claimant in the sum of USD 4,245,220 drawn on the BDL and issued to the order of a notary, Me Eugenie al Bireh, using the procedure authorised by article 822 of the LCCP.

62. The Bank then issued a claim against the claimant before a tribunal in Lebanon on or about 17 November 2021, under article 824 of the LCCP, seeking a declaration that the deposit of the cheque with the notary had discharged and extinguished all the Bank's obligations towards the claimant. That action (**the validation action**) is stayed by consent pending the outcome of these proceedings in England.

63. Over the past few years, some customers who are unable to withdraw USD at their full value from banks in Lebanon – including the Bank – have complained bitterly. Others have accepted the restrictions or bided their time, waiting and hoping the crisis will end. Others have staged protests and sit ins and even threatened or committed acts of violence. Others, like the claimant, have sued. This claim was brought in early February 2021. The crisis remains unresolved.

Submissions, Reasoning and Conclusions

*Issue 1: does the agreement on its true construction, aside from any custom, confer on the claimant a right to require the bank to make a transfer in USD to a bank outside Lebanon (an **international transfer right**)?*

64. As I have said, the main terms of the agreement were set out in articles I to XII of the MPAA. The agreement is governed by the law of Lebanon. The parties drew my attention to case law in this country for the purpose of guiding me on how I should approach foreign law generally, in this case Lebanese law, where the system is of the familiar civil law kind with a constitution, a hierarchy of codes, case law but not binding precedent, all supplemented by learned texts.

65. I am guided by the learning in those English cases but I do not think I need to rehearse them in this judgment. I will set out the parties' main contentions much more briefly than they were expounded to me in written and oral argument. I am greatly indebted to the authors of the numerous learned texts cited by counsel and referred to by the expert witnesses. I will not repeat more of the citations than necessary to determine the issues in this case.

66. The claimant submits that a number of questions of Lebanese law have already been decided by Picken J and Freedman J in, respectively, *Manoukian* and *Bitar v. Bank of Beirut*; and that therefore, by the Civil Evidence Act 1972 (**the 1972 Act**), section 4(2) and 4(2)(a) and (b)), their findings and decisions on those matters are presumptively correct, since:

> "… the law of that country … with respect to that matter shall be taken to be in accordance with that finding or decision unless the contrary is proved."

67. The claimant's starting point is that, in Lebanese as in English law, the interpretation of contracts is based on the intention of the parties at the time of contracting and having regard to the factual context in which the agreement was reached. He relies on the summary of the principles in the judgment of Picken J in *Manoukian* at [43], echoed by Freedman J in *Bitar v. Bank of Beirut* at [57].

68. The claimant further relies on provisions in the Lebanese Code of Obligations and Contracts of 1932 (**LCOC**) and Consumer Protection Law of 2005 (**CPL**). By article 366 of the LCOC, "… the judge must enquire about the … real joint intention of the parties (agreement), rather than abiding by the literal meaning of the terms".

69. Article 367 then provides:

> "Terms that are susceptible of two meanings must be taken in the meaning that fits best with the purpose and the very spirit of the contract, and, in any event, in the meaning that gives them effect rather than that with which it would have none".

70. And article 369 provides:

> "In case of doubt, the clause is interpreted in favour of the debtor and against the creditor."

71. However, a banking contract is a consumer contract under articles 2 and 17 of the CPL, where the consumer is the depositor. The claimant relies on article 18 of the CPL, displacing the effect of article 369 of the LCOC. Article 18 of the CPL provides that consumer contracts to which the CPL applies must in case of ambiguity "be interpreted in … favour of the consumer".

72. In Lebanese law (unlike the more restrictive approach taken in English law), post-contract conduct of the parties may be taken into account when interpreting the contract. The claimant submits, relying on the view of Professor Najm and the commentary of Terré, Simler and Lequette, that the parties' subsequent conduct "out of contract but related to it" may "reveal the parties' intent when contracting".

73. Custom is a source of law which may play a part in the interpretation of a contract, the claimant submits. The Bank accepts that much, but President Maamari takes a more restrictive approach to custom than Professor Najm. The extent to which custom informs the meaning of a contract is relevant to the third issue. Here, I am considering whether there is an international transfer right aside from any custom.

74. Approaching the matter in the manner outlined above, the claimant submitted that the contract included an international transfer right, without the need to consider any question of a custom in the banking industry. The wording of the MPAA does not include any express international transfer right, but Mr James Cutress KC made the following points about the language used in articles I to XII of the MPAA and the addendum to it.

75. Article II, headed "current account", under the sub-heading "operation of the account" states at 2.2:

> "*Debit transaction*
>
> - *Payment of checks issues: THE BANK pays the amount of checks issued is there is an available reserve and if they are not opposed.*
> - *Payment by card: invoices presented by traders are debited from the account in accordance with the provisions agreed in the general conditions governing these cards [chapter IV]*
> - *Direct debit notice: the account holder can ask THE BANK to debit their account for certain services (Electricity of Lebanon bill, cell phone bill, Internet bill etc.).*
> - *Permanent automatic transfers: THE BANK is responsible for transferring fixed amounts, on a regular date, to a bank account.*
> - *Cash withdrawal*."

76. The claimant says the right to make multiple transfers on a regular basis must include (*a fortiori*) a right to make a single such transfer. It cannot be right that the account

holder can transfer USD 1 million a day on five successive days, but cannot transfer USD 1 million once (cf. *Manoukian* per Picken J at [51]).

77. Next, article III is headed "operation of the specific accounts". Within it, article III at 1.1 provides:

> "*Any CLIENT of THE BANK has a current account on which only THE BANK makes payment instruments, check books and payment cards available to THE CLIENT, and through which any movement of funds resulting from a transaction by THE CLIENT (transfers, withdrawals or deposits, etc.)*"

78. The claimant's point is that this provision assumes the client is entitled to instruct the Bank to execute transfers. The provision does not exclude international transfers and the addendum to the MPAA then (as we shall see) refers to regulatory requirements and provision of information which, the claimant says, assumes that there is a right to transfers including an international transfer right.

79. Article III(5) then permits the appointment of a "proxy" by power of attorney who can, among other things "make transfers" (5.2) and "[c]arry out any foreign exchange transaction, currency transfer, wire payments, transfers, etc …" (5.3). The principal must, the claimant says, have power to do what the proxy can do.

80. Next, the claimant relies on article V of the MPAA (on processing of specific operations), at 1.1, headed "currency transactions":

> "*THE CLIENT's assets in foreign currencies are included, unless otherwise stipulated, in THE BANK's assets with its foreign correspondents in the countries concerned. This holding is carried out by THE BANK, for the account and at the risk and peril of its clients. In particular, the fiscal, administrative and other provisions of these foreign countries, and especially the provisions relating to the restrictions applied to THE BANK's assets in these countries, are automatically applicable to the assets of THE BANK's clients.*"

81. The claimant submits that this provision requires the Bank to hold USD with a correspondent bank in the USA (and other foreign currencies in the countries using the currency concerned); and that it would be strange for the Bank to be required to hold USD in the USA if the claimant could not transfer USD to the USA.

82. Next, article V at 1.4 provides:

> "*In addition, repayments for account denominated in foreign currencies are made in the foreign currency concerned. However, the holder of an account in foreign currencies may not require THE BANK to make withdrawals in currency or in banknotes of the currency concerned.*"

83. Thus, the claimant says, the Bank must make "repayments" to the customer from the account, in USD, but the customer may not demand payment in cash (banknotes). The provision does not exclude the right to payment by foreign currency transfer.

84. The claimant points next to article IX, on "reception and execution of client instructions by mail / by fax / by telephone / via the bank's email". Within that article, it is provided at (4) and (11):

> "*4) THE BANK takes normal care to carry out the CLIENT'S instructions without delay. However, if THE CLIENT were to suffer any damage as a result of the late execution of its instructions, THE BANK could only be held responsible for losses suffered in interest, to the exclusion of damage of any other nature, and in particular exchange losses and capital losses.*
>
> […]
>
> *11) THE BANK cannot be held responsible for any damage resulting from a case of force majeure, and in particular from the non-execution of the CLIENT's instructions. The same applies to any damage resulting from measures taken by national or foreign authorities, in particular with regard to exchange controls.*"

85. These provisions, the claimant submits, include reference to foreign currency transactions and non-Lebanese authorities; they proceed on the assumption that there is an international transfer right and would be unnecessary if there were not such a right.

86. Turning to the addendum to the MPAA, the claimant relies on the following words:

> "*In application of local and international laws and regulations in force, directives and circulars of the Central Bank of Lebanon and other supervisory authorities, relating to the fight against money laundering and terrorist financing, and international sanctions programs, the Bank is entitled to request and collect from the Client any information and documentation relating to his personal, professional and financial situation, as well as to his assets* […]
>
> *In this context, the Bank regularly verifies the transactions of its CLIENTS and in particular the movements of their accounts and their transfers* […]
>
> *The Bank reserves the right to refuse a transaction on behalf of the Client or to terminate its relationship with the latter if this relationship compromises its obligation to comply with the aforementioned regulations.*"

87. This wording, the claimant says, assumes there is a transfer right; otherwise the reserved right to refuse one for good cause such as compliance with anti-money laundering or anti-terrorism legislation, would not be needed.

88. The cumulative effect of these provisions, says the claimant, is that there is a right to a transfer except where a specific exception applies (i.e. fraud, anti-terrorism or anti-money laundering legislation, foreign exchange controls or other compliance issues). And there is nothing to restrict the right to domestic transfers inside Lebanon.

89. As to the factual context in October 2014, the claimant cites the family's prior relationship with LFF and SBA; the Bank's knowledge of their links to France, Switzerland and Nigeria as well as the UK and Lebanon; the highly "dollarized" Lebanese economy; the Bank's marketing strategy of targeting expatriate customers the world over; the expectation expatriate customers would have that foreign currency deposits could flow out of as well as into Lebanon; and the expected throughput of funds recorded in the account opening documents.

90. Mr Cutress took me through the detail of these matters. He pointed out that the Bank willingly executed USD transactions to accounts outside Lebanon until the crisis in 2019, without ever suggesting it was doing so voluntarily. There is no sensible

distinction between domestic and international transfers, the claimant submitted; nor between one-off transfers and repeated transfers by standing order.

91. The claimant relied on the reference to fairness (*l'équité*) informing the interpretation of contracts in article 221 of the LCOC; and the judge's obligation, in article 4 of the LCCP, to rely on "general principles, custom, and fairness [*l'équité*]", in the absence of a written law. It was a matter of basic fairness, the claimant said, that the Bitars could withdraw their USD from Lebanon as well as deposit it there; without it, the claimant's evidence was, the joint account was useless.

92. To support the absence of a valid distinction between domestic and international transfers, the claimant relied on learned writings and judicial statements, alluded to by Professor Najm. Most of the cases were "urgent matters" decisions. The experts differed about their status, as there is no system of binding precedent and judges hearing urgent matters do not address the merits except to the extent necessary to decide whether the outcome is clear beyond argument on a summary basis (or "*apodictique*", to use President Maamari's term).

93. If there were considered to be any ambiguity, it would be resolved in the claimant's favour under article 18 of the CPL, the claimant submitted. The parties' conduct subsequent to the making of the contract also supported the existence of an international transfer right: the Bank had willingly executed international transfers in USD until October 2019, without any reservation of the right not to do so. Finally, there was no express exclusion of such a right.

94. For the Bank, Mr Rajesh Pillai KC made the following main points, in my brief paraphrase. He accepted, as the experts did, that the applicable principles of interpretation were, in general, correctly summarised by Picken J in *Manoukian* at [43], referring to relevant provisions in the LCOC and the CPL.

95. However, the Bank adopts the view of President Maamari that there is no need for unnecessary analysis or interpretation where the contract terms are clear. Similarly, the Bank submitted, there can be no recourse to the factual context in which the contract was made unless the terms are unclear or ambiguous, or the answer cannot be found in the contract itself or in supplementary laws.

96. In support of his view, President Maamari refers to the writing of Sioufi in *The Theory of Obligations and Contracts* and of Moustafa Aujeh in *Civil Law (Contract)*, who puts the point pithily: "when the text is clear, he [the judge] is prohibited from interpreting it". Professor Najm accepted this proposition.

97. Mr Pillai submitted that such is the position here. There is nothing in the wording of the MPAA or any other contractual document stating that the terms of deposit include an international transfer right. Therefore, there is not one. Nothing was said orally on the subject at the time, on the claimant's evidence. The written terms were in standard form, not individually negotiated.

98. Mr Pillai submitted that there is a world of difference between what bankers habitually do, voluntarily, and what they are obliged to do under a deposit contract. He referred me to *Paget's Law of Banking*, 15th edition (2018) at 22.50 and the observations of Staughton J (as he then was) in *Libyan Arab Foreign Bank v Bankers Trust Co* [1989]

QB 728, at 749E-F. Absent an express term, he submitted, a banker is not in English law obliged to make payment abroad; only delivery of cash over the counter (or by electronic facilities where these are provided) and honouring cheques are obligatory.

99. The provision relating to making standard order payments does not, the Bank submitted, relate to international transfer standing order payments, only to domestic ones. Article II, at 2.2, exhaustively defines the scope of the Bank's obligation to make transfers and says nothing about such transfers being international. Therefore, the orthodox position prevails. The pre-crisis practice of making international transfers was what Staughton J referred to as "services which many bankers habitually do, but are not bound to, provide".

100. As for the power of the customer to appoint a proxy by power of attorney (article III(5), at 5.1 to 5.3), the Bank contends that this provision does not create further rights beyond those the customer already has. It is correct that the proxy cannot require the Bank to do anything more than the customer can require of it. The reference in 5.3 to "foreign exchange transaction (currency transfer, wire payments, transfers, etc.) either in cash or in term" says nothing about those transactions involving a payment to an account outside Lebanon.

101. The provisions of article V relating to holding of foreign currency in foreign correspondent banks do no more than protect the Bank from the risk of liability in the event that foreign banking laws or controls block the release of funds held outside Lebanon. They do not create or assume the existence of an international transfer right.

102. And, the Bank submits, article V at 1.4 merely exempts the Bank from having to pay cash ("banknotes") to an account holder of an account denominated in foreign currency. While that provision does not exclude an international transfer right, nor does it create one, the Bank submitted. (Further, despite that provision Lebanese law expressly permits repayment in Lebanon in LBP, as submitted later in respect of the sixth issue, below.)

103. The Bank makes similar submissions in relation to other provisions of the MPAA and the addendum to it, relied on by the claimant: article IX(4) and (11) on late execution of client instructions and *force majeure*; and article III at 1.1 (on movement of funds). These, the Bank contends, recognise that transfers are likely to take place but without indicating that the Bank was obliged to make international transfers.

104. Rather than express words being needed to exclude an international transfer right, the Bank submitted, express words are needed to create such a right. The position in *Manoukian* was different because there, the bank conceded that if a relevant custom was made out, Mr Manoukian was contractually entitled to an international transfer (see Picken J's judgment at [46], [86] and [87]). There was no justification for implying or reading in an international transfer right.

105. I interject that the claimant does not accept that this concession is relevant because Picken J went on (see [47] to [59] for Société Générale and [60]-[68] for Bank Audi) to consider the question of an international transfer right based on each bank's terms and conditions and concluded that the right existed, irrespective of custom.

106. Mr Pillai went on to submit that it would be unworkable for the Bank to be required to make international transfers to correspondent banks in all territories outside Lebanon. Not all would accept the transfers. The obligation would have to be to transfer to only some, not all, territories. Correspondent banks outside Lebanon do not apply uniform rules and sometimes change their rules for accepting transfers.

107. As the terms of the agreement are clear and there is no ambiguity, there is no basis for resorting to principles of interpretation or supplementary laws for the purpose of determining its meaning, the Bank submitted. There is no need to consider the factual context in 2014, when the agreement was entered into; but if that context is considered, the Bank submits that it does not assist the claimant.

108. Mr Pillai took me through the contextual evidence, submitting that the family's connection to Lebanon was strong – Mrs Bitar lived there – and the arrangements were essentially Lebanese; hence, the contract was governed by Lebanese law and subject to the jurisdiction of the Lebanese courts. The arrangement was essentially a domestic one in a highly dollarized economy.

109. Furthermore, the Bank submits, if the agreement is ambiguous or includes a lacuna, the court should prefer President Maamari's view that applicable code provisions should be applied before and not after any relevant custom, over Professor Najm's contrary view.

110. The Bank then submits that, aside from any custom, if (contrary to the Bank's primary position) the contract is ambiguous or there is a lacuna in it, relevant supplementary code provisions not dealing with custom are considered first; and these point to the place of payment of the debt being Lebanon, which means that payment can be in LBP or USD (or "lollars") with a lower than open market value.

111. The Bank relies, first, on the concluding words of article 4 of the LCCP to support President Maamari's view that custom is secondary to any applicable "written law". Article 4 provides:

> "A judge may not under penalty of being considered in denial of justice:
>
> 1. Refrain from ruling on the pretext of ambiguity or non-existence of the text.
>
> 2. Be late for no reason in issuing the judgment.
>
> When the text is ambiguous, the judge interprets it in the sense that it creates an effect that is compatible with its purpose and insuring consistency between it and the other texts.
>
> In the absence of a written law, the judge shall rely on general principles, custom, and equity."

112. President Maamari relies on two decisions (of the Court of Appeal and Court of Cassation in Lebanon) and on a further citation from Sioufi (*op. cit.*). Further, whether or not supplementary laws are applied ahead of custom, article 314 of the Lebanese Commercial Code of 1942 (**LCC**) provides that bank operations not covered by the LCC itself are governed by the LCOC, article 302 of which provides:

> "A debt must be paid in the place designated in the contract. Absent explicit or implicit stipulation in this respect, payment is made in the place of residence of the debtor."

113. That is preceded by article 301 which, it is agreed, does not apply to international transfer obligations where the debt is payable in a territory outside Lebanon:

> "When the debt is a sum of money, it must be paid in the currency of the country. In normal times and when a forced rate has not been established for fiduciary money, the contracting parties are free to stipulate that payment shall be made in specified metallic currency or in foreign currency."

114. So, the Bank reasons, if the debt is not clearly payable in USD outside Lebanon because the contract does not explicitly so state, the debt is payable in Lebanon and may be paid in LBP or USD. This is what Foxton J decided in *Khalifeh*, holding that article 301 reflects Lebanese public policy and that clear words would be needed to displace the operation of the article.

115. Further, the Bank submits, Professor Najm's view that article 307 of the LCC displaces article 301 of the LCOC in cases of "international" contracts and bank deposits, is wrong. Article 307 of the LCC provides in part:

> "The bank which receives a sum of money as deposit acquires ownership thereof. It must refund it in one or several instalments of equivalent quantity upon the depositor's first request or in accordance with the time-limit or notice terms laid down in the contract."

116. That does not, Mr Pillai submitted, say anything about repayment to the depositor in any particular currency and article 301 of the LCOC does not include any exception in the case of bank deposits. Article 307 of the LCC requires repayment either in the same currency or the equivalent in LBP. In *Khalifeh*, Foxton J accepted at [154(ii)] that the language of article 307 of the LCC is not inconsistent with that of article 301 of the LCOC.

117. I come to my reasoning and conclusions on the first issue. In my judgment, the claimant's arguments are by far the stronger and must prevail. I find them compelling. I start from the agreement of the parties that the contract should be interpreted in line with Picken J's summary of the principles, in *Manoukian* at [43].

118. I agree with the Bank that if the words of the agreement are completely clear, there is no room for interpretation. But it is obvious that they are not completely clear. They leave open the question I must decide. If the words of the agreement were completely clear, they would expressly include or exclude an international transfer right. They do neither. Instead, they include a right to transfers without saying whether that means domestic only or domestic and international ones.

119. I agree with Mr Cutress that it seems unlikely much of the wording in the provisions to which he drew my attention would have appeared in the agreement if there were no international transfer right; but it is also true that the terms are standard ones and may well be used for ordinary domestic Lebanese customers who are not necessarily accustomed to moving money frequently from one country to another.

120. Neither meaning contended for is excluded by the plain words of the agreement. Therefore, the court must look beyond the literal meaning of the words used and

"enquire … about the real joint intention of the parties" (article 366 of the LCOC) and adopt "the meaning that fits best with the purpose and the very spirit of the contract …" (article 367).

121. The Bank accepts that in a case of ambiguity the agreement must "be interpreted in … favour of the consumer" (CPL, article 18). President Maamari does not accept that recourse to article 18 is necessary, but I have rejected his proposition that the words of the agreement are completely clear. He does not dispute that where article 18 applies, it displaces article 369 of the LCOC providing for interpretation in favour of the debtor in a case of doubt.

122. Nor does the Bank dispute that the factual context at the time of contracting and the subsequent conduct of the parties can be taken into account if (contrary to the Bank's case) the words of the agreement are not clear. The factual context and the parties' subsequent conduct may help the court in the search for the real joint intention of the parties and for the purpose and very spirit of the contract.

123. Taking the factual context first, I agree with the claimant that the Bitar family's prior relationship with LFF and SBA is relevant. I reject the Bank's dismissal of that prior connection because it was with different legal entities. The Bank knew in 2014 that the family had links to its associates in France and Switzerland, operated internationally and led a cosmopolitan life, with residences in several countries other than Lebanon.

124. It was part and parcel of the arrangement that money in USD could flow out of, as well as into, the joint account. This was not a case where the purpose of the account was to receive remittances from abroad to family members within Lebanon. The account documents confirmed that and provided estimated flow rates in and out of the account. The Bank's marketing materials would have been close to misleading to the expatriate customers it sought to attract if their deposits from abroad risked becoming trapped in Lebanon at the Bank's will.

125. The Bank did not, indeed, reserve to itself in October 2014 a right to withhold an international transfer at will. Instead, it delineated carefully the circumstances in which it could refuse to transfer money from the account. The exceptions mentioned in the addendum to the MPAA cited cases such as fraud risk, money-laundering concerns or exchange controls under Lebanese or other countries' banking laws and practices.

126. These exclusions correspond to the ones noted by Freedman J in *Bitar v. Bank of Beirut*, at [103]:

> "… 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."

127. Here, the exceptions carved out in the addendum are cases where the Bank, in the words of the addendum to the MPAA, "reserves the right to … refuse to execute a transaction on behalf of the Client …". Those words would be unnecessary in the case of international transfers if executing them were not otherwise a contractual obligation.

128. I accept also that the reference to fairness (*l'équité*) in article 221 of the LCOC and article 4 of the LCOC has potential relevance to the existence of an international transfer right under the agreement. It would have been unfair for the Bank to deny the right in 2014 or later, having clearly contracted on the understanding that the client would be making international transfers.

129. The Bank did not refuse to perform them until late 2019, basing its refusal on invocation of external pressures, not contractual rights. It does not seem to have dawned on the Bank until very late that the practice of making international transfers had been non-binding all along. I will return to this point when addressing the issue of custom; for present purposes, the consistent practice amounts to relevant subsequent conduct for interpretation purposes.

130. The above reasoning is sufficient to inform my clear conclusion that the terms of the agreement included an international transfer right, qualified by the specific exceptions set out in the addendum to the MPAA (fraud risk, money-laundering, exchange controls and the like) and not by a general exception whenever the Bank should choose, in its sole discretion, to disregard an international transfer instruction.

131. I reach that conclusion without having, at this stage, to examine the various urgent matters decisions of Lebanese courts and to consider their status. They are more relevant to the question of custom than to the terms of an individual banking contract, terms which differ from case to case. At this stage it is enough to say that nothing in the urgent matters cases or any other Lebanese court decision, or in any of the learned writings cited to me, precludes my conclusion.

132. I did not find persuasive the citation from Staughton J's judgment in the *Libyan Arab Foreign Bank* case. To distinguish between obligatory banking services and habitually performed voluntary ones is not the same as drawing the line between them. The latter category *may* include foreign currency transactions. As Staughton J put it at 749E-F:

> "Other services, such as standing orders, direct debits, banker's drafts, letters of credit, automatic cash tills and foreign currency for travel abroad, may be in the second category of services which the bank is not bound to but usually will supply on demand. I need not decide that point. The answer may depend on the circumstances of a particular case."

133. In the 15th edition of *Paget's Law of Banking*, the footnote relied on by the Bank (footnote 2 to paragraph 22.50) appears after the following text in the paragraph:

> "Although there are old cases indicating that the bank is only obliged to make repayment at the branch of the bank where the account is kept, it is suggested that their rationale no longer exists, at least so far as domestic banking transactions are concerned."

134. Times, therefore, may change and the law with them. The footnote then refers to two of the old cases where the banks had "in practice localised their obligations". The authors then comment on the advent of electronic banking technology and submit that it has superseded the reasoning in the old cases. In that context, the footnote continues (with my italics):

> "It is suggested that different considerations may still apply in relation to cross-border banking relationships (for example where *a customer of an English bank seeks to withdraw funds from a branch of that bank in a foreign country*). In those circumstances, it must be

doubted whether, absent express terms, English law would require that the bank must make payment abroad, in circumstances where the bank may incur exchange / transmission / regulatory costs. …"

135. The example of an English bank customer seeking to withdraw funds from a non-English branch of the bank is not the same as this case. The authors of the footnote acknowledge that the doubt about an obligation to "make payment abroad" would be resolved by a contract term requiring it. You would expect such a term where a bank is in the business of attracting funds from abroad. The bank's transaction costs, mentioned as a rationale, could easily be (and frequently are) passed on to the customer.

136. I am conscious that Picken J's analysis in *Manoukian* included recognition that there is not necessarily a bright line between an international transfer right grounded in the terms of the contract and such a right derived from custom. Freedman J made the same point in *Bitar v. Bank of Beirut* at [63]-[65]. Nonetheless, both judges felt able, as I do, to consider the international transfer right issue without reference to custom in the first instance.

137. Freedman J was able to discern an international transfer right directly from the terms of the contract (see his judgment at [73]), without resort to article 18 of the CPL; while Picken J accepted that, if it were needed, article 18 pointed to the claimant's interpretation being the correct one. For my part, I am assisted by a combination of articles 366 and 367 of the LCOC and by article 18 of the CPL as well as the factual context and the parties' subsequent conduct.

138. The analysis and conclusion in the two previous cases and in this case turns on each occasion on the specific wording of the contract, the factual context and the evidence, which is different in each case; but the reasoning proceeds along similar lines and I am fortified in my conclusion by the similarities between my reasoning and that of my brethren.

139. I do not find it necessary to embark at this stage on an analysis of the territory occupied by section 4(2) of the 1972 Act and its application to the findings and decisions in the previous cases. A decision as to the interpretation of an individual contract is not a question of Lebanese law but of fact, or at most mixed fact and law. Such a decision therefore does not attract the presumption of correctness in section 4(2).

140. I do not accept that my interpretation of the contract is inconsistent with article 4 of the LCCP because there is a "written law" governing the place where the debt is payable, namely article 302 of the LCOC stating that the debt is payable at the place of residence of the debtor in the absence of an explicit or implicit stipulation in the contract. The reasoning of Foxton J in *Khalifeh* supports the applicability of articles 301 and 302 to bank deposit contracts, but only where – as conceded in *Khalifeh* - there is no international transfer right.

141. That is different from the position here, where the agreement does provide for an international transfer right and the place of payment of the Bank's debt is outside Lebanon, leaving no room for the operation of article 301 of the LCOC. I therefore do not find it necessary, at this stage, to examine the correctness of Professor Najm's view that article 307 of the LCC displaces article 301 of the LCOC in cases of "international" contracts and bank deposits.

Issue 2: for the purpose of assessing the effect of any custom, is the relevant time the date when the agreement was entered into or the date on which a relevant instruction was given to transfer funds outside Lebanon?

142. This second issue does not affect the outcome of the case, as I have already found the existence of an international transfer right on the true meaning of the agreement, without the need to resort to a customary right. Nonetheless, I will address this issue of timing, though not in great detail. The arguments overlap with those deployed for the third issue, namely whether the agreement included (if it needed to) or the law conferred any customary international transfer right.

143. The claimant says the weight of authority strongly supports the view that the effect of a custom is assessed at the date of contracting. He relies on the opinion of Professor Najm who in turn cites a plethora of case law decisions, not just urgent matters cases but including three from the Court of Appeal in Lebanon, and the scholarly writings (from Belgium and France as well as Lebanon) of Terré, Simler and Lequette; Frankignoul; Rozès; Aujeh; Tyan; and Nammour.

144. The claimant also relies on the findings of both Picken J and Freedman J that custom is assessed at the date of contracting; findings that by section 4(2) of the 1972 Act are presumed correct unless the contrary is shown. The reasoning is that a custom cannot be imposed upon a bank's customer unless the latter knew of it, or unless the custom is so notorious that the customer is taken to know of it. That can only be tested at the time of contracting.

145. The contrary view of President Maamari that parties are more likely to have intended that the customer would have access to services customarily available when they are requested, should be rejected, the claimant argued. Freedman J [94]-[96] had accepted Professor Najm's view and rejected the suggestion that the parties had agreed to abide by custom as amended from time to time.

146. Freedman J accepted the correctness of the decision of 11 February 2021, of the Third Chamber of the Beirut Court of Appeal in *Byblos Bank v. Rizk*, that an amendment to the contract agreed to by both parties would be needed in order for a new custom to be incorporated.

147. A custom such as the right to an international transfer was different from merely updating methods or "modalities" (to use Professor Najm's word) of payment, for example by the advent of internet banking or contactless payments. Procedural changes in how payments are made are not the same as changes of substance to the kinds of payments that must be made, to what destination and in what currency. The latter are the stuff of custom, the former not.

148. While President Maamari had attempted in oral evidence to establish a distinction between "interpretation" and "execution", it is difficult to understand and not supported by any doctrinal writings or other authority. The court should reject any such distinction, the claimant submitted.

149. Such were the claimant's main points on this issue. For the Bank, Mr Pillai contended that the existence of a custom must be distinctly proved. The renowned Lebanese jurist,

Emile Tyan, confirms in his *Commercial Law* that evidence of custom is "flexible" but must be adduced, as Professor Najm had accepted.

150. The sufficiency of evidence is a matter of English law and should come from a person qualified to give it. The custom contended for – an international transfer right – is not one that has become so well known that a court can take judicial notice of it (cf. the discussion of Hawkins and Channell JJ in *Moult v. Halliday* [1898] 1 QB 125, at 128-130). Professor Najm is not qualified to speak to the issue, which is one of industry practice.

151. President Maamari disagrees with the view of Picken and Freedman JJ that the focus should be on the custom prevalent when the contract was concluded. The purpose of applying a custom is to ascertain the implicit intention of the parties at the time of contracting. While the time of contracting may be the correct time to consider where the contract is a short lived affair, where the contract is a long term framework for a durable relationship the parties are unlikely to have intended that customary rights and obligations should be set in stone.

152. Freedman J had recognised in *Bitar v. Bank of Beirut* at [90] that in principle the parties could intend and agree at the time of contracting that "something in the contract would yield to a subsequent change in custom" and that this could affect the obligations of the parties. In the present case, unlike the first *Bitar* case, that analysis should be adopted.

153. Mr Pillai did not accept that changes to methods of payment involved no change of custom. If the range of payment methods were altered, as it has been because of technological developments, the banks are not still providing the same service by other means; they are developing, altering and upgrading the service they provide. That reasoning, he argued, supported President Maamari's view.

154. The point is ultimately one of fact, the Bank says. Here, any practice or custom existing before the transfer requests were made from August 2020 onwards, had ceased to exist by then, following the onset of the financial crisis from October 2019. By early 2020, Mr Pillai submitted, any prior custom was overtaken by the restrictions on foreign currency transfers imposed on the Banks by the BDL and the agreed policy of the ABL.

155. Similarly, a "Student Law" of 16 October 2020 conferred a legal right on Lebanese students studying abroad to receive international transfers subject to a cap of USD 10,000 to enable them to meet tuition fees and expenses. That law was needed precisely because international transfers would not otherwise occur by contract or custom, the Bank argued.

156. Mr Pillai argued that most Lebanese citizens accepted the restrictions on transfers as inevitable because of the financial crisis. Mr Raphael had produced statistics showing, the Bank contended, a dwindling number of complaints and for the most part a metaphorical resigned shrug of the shoulders in the face of the reality that banking customs had changed with the times.

157. In my judgment, the claimant's submissions are much to be preferred. A bank cannot bind its customer to future customs of which the customer knows nothing. A custom takes time to become notorious and well known, as the Bank demonstrated from the

erudite observations of the Victorian judges in *Moult v. Halliday*. Until it does, it must indeed be proved, as the Bank rightly says.

158. I accept the claimant's submission that Professor Najm's view is supported by the overwhelming weight of authority, while President Maamari's view has scant if any support. Freedman J accepted her view, while Picken J agreed with the proposition, with different experts giving evidence. While the question may be ultimately one of fact, a custom may be included where the contract is silent.

159. It makes good sense to fix the parties with knowledge of notorious customs at the time of contracting, but none to fix them with an obligation to follow future and by definition unknown customs. A bank (or, indeed its customer) can avoid a custom becoming set in stone. Banking contracts can be and often are updated.

160. A bank which is no longer willing to accept a custom binding on it can ask the customer to agree to an amendment of the banking contract. If that is not forthcoming, the bank can decide to pay out the customer's balance and terminate the deposit contract.

161. I accept Professor Najm's distinction between modalities of payment, on the one hand, and the kinds of payment contracted for, on the other. The latter include specifying the destination of the payments and the currency in which they are to be made. They are the raison d'être of the contract; they define the purpose for which the customer entrusts their money to the bank. The former are the tools by which the bank performs its obligations: by wire transfer, by online payment, by contactless card payment, and so forth. I do not think these changing payment methods have the status of custom.

162. I also accept that Professor Najm was qualified – no less so than President Maamari - to speak to the issue. Both were entitled to give their evidence by reference to legal writings and court decisions, which are *par excellence* her field of expertise. Those decisions and writings are likely to be, in turn, informed by evidence, including industry evidence, as Tyan noted.

163. I accept that the practice of accepting international transfer instructions changed and to a substantial extent ceased from October 2019 onwards. The Student Law was needed to ensure students could acquire under that law what they could not, in practice, acquire by asserting contractual rights against their bankers. That these changes occurred is clear but, that they occurred does not determine whether the banks were entitled to impose them. I will consider that question further in the course of addressing the third issue, to which I come next.

Issue 3: does the agreement include an international transfer right, or does the claimant have an international transfer right, because of a custom among banks in Lebanon at the relevant time or times?

164. In view of my conclusion that the agreement includes an international transfer right, aside from custom, this issue does not impact on the outcome of the case but I will address it anyway, albeit not in the high level of detail with which the parties and experts did. There is no dispute that custom (*les usages*) plays some role in Lebanese contract law; the last sentence of article 4 of the LCCP states:

> "In the absence of a written law, the judge shall rely on general principles, custom, and equity."

165. And article 4 of the LCC provides:

> "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 customs contravene mandatory legal provisions.
>
> Special or local customs are presumed to prevail over general ones."

166. There is a disagreement about the extent to which custom can supplement the express obligations under a contract or inform its correct interpretation. For President Maamari, the role of custom in commercial transactions is subsidiary and limited; there are customs flowing from practice in particular industries or professions, rather than customs of law. Further, in his view a custom only becomes part of a contract to fill a gap or resolve an ambiguity.

167. For Professor Najm, as well as informing the interpretation of a contract, customs are binding supplementary rules (*lois supplétives*) incorporated into commercial contracts unless the parties have agreed to the contrary or incorporation of a custom conflicts with a mandatory provision. Further, a custom would prevail over a non-mandatory provision of the general civil law found in the LCOC, over which the LCC takes precedence (applying the principle *specialia generalibus derogant* enshrined in article 2 of the LCC).

168. Professor Najm cited various doctrinal sources in favour of her position. This led to a subsidiary disagreement (on which I will not dwell) over whether it is permissible to rely on non-Lebanese sources of *la doctrine*, in particular from France. It is common ground that there is no definitive Lebanese court ruling addressing this difference of expert opinion.

169. The defence expert in *Bitar v. Bank of Beirut* had, as noted by Freedman J at [75]) accepted that "customs rank[ed] higher than 'provisions of general law (civil law)' in the hierarchy of norms". The claimant submits that this means the view of Professor Najm is presumed to be correct by section 4(2) of the 1972 Act, unless the contrary is proved.

170. The claimant criticised President Maamari's reliance on article 119 of the LCOC, a provision of the general civil law citing four sources of obligations. While it does not explicitly mention custom as one of them, the first of them is "*la loi*" (law) and the fourth is "*actes juridiques*", which include contracts and whatever customary obligations are included within those contracts.

171. And even if article 119 of the LCOC might otherwise create a difficulty for the claimant, it is removed by articles 221 (on the effects of contracts) and 371 (on the interpretation of *actes juridiques*) of the same code, the LCOC, which provide respectively:

> "Contracts validly concluded must bind the parties. They must be understood, interpreted and performed in accordance with good faith, equity and customs."
>
> ….

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

172. While President Maamari responds (says the claimant) by relying on article 314 of the LCC (in the part dealing specifically with banking operations), stating that the LCOC governs bank transactions "not referred to in the present title", in commercial transactions article 4 of the LCC is superior to the general provisions of the LCOC and article 4 of the LCC is not excluded by article 314 of any of the other "banking specific" provisions of the LCC (found in title V, book III, headed "*Des Opérations de Banque*").

173. As for interpretation of the contract, Professor Najm's view is that for commercial contracts, article 4 of the LCC is in harmony and goes hand in hand with articles 221 and 371 of the LCOC, which require custom to be taken into account when interpretating such a contract. The claimant submitted that President Maamari's attempt to impose what Mr Cutress called "a hard-edged gateway to or precondition for the interpretative exercise", requiring a lacuna or ambiguity, was unprincipled and wrong.

174. The above arguments and views were developed, in much greater detail than my summary, during the cross-examination of the experts and in the parties' written and oral submissions. The experts did agree that to establish a binding custom, the twin requirements of *repetitio*, repeated use of a practice over a reasonable period, and *opinio necessitatis*, that the practice is subjectively regarded as a binding rule, must be present.

175. Over some 40 of the 227 pages of the claimant's written closing submissions, he commented on the applicability of these requirements to the present case, pointing to the admitted practice of making international transfers up to the start of the crisis in October 2019 and the implausibility of a "tacit derogation" from that binding custom, as the claimant says the practice clearly was.

176. The claimant seeks to argue that the Bank has not properly pleaded a case that the practice of making international transfers, which endured from October 2014 to October 2019, was anything other than a binding custom when the agreement was concluded in October 2014. The Bank has not pleaded that the requisite *opinio necessitatis* was absent in 2014 and, in consequence, the experts were not asked to address that issue in the agreed list of questions to them.

177. The Bank's pleaded case, said Mr Cutress, is and remains that the custom was not binding from 2014 to 2019 only because of articles 301 and 302 of the LCOC, dealing with, respectively, the currency and place of debt payments; and article 192 of the Lebanese Code of Money and Credit of 1963 (**LCMC**) (imposing penalties in some circumstances for refusal to accept Lebanese currency). Other arguments were therefore not open to it.

178. Articles 301 and 302 did not assist the Bank; the former, because it does not apply where there is an international transfer right; the latter, because parties can contract out of it. The claimant said the Bank has not suggested until very late, based on Mr Raphael's evidence, that the admitted practice was other than binding from 2014 to 2019.

179. However, I indicated at trial that I was minded to permit the Bank to put its case on custom on a different footing from that indicated in its pleading; the point was for argument rather than pleading and the Bank's pleaded case had always been, and still is (albeit relying on changed reasoning) that there was no binding custom in the agreement conferring an international transfer right.

180. The claimant submitted that, even on that footing, the evidence that *opinio necessitatis* had fallen away was implausible and contrary to the (presumptively correct) decisions in *Manoukian* and *Bitar v. Bank of Beirut*, which had supervened during the progress of this case towards trial. The issue was not concluded by the self-serving *ipse dixit* of Mr Raphael; one bank's internal policies could not determine custom for the whole Lebanese banking industry. And Mr Gebrane had admitted in oral evidence that the custom was a "right".

181. Returning to the legal sources informing this contested issue, the claimant relied on Professor Najm's view that not just doctrinal writings but a substantial body of case law supported the existence of a customary international transfer right. The commentaries she relied on included those of Awad, Bou Ziab, Gannagé, Nammour, Cabrillac, Hamel, Routier and Vezian (the last four being French); and the case law, not just 19 urgent matters decisions but three Court of Appeal decisions and three first instance full merits decisions.

182. The claimant submitted, based on Professor Najm's view and the decisions of Picken and Freedman JJ, that it was legitimate to look at urgent matters decisions. The absence of a system of binding precedent did not prevent those decisions from giving a fair indication of what the law is, where they display a consistent pattern. President Maamari was wrong to dismiss them as of no value. The weight of the case law supported the custom, the claimant submitted.

183. Turning to the Bank's case, Mr Pillai submitted that Professor Najm's thesis – that custom prevails unless the contrary is agreed or a mandatory provision would be contravened – is incompatible with the concluding words of article 4 of the LCCP, which refer to custom being relied on by judges "[i]n the absence of a written law". Thus, the Bank and President Maamari reason, there must be a gap or ambiguity in a contract before custom can be invoked.

184. President Maamari relies on a commentary by Sioufi; and refers also to extracts from a Court of Cassation decision of 28 January 2003 and from a Court of Appeal decision of 30 March 1992, where debtors tried unsuccessfully to escape the adverse consequences of currency devaluation and were rebuffed because article 4 of the LCCP in the first case, and article 221 of the LCOC in the second, tied them to the letter of their contracts, leaving no room for reliance on custom or fairness involving a departure from the contract's express terms.

185. President Maamari considers that the place and currency of payment are settled by articles 301 and 302 of the LCOC, as already explained. These are applicable because article 314 of the LCC confines its impact to bank operations not dealt with in title V, book III (comprising articles 307 to 314 of the LCC) dealing with bank operations. He then states by reference to article 119 of the LCOC, read with article 4 of the LCC, that recourse to custom under the latter is limited to giving effect to or executing a

commercial transaction, rather than defining the scope of the parties' obligations in respect of the contract.

186. Mr Pillai further submitted that a custom must be proved on the facts and that, first, there was no Lebanese banking custom of making international transfers before October 2019 and, second, even if there were, it ceased to exist once the crisis set in and restrictions began to be imposed. Banks became unable to gain access to their foreign currency deposits with the BDL and, in turn, passed on the restriction to their customers.

187. The new customary state of affairs was, the Bank submitted, occasional small international transfers in foreign currencies to cover essential expenses and invoice payments, of the type typified by the Student Law of October 2020 setting a ceiling of USD 10,000 per student. There was, in the main, general acceptance among depositors that such was the new order. Complaints against banks, and this Bank in particular, dwindled and became less frequent.

188. As for the period from 2014 to October 2019, Mr Pillai contended that the admitted practice of honouring international transfer instructions was the habitual provision of a voluntary service and not a matter of legal obligation. The requirement of *opinio necessitatis* was not satisfied. Lebanese law, like English law, recognised a distinction between a service habitually provided and one the provider is bound to provide.

189. Furthermore, Mr Pillai submitted, the content of the practice was not clear enough to amount to a custom: international transfers could be declined for different reasons by different banks; the criteria for declining to make one – usually relating to fraud risk, money laundering or other similar risks – varied from country to country and were evolving all the time.

190. The Bank submitted that the learned writings cited by Professor Najm spoke of a custom of making transfers but not specifically international ones (and in one of them, a commentary by Awad, an Arabic word had been mis-translated as "custom" when the correct translation would have been "practice"). While Professor Najm asserted that where the texts did not differentiate between domestic and international transfers, neither should the expert lawyer; but that was a matter of argument rather than properly founded expert opinion.

191. The Bank helpfully produced a tabulated account (at appendix B to its written closing submissions) of 38 cases (mostly urgent matters decisions) produced and analysed by the experts, with its comments in the right hand column. Mr Pillai submitted that the urgent matters decisions should carry no weight at all. They are not *res judicata*, nor properly reasoned decisions on the merits. They have no status in Lebanese law. They must be ignored when the same case goes to a full merits hearing. In any case, they are not all one way.

192. Mr Pillai said that those cases cited by Professor Najm that were decisions on the merits did not, on examination, establish the existence of a customary international transfer right. She had accepted in cross-examination that none of the cases was directly on the point. The summary decisions should be treated as of no value; they were no substitute for reasoned decisions on the merits, of which there were none supporting the custom contended for.

193. Indeed, an important decision of the Court of Appeal (Mount Lebanon, 13th Chamber), *Blom Bank SAL v. Nakad*, 16 April 2021, is rightly considered by President Maamari to be wrong, Mr Pillai submitted. The Court of Appeal ordered a transfer of money abroad (to an account in Abu Dhabi) of an amount in Emirates Dirham or the equivalent in USD. While the Bank does not accept that the decision supports a customary international transfer right, the Court of Cassation has, in any case, stayed the Court of Appeal's order and is seised of the case but has not yet given judgment.

194. One of the grounds for such a stay is that the decision is likely to be reversed on appeal, Mr Pillai pointed out. The Court of Cassation had also earlier in February 2020 stayed a decision of the Court of Appeal of the Beqaa in *Abdulrahman v. Crédit Libanais SAL* in which (according to the translation from Arabic) the bank asserted among other things that "bank transfers are optional services and are not mandatory for the Bank" and the depositor "did not have any legal right to require it to make any bank transfer overseas …".

195. President Maamari opined that certain individual urgent matters judges were particularly attracted to the existence of an international transfer right. He undertook a numerical analysis to show that the decisions favourable to its existence tended to be made by the same judges time and again. He suggested the judges were subject to strong pressures on social media; and even that some could be influenced by themselves having USD deposits in Lebanon stuck in the banking system, as his own are.

196. Mr Pillai noted that passages in some of the urgent matters judgments had been cut and pasted from one ruling to another. He characterised such decisions as those of "a busy judge in a busy court", in the words of Simon J (as he then was) in *Yukos Capital SarL v. OJSC Oil Company Rosneft* at [66]. Picken J and Freedman J had erred, said Mr Pillai, when accepting that it was legitimate to take account of the urgent matters decisions. They should be ignored completely, as President Maamari said.

197. In none of the urgent matters decisions (nor in one from the "enforcement" court cited by Professor Najm) did the court rely on expert evidence of a custom. Too often, the decisions were wrongly based on an interpretation of the Lebanese constitution; too often also on article 141 of the LCCP. That prohibits reliance on the judge's personal knowledge but permits reliance on "information obtained from the judge's experience in public affairs, which he is required to be aware of"; a principle similar to the English law doctrine of judicial notice.

198. Yet, Mr Pillai submitted, even where article 141 permits the judge to rely on information from experience of public affairs (for example, in a Court of Cassation case where the court found a customary obligation to verify the identity of a person seeking to cash a cheque, without the need for evidence), the opposing party may still dispute the judge's ruling on the point and rely on evidence contrary to the ruling (as explained by Edouard Eid in *Rules of Civil Procedure and Arbitration*).

199. As to section 4(2) of the 1972 Act, Mr Pillai submitted that the decisions of Picken and Freedman JJ on this point were not sound findings that as a matter of Lebanese law the customary international transfer right exists. Either the presumption in section 4(2) does not apply at all or, if it does, it is rebuttable and rebutted because the two judges who previously considered this issue heard different evidence and arguments. They

overlooked the paucity of evidence supporting the urgent matters decisions and should have given them no weight.

200. I come to my reasoning and conclusions on this issue. First, I return to the experts' disagreement about the stage at which and the circumstances in which a custom is considered. I have already found (when considering the first issue) that an international transfer right is not found in the express words of the agreement but is included in it by a process of interpretation. Recourse to custom is therefore a possibility even if President Maamari's view is adopted.

201. Next, I consider the provisions of the various codes, starting with the LCC. By article 1, it applies to "all commercial acts" (*tous les actes de commerce*). Where it applies, provisions of the general law apply only in so far as compatible with the LCC (article 2). I am satisfied that a banking deposit contract is a "commercial operation" within article 4 of the LCC. Later provisions in the LCC specific to banking operations would be out of place unless that were so.

202. I do not accept that article 4 is limited by reference to "the effects" of a commercial operation; it is not confined to the execution of contractual obligations as distinct from their content. Article 4 forms part of the general introductory provisions governing commercial operations. It appears under a heading which translates as: "first book; of commerce in general, of practitioners of commerce and of commercial funds; title I; general provisions".

203. In my judgment, article 4 of the LCC means what it says: "the judge must apply well established custom", subject to two exceptions, an intention to derogate from such custom, or illegality (i.e. contravention of mandatory law). The next question I consider is whether article 4 of the LCCP is a mandatory law which excludes the application of article 4 of the LCC.

204. In my judgment it is not, for the following reasons. Article 4 of the LCCP is a procedural provision. President Maamari cites the last sentence of it, out of its proper context. It follows on from article 3 which is about how a judge must give a ruling; it must not be "in the form of regulations". Article 4 then enacts the judge's duty not to shirk or delay unduly the task of giving judgment; it states the principle that justice delayed is justice denied.

205. In that context, the last two sentences remind the judge that the duty cannot be avoided by reason of the text concerned being ambiguous, or there being no "written law" resolving the issue. In the absence of a "written law", the judge must "rely on general principles, custom and equity". I do not agree that this command to judges to do their job properly alters substantive Lebanese banking law or that it bears on the scope of the LCC or other codes such as the LCOC.

206. I do not think the two devaluation cases relied on by President Maamari assist the Bank's argument. In each of them, the debtors were seeking to reduce the amount of money they had to pay on the ground that the obligation to pay it was more onerous than they had thought it would be due to the devaluation. The invocation of equity or fairness failed because the contract terms were clear. That reasoning does not bear on the present issue.

207. In my judgment, Professor Najm's view simply follows the text of article 4 of the LCC and is correct. Accordingly, article 4 applies to this case unless it is somehow disapplied. The court "must apply well established custom", unless either of the two exceptions applies. I have already rejected article 4 of the LCCP as a candidate for being a mandatory law negating the obligation to apply well established custom.

208. I also reject the suggestion that any provisions of the LCOC are mandatory laws triggering the obligation of the judge (under the LCC, article 4) to refrain from applying well established custom. The LCC takes precedence over the LCOC; see article 2 of the LCC. Moreover, no incompatibility between the provisions of the two codes was drawn to my attention.

209. Article 119 of the LCOC does not enact anything incompatible with article 4 of the LCC. It includes the provision that legal obligations are derived from *actes juridiques*, which include contracts. It is not particularly surprising to find this provision saying that contracts can create legal obligations.

210. Article 221 of the LCOC (under the heading "effects of contracts") is very general; it embodies the principle *pacta sunt servanda*. The reference in it to custom relates both to interpretation of the contract and to its performance. It does not in any way contradict article 4 of the LCC. Nor does article 371 of the LCOC, under the heading "rules for interpreting legal acts". It too marches hand in hand with article 4 of the LCC in the case of commercial operations.

211. Next, I find nothing in the LCC title V, book III (on banking operations, comprising articles 307 to 314) to exclude article 4 of the LCC. Article 314 states that bank transactions "not referred to in the present title" are governed by the LCOC. Article 314 cannot be interpreted as reversing the order of precedence as between the LCC and the LCOC, contrary to article 2 of the LCC.

212. So, article 314 does not subordinate article 4 of the LCC to the LCOC, nor does it disapply the opening words of article 4. But even if article 314 did have those effects, I do not think the interpretation exercise and the treatment of custom would produce a different result, because the LCOC includes articles 221 and 371 which seem to me to much the same effect as article 4 of the LCC. The reasoning is weak that seeks to invoke article 314 of the LCC to engage articles 301 and 302 to permit payment to be made in Lebanon. I reject that reasoning.

213. I come next to the learned commentaries. Without descending into the detail, I think it is permissible to refer to French or Belgian sources provided one is alive to any inconsistency with a Lebanese code provision or other difference of law. Courts in Lebanon do so frequently. It stands to reason that if the words of a code in another civil law country are similar or the same, you can read across countries to some extent, just as you can across common law countries.

214. The commentators focus on a bank's contractual transfer obligation without saying that the rules are different where the transfer crosses an international frontier. The obvious conclusion is that whether the bank's obligation includes making international transfers is a matter of contract. It is also possible that customs which bind a bank could differ as between international commercial operators, on the one hand, and ordinary domestic retail customers on the other.

215. I agree with Professor Najm that if there were a structural, conceptual or institutional distinction between domestic and international transfers, then (as a matter of common sense rather than legal maxim) the learned authors would have said so; particularly the Lebanese commentators, where much routine business is carried on in USD. That said, the commentaries are not completely conclusive in favour of a customary international transfer right.

216. Turning next to the case law, the full merits decisions are not conclusive either. The stays granted by the Court of Cassation in two cases support the proposition that the issue of a customary international transfer right is not fully settled in Lebanese law. In this country, I do not regard Foxton J's decision in *Khalifeh* as lending support to the absence of such a customary right, because it was conceded in that case that there was no international transfer right.

217. I come next to the urgent matters decisions, for what they are worth. I think it is unrealistic to ignore them completely. The absence of a system of binding precedent does not preclude a pattern of decision making from throwing light on what the law is, given the inherent improbability that a series of decisions would repeat the same error time and again. This is so even where the decisions are (in Simon J's phrase in *Rosneft*) of a busy judge in a busy court.

218. On the other hand, the weight of the urgent matters decisions is diminished by their low status, the summary process without full evidence and the absence of any jurisdiction over the matter unless the outcome is "apodictic". Furthermore, it is clear that they have not been decided all one way. I give the urgent matters decisions only limited weight but I do not ignore them completely.

219. The weight of the decisions, to the extent that they merit any weight, is more in favour of than against an international transfer right; but the basis of the decisions in favour are not always founded on custom and the reasoning is not always particularly strong. The decisions are diffuse. I would say they indicate that the weight of judicial opinion tends to regard banks seeking to avoid making international transfers as in breach of their obligations.

220. I do not think it is right to accept President Maamari's suggestion that some judges have been pressured or improperly influenced by their own financial interest. This is deduced from no more than economic conditions in Lebanon, the presumed possession by judges of USD accounts and some social media posts. Complaints and even threats from disappointed litigants are normal in free societies where the rule of law exists. Judges routinely ignore them.

221. The issue of a customary international transfer right is clearly not a matter of judicial notice falling within article 141 of the LCCP, permitting the judge to decide the issue from his or her own experience of "information obtained from the judge's experience in public affairs, which he is required to be aware of". The stays granted by the Court of Cassation demonstrate that.

222. Drawing the threads together, I would characterise the Lebanese law materials as showing a probability but not a certainty that the customary international transfer right exists. The matter is not what the Court of Justice of the European Communities would

call *acte clair* but the weight of current legal thinking and decision making is considerably more for than against the custom.

223. I come back to the facts, in the light of those observations on the legal materials. There was, it is agreed, a practice of making international transfers from late 2014 when the joint account was opened. I am confident that the practice was not confined to the Bank. The litigation in other cases shows that other Lebanese banks were routinely moving USD outside Lebanon on request until late 2019.

224. I am satisfied, particularly on the basis of Mr Gebrane's evidence, that the Bank and banks generally did not regard the making of international transfers as a matter of goodwill only, at least for foreign customers with USD accounts. That would make no sense. If they admitted to customers that they did not undertake to make such transfers they would not attract those customers and their marketing materials would be, as I have said, verging on misleading.

225. At the time the joint account was opened, this Bank regarded the criteria for refusing to make a transfer as those set out in the addendum to the MPPA (fraud, money-laundering risk, exchange controls and the like). Those criteria were evolving but the language of the addendum would capture future changes to the criteria applied by international banks and state authorities within and outside Lebanon.

226. I conclude that there was both *repetitio* and *opinio necessitatis* here. I reject the Bank's submission that the making of international transfers was a matter of goodwill only. The factual position in this case lends further support to the existence of a custom in the industry generally.

227. I have concluded that it is probable but not certain that the right exists as a general industry custom; the weight of current legal thinking and decision making is considerably more for than against the custom. In the light of that, I come to the findings of Picken J and Freedman J in the two previous cases and I consider the application of the presumption in section 4(2) of the 1972 Act.

228. There is relatively little authority on section 4(2), which is to be read with section 4(5). I am guided by the observations of Warren J in *Joint Stock Co Aeroflot Russian Airlines v. Leeds* [2017] 1 WLR 4537 (Ch) at [13]-[25] and the remarks of Professor Richard Fentiman in his 1998 monograph, *Foreign Law in English Courts*, at p.191, p.192, and p.223. I will not lengthen this judgment further by setting them out here.

229. Adopting Warren J's approach, I accept the submission that the presumption in section 4(2) applies to the finding of Picken J in *Manoukian* (in particular, at [92]-[93]) and of Freedman J in *Bitar v. Bank of Beirut* (in particular, at [134]) that there was a custom requiring banks to carry out international transfers on instruction, at least, from 2015 until late 2019. I am satisfied that the presumption is not rebutted and I therefore adopt their findings to that effect.

230. I conclude the third issue in favour of the claimant but, returning to my starting point, that conclusion is not necessary to my decision that the claim succeeds; even if I were wrong in deciding that the customary international right exists, I would still be confident that this particular agreement on a correct interpretation, contained an international transfer right.

Issue 4: did the Bank, by communications with the claimant's parents, or by reference to an email dated 8 September 2020 or otherwise, terminate or modify or suspend any obligation to effect international transfers?

231. The Bank's answer to this question was yes. There was a Part 18 request about what the Bank had referred to as "several meetings and communications with the Claimant's parents" prior to 8 September 2020 (the date of Mr Raphael's email referring to those meetings and communications) where the Bank had "explained the restrictions that were imposed on us by the [BDL] and its implications on international banking transactions".

232. Those discussions took place on 12 December 2019, 26 February 2020 and (by telephone) 24 June 2020, as set out above. In its response to the Part 18 request, the Bank relied on those communications as effective notice that it was suspending or terminating any obligation on it to make international transfers; and that notice to one joint account holder was good notice to all.

233. The Bank relies on the following provisions of the MPAA. By article XI:

> "THE BANK reserves the right to terminate, modify or suspend the conditions of the contract (of this Agreement and/or of the Special Conditions) at any time. Any change will be brought to the attention of the CLIENT(s) account holder by the means that THE BANK deems most appropriate. Modifications affecting in particular the operation of the Remote Banking Service, the Call Centre, the Card, tariffs, fees and commissions, as well as the insurance and assistance services covered by the Card, etc. are considered as such. This Agreement is to be terminated immediately and all amounts and costs due by THE CLIENT will be debited from the latter's account upon his death. In all cases, THE CLIENT's heirs will be jointly, severally and indivisibly required to fulfil all the commitments contracted with THE BANK by the latter."

234. I was also referred by the Bank to provisions elsewhere in the MPAA which refer to particular methods of banking services provision not being guaranteed and being subject to withdrawal without notice and sometimes without cause. Article VII (headed "E-Banking" and under the sub-heading "Rights and Obligations") states in part at 3.1.4:

> "THE BANK has the discretionary right to refuse or cancel any transaction by giving reasons for its decision and/or if the request or transaction is incomplete, incorrect or contrary to laws, customs and regulations."

235. And the next sub-paragraph beneath 3.1.4 explains that the Bank may:

> "without any notice, block the connection … or even interrupt the service for any reason whatsoever and without having to justify it" and "cannot be held responsible for the consequences …"

236. Article VIII, headed "Client Services Call Center", under the sub-heading "Available Services", provides at 3.4 to the effect that the services provided via the call centre are not guaranteed to be available; and in a separate paragraph at the end of 3.4 states as follows:

> "THE CLIENT has also taken due note that THE BANK may at any time, at its sole discretion, and without the need for prior notice, add new services to the list of services it

offers, suspend one or more services, or set limits or a ceiling or conditions for the provisions and use of certain services."

237. The main points made in the Bank's written submissions were the following. First, Lebanese and English law banking contracts not unusually contain clauses enabling the bank to terminate the contract unilaterally. In Lebanese law that does not require notice unless the contract so provides.

238. The Bank relies on President Maamari's view that article XI of the MPAA expressly permits the Bank (in the words of the Bank's closing submissions, paragraph 206, with italics in the original) "to terminate, modify or suspend *any* obligations to which it is subject at any time, and that no formalities need be satisfied in this respect."

239. I interject that despite the absolutist manner in which that proposition is enthusiastically expressed, President Maamari does not go as far as to say that the Bank can terminate its obligation as creditor to repay the credit balance to the client. That would be far fetched and not consistent with the words of article XI which refer to costs due from the client being debited before closure of the account and, implicitly, to any credit balance being paid to the account holder.

240. What President Maamari says is that by article XI, the Bank without any formality can terminate any obligation it may otherwise have to make an international transfer to the account holders in USD. The Bank appears to liken such a change in its obligations to a change of the procedural kinds mentioned in article VII, at 3.1.4, and at article VIII, at 3.4, dealing with the method of service delivery by e-banking, via a call centre and so forth.

241. Mr Philip Hinks made the Bank's closing submissions on this issue. His starting point was that if (contrary to the Bank's case) it was under an international transfer obligation, on 3 November 2019 the Bank suspended that obligation or varied the agreement so as to disapply it. That was the day the Bank decided to restrict international transfers to cases where personal or family expenses, tuition fees, business, professional or personal invoices needed paying urgently; with committees considering transfer requests on a case by case basis.

242. Mr Hinks submitted that the Bank was not obliged to give notice of the change to the account holder; it was not a precondition of the change coming into effect that it should be conveyed to the Bitar family. The changes were effective from the moment they were decided upon and could be conveyed to the account holder or holders later, "by the means that THE BANK deems most appropriate" (in the words of article XI).

243. Here, the Bank submitted, the pleaded and particularised communications to the claimant's parents and brother sufficed to convey the changes. That was also good notice to the claimant; it was obvious he must have been told about them and to the extent he professed lack of knowledge, he could have called the other family members as witnesses and an adverse inference should be drawn from his failure to do so, applying the usual principles set out in *Wisniewski v Central Manchester HA* [1998] PIQR 324 (in Brooke LJ's four propositions at 341).

244. The matter was put in the following way in closing written submissions (with the footnotes omitted):

> "The Bitar family had been asking for an international transfer of USD 1.9m since November 2019 and the Bank had repeatedly refused to make that transfer. It is common ground that no such transfer was made. They had a number of meetings and calls with Mr Raphael and Mr Gebrane about this. There were also email follow ups in which requests for payments for home improvements were sought, that being one of the Bank's exceptions for the making of international transfers. The Court should find on the balance of probabilities that Mr Raphael and Mr Gebrane told the Bitar family in these exchanges that the transfers were not possible because of the changes the Bank had made to the way in which it dealt with international transfer requests. It is common ground that the Bitar family (save for Mr Bitar himself) attended the Achrafieh branch on several occasions after November 2019 requesting international transfers. They would have seen, therefore, the ABL directive concerning such transfers, which was put on the screens of all branches of the Bank, and on the desks of all the Bank's tellers.
>
> Given the significance of these matters to the Bitar family, it is inherently probable that they (the Claimant's parents and brother) would have informed Mr Bitar of the changes made by the Bank to its international transfer service. He was copied in on a number of email exchanges in which his family members complained about the Bank's refusal to comply with their requests: it is inconceivable that Mr Bitar did not understand full well the context to those emails and what the Bank had told his brother and parents regarding the restrictions on transfers. If Mr Bitar had been in any doubt as to the position then there would be a record either of him responding to one of the emails to ask about it, or he would have given evidence saying that he asked for an explanation at the time. He would not have remained in a state of silent ignorance."

245. In oral argument, Mr Hinks submitted that it would be wrong to expect Mr Raphael or Mr Gebrane to use legal language when communicating the changes to the Bank's international transfer service. These were embodied in what Mr Hinks called a "directive" from the ABL, i.e. the press release of 17 November 2019 which had been agreed by the members of the ABL in consultation with the BDL.

246. As there was no need for the Bank to give notice before the event at all, it was on any view enough, Mr Hinks argued, that the Bank informally but clearly conveyed to the Bitar family that the Bank would be restricting international transfers in the manner set out in the ABL press release. No further formality was required and notice in writing was not required.

247. Next, the Bank resisted the suggestion that its suspension or disapplication of an obligation to perform international USD transfers was what was described as "abusive" under article 26 of the CPL. I was given two different English translations of that provision. The original text is in Arabic. The Bank's case is that article 26 provides in translation as follows:

> "Clauses that aim or may lead to breach the balance between the rights and obligations of the professional provider and the consumer on the detriment of the latter are considered arbitrary clauses.
>
> The arbitrary nature of the clause is estimated at the date of the contract and by reference to the provisions of the contract and its appendices, with the exception of those related to the price.
>
> It is considered abusive clauses, including, but not limited to, any of the following clauses: […]

- Unilaterally granting the supplier the power / authority to amend, all or some of the contract's provisions, particularly those concerning the price, date, or place of delivery. […]

Arbitrary clauses are considered null and void, though all other provisions of the contract are effective."

248. The claimant's translation referred in the second paragraph of article 26 quite differently to the "abusive aspect" of a clause rather than to its "arbitrary nature". In any case, although the first paragraph of the article appears to target the clause itself rather than the manner in which it is exercised, the experts agreed that if a derogation from the customer's rights is merely trivial – for example, the withdrawal of a cashpoint or ATM facility at a particular branch – article 26 would have no application.

249. The test is whether the exercise of a contractual right by a provider, such as a bank, breaches the balance of rights between that provider and the consumer, to the detriment of the latter. Professor Maamari's view is that article XI is not an abusive clause because it does not do so; if the customer is not satisfied with the changes to the Bank's obligations on which the latter insists, the customer as much as the Bank is entitled to terminate the contract and walk away.

250. The Bank submitted that its international transfer obligation (if it had one) was not its "main obligation" under the agreement and that article 26 therefore did not apply. President Maamari had explained in the joint statement of the experts that article 26 indicates in particular that it is concerned with rights "related to the price, the date and the place of delivery". These refer to contracts for the sale of goods, rather than a contract such as this one, of indefinite duration.

251. The claimant dismissed those arguments as unfounded. First, Mr Cutress submitted in closing that article XI does not on its true construction empower the Bank to suspend or terminate its international transfer obligation. The apparently broad opening words are qualified by the narrower third sentence setting limits to the kinds of changes authorised by article XI:

"Modifications affecting in particular the operation of the Remote Banking Service, the Call Centre, the Card, tariffs, fees and commissions, as well as the insurance and assistance services covered by the Card, etc. are considered as such."

252. Next, President Maamari in his oral evidence had accepted Professor Najm's proposition that *le parallélisme des formes* required equivalence between the means used to create the right exercised and the means used to exercise the right. The former was in writing, so the latter must be too, in her view. President Maamari had accepted at trial that an amendment of a deposit contract, or notice of such an amendment, would have to be in writing.

253. Next, it was incontestable, the claimant said, that invocation of article XI to shrink the Bank's international transfer obligation to one enabling it to pay out only about 15 per cent of its real value would be abusive and void by article 26 of the CPL. It was obviously a fundamental part of the Bank's obligations to the joint account holders, as the claimant himself regarded it when the account was opened and later when transfer instructions were declined.

254. Furthermore, President Maamari had accepted that too in his oral evidence at trial; thereby effectively abandoning the views on which the Bank's case was founded. Nor could it still be maintained that article 26 was confined to matters of price and delivery; the words made clear that the list of types of abusive conduct was not exhaustive. Nor was it relevant that the customer could choose to terminate the contract if dissatisfied with the Bank's exercise of its right. The customer would still lose about 85 per cent of their money.

255. Finally, Mr Cutress submitted that the communications with the claimant's parents and brother, and the email of 8 September 2020, did not amount to giving of notice at all, let alone written notice. The recipient of the (written) notice would have to understand, objectively, that other party was exercising the contractual right to modify the Bank's obligations conferred by article XI of the MPAA.

256. While that process did not require any particular formality, it was the minimum requirement for exercise of the contractual right. In the present case, the claimant contended, neither the oral communications from Mr Raphael nor the email of 8 September 2020 mentioned any amendment of the agreement or included any reference to it. Mr Raphael did not intend to give a contractual notice and the Bitar family did not understand him to be giving one.

257. On this issue, I find the claimant's submissions compelling and those of the Bank untenable. I agree, first and foremost, that article XI does not encompass a right to suspend or terminate the Bank's international transfer obligation. The clearest possible words would (aside from article 26 of the CPL) be required to achieve that ambitious objective. The customers' international transfer right was a crucial part of the parties' bargain, as I have explained.

258. Next, even if that were wrong, I reject the Bank's contention that the Bank's will was self-executing. It is wholly unrealistic to contend that the Bank's international transfer obligation disappeared on 3 November 2019 because the Bank on that date made an internal decision that it should disappear. It was then said, implausibly, that it was for the Bank to decide how to give the customer the bad news afterwards. I reject both suggestions.

259. The suspension or termination of an obligation affecting about 85 per cent of the customer's asset value is not comparable to, for example, the closure of a call centre for maintenance or the stopping of an internet payment on the ground of suspected fraud. It is to those kinds of acts that article XI and the other clauses relied on by the Bank are directed.

260. It is also irrelevant that the claimant did not call as witnesses the members of his family who spoke to Mr Raphael about the Bank's restrictions on international transfers. The claimant did not dispute that he was made fully aware by his family that the Bank was declining the family's instructions to make such transfers. Mr Raphael, for his part, did not suggest that he mentioned to any of the other family members that the Bank was exercising or had exercised a contractual right to change the terms of the agreement.

261. The passages quoted above from the Bank's written closing demonstrate that there was a dispute from late 2019 onwards and into 2020 which culminated in the issue of these proceedings. I am invited to make a finding on the balance of probabilities that "Mr

Raphael and Mr Gebrane told the Bitar family in these exchanges that the transfers were not possible because of the changes the Bank had made to the way in which it dealt with international transfer requests".

262. That formulation is a fair summary of what Mr Raphael was telling the Bitar family members to whom he spoke. But such a finding does not help the Bank's case; it is a finding that the Bank was refusing to perform its obligations, not a finding that its contractual right to modify them was validly exercised, even if the right had been wide enough to encompass the transfer refusals that persisted through the year 2020.

263. I accept the claimant's submissions that the oral communications from December 2019 onwards did not purport to exercise any contractual right; that at least those to whom Mr Raphael spoke would have had to understand, or be objectively expected to understand, that they were being told the Bank was exercising a contractual right to change the terms; that they were not told that; that written notice was required and was not given; and that the email of 8 September 2020 was not a written notice of the exercise of any contractual right.

264. Finally, if article XI on its true interpretation did permit the Bank to abrogate its international transfer obligation, I would accept the submission of the claimant that the exercise of the right, or article XI itself, or both, amount to an abuse under article 26 of the CPL. A plainer case of upsetting the balance between the provider's rights and obligations and those of the consumer is difficult to contemplate.

Issue 5: has the claimant validly requested or instructed the bank to make, or validly demanded that it make, one or more relevant international transfers? If so, what was its or their nature and effect?

265. It appeared to be the Bank's case up to trial that while the claimant made a demand on 31 August 2020 that the Bank should transfer USD 3.5 million to the account held with LFF in Switzerland, once that request had been declined by the Bank, any right the claimant had to require that transfer was subsequently waived. That point was, rightly in my view, not pressed at trial.

266. Nor was it seriously disputed at trial that the claimant made two further effective demands on 5 and 9 November 2020 (the second through solicitors) that the entire credit balance in the joint account should be transferred to the claimant's account (held jointly with his wife) at Barclays Bank in London.

267. The demand made by the claimant's solicitors on 9 November 2020 made clear that the claimant's rights were reserved. No real challenge to the validity of any of the demands was maintained at trial. I am satisfied they were all validly made and effective to trigger the Bank's obligation to make payment of the amounts demanded as from the dates of the demands: 31 August 2020 in the case of the USD 3.5 million and 5 November 2020 in respect of the entire credit balance.

*Issue 6: did the Bank discharge its debt by providing a cheque drawn on the Banque du Liban (**BDL**) and depositing it with a notary, using the procedure in article 822 ff. of the Lebanese Code of Civil Procedure of 1983 (**LCCP**)?*

268. This issue arises on the claimant's alternative claim for repayment of the debt owed to him by the Bank. It is common ground that the issue only arises if the agreement does not (contrary to my decision) include an international transfer right. I will address this issue in much less detail than Foxton J did in the *Khalifeh* case. I confine myself to the following brief observations.

269. The claimant submits that that the Bank is not entitled to close his account and discharge his debt by using the services of the BDL, because a BDL cheque does not (and did not when deposited with the notary) constitute good discharge of the debt. The claimant cites various code provisions to support its proposition that BDL cheques do not give good discharge: article 307 of the LCC and, in the LCOC, articles 249, 299, 701, 711, 754 and 761. I will not set out the text of those provisions.

270. The claimant complains that, as the experts agree, a BDL cheque gives only the value of the deposit in "lollars" and cannot be deposited outside Lebanon. The claimant then cites further recent Lebanese court decisions which are said to support the proposition that BDL cheques are not effective: five enforcement decisions from two different judges; three urgent matters decisions; and three Court of Appeal decisions.

271. These decisions are said to supersede the reasoning and authority of Foxton J's decision in *Khalifeh*. He decided that a BDL cheque could constitute effective payment. All but one of the decisions relied on, says the claimant, post-date the start of the hearing in *Khalifeh* (3 November 2021), in which the judgment was given on 7 December 2021. Further, the claimant says, BDL cheques can no longer be considered free from risk of dishonour and therefore equivalent to cash, unlike the position when *Khalifeh* was decided.

272. The claimant asserted that President Maamari had accepted in cross-examination that "in normal circumstances" a BDL cheque worth about 15 per cent of the real value of the deposit would not give good discharge; and that he attempted to build a case founded on impermissible arguments that the circumstances were so abnormal that an insolvency based argument or an analysis akin to *force majeure* had to be applied.

273. Further, Professor Najm considers that article 301 of the LCOC does not apply to bank deposits, while acknowledging that Foxton J reached a contrary conclusion in *Khalifeh*. She believes, moreover, that article 301 does not apply to "international contracts". She relies on, among other things, article 307 of the LCC as a *lex specialis* displacing article 301. Article 307 provides:

> "The bank which receives a sum of money as deposit acquires ownership thereof. It must refund it in one or several instalments of equivalent quantity upon the depositor's first request or in accordance with the time-limit or notice terms laid down in the contract. All deposit or refund operations must be stated in writing. In the absence of agreement to the contrary, interest, if any, is due from the working day following each deposit and up to the eve of the day of each refund."

274. To pay the debt by a BDL cheque is to pay less than the "equivalent quantity" (*quantité équivalente*) of money owed. Professor Najm says this view is supported by Hage-Chahine, Fabia and Safa, Eid, Grua and Sioufi, as well as the Mount Lebanon Court of Appeal's decision in *Blom Bank SAL v. Nakad* (April 2021); the Beirut Court of Appeal's decision in *Captain Magdaliyev vessel v. MED Petroleum DMCC* (30

December 2021) and two enforcement decisions of different judges, both post-dating *Khalifeh*.

275. The secondary issue of the validity of the "tender and deposit" procedure, i.e. deposit of a BDL cheque with a notary followed by a validation action in Lebanon, is pending in proceedings there that are stayed by consent. That dispute, the claimant said, is not of particular relevance at this stage. The claimant disputes the validity of the procedure on various grounds.

276. The Bank, straightforwardly, invites the court to follow the reasoning of Foxton J in *Khalifeh* and consequently to prefer the views of President Maamari to those of Professor Najm. As Foxton J put it at [151], the effect of article 301 of the LCOC is that, as regards debts that are payable in Lebanon:

> "even when the money of account of a debt is a foreign currency, the debtor can insist on discharging the debt in LBP, although if both debtor and creditor agree to make and accept payment in that form, the debt can also be discharged in the relevant foreign currency."

277. Foxton J, the Bank reminds me, concluded at [154(i)] that article 301 reflects Lebanese public policy and that clear words would be necessary to displace its operation. The state is responsible for regulating the money supply both within its territory and flowing out of it. The rationale applies to international contracts as well as to domestic ones.

278. The view that article 307 of the LCC displaces article 301 of the LCOC should likewise be rejected: the obligation to return the "equivalent quantity" to the creditor, as article 307 requires, applies as much to bank deposits as to other forms of debt; and the obligation in article 307 is formulated without reference to the currency in which the debt is to be repaid. It does not say that the debt must be repaid in the same currency as provided for in the contract.

279. Article 302 of the LCOC then specifies the place of payment as that of the debtor's residence unless the contract provides for payment elsewhere. Here, it does not and the place of payment is therefore Lebanon, which means the debt may be discharged in either USD or LBP.

280. The Bank also made detailed submissions in support of the tender and deposit procedure provided for by articles 822 ff. of the LCCP. This issue too was considered in *Khalifeh*, against the backdrop of a USD account held in Lebanon but without the customer having an international transfer right.

281. Such were the parties' main contentions, presented at trial in much more detail than my sparse overview, but in considerably less detail than that provided to Foxton J in *Khalifeh*. There, this issue occupied centre stage in the case rather than appearing contingently at the periphery, as in this case.

282. At [133] and following, Foxton J considered (in the admitted absence of an international transfer right) "[t]he nature of a bank's obligation to a foreign currency deposit holder and how it can be discharged". He concluded first, so far as relevant here, at [160], that:

> "iii) Where the debt is payable within Lebanon, the bank can offer to discharge the debt by payment in the relevant foreign currency, which will discharge the debt if the customer accepts it.
>
> iv) However, the bank is also entitled to discharge the debt in LBP in the equivalent amount, which the customer is not entitled to refuse on that basis."

283. Foxton J went on to consider (at [162]ff) the tender and deposit procedure and asked the question (at [171]ff) whether the bank was "obliged to discharge the debt arising on the closure of the USD Account by any particular method". He remarked at [172] that he:

> "was not taken to any clear statement of Lebanese law as to the manner of payment by which which a bank was obliged (or permitted) to discharge an obligation to its customer to repay the balance of a foreign currency deposit account."

284. He asked himself (at [184]ff) whether Mr Khalifeh was "obliged to accept the Bank cheque tendered by the Bank". In the course of discussing the numerous Lebanese law materials and the competing views of the expert witnesses, he remarked at [207] that this was:

> "clearly a difficult issue of Lebanese law on which no definitive ruling has as yet emerged from the Lebanese courts."

285. Having considered the position in detail and on the evidence and arguments addressed to him, he concluded at [214]:

> "… that a Lebanese court would hold that the tender of the BdL Cheques by the Bank was a valid tender which, coupled with the subsequent crediting of those cheques to the account of the notary public, discharged the debt under Lebanese law."

286. Those are decisions of an English court on Lebanese law which attract the presumption in section 4(2) of the 1972 Act. For understandable reasons, the Bank did not expressly seek to rely on the presumption, but I do not think that makes it inapplicable; it is, after all, in a statute. I should therefore treat Lebanese law as being in accordance with those decisions of Foxton J unless the contrary is proved.

287. I have considered carefully whether the law of Lebanon is now contrary to what Foxton J decided. The developments in the case law relied on by the claimant do not persuade me that the law is now any different. In my judgment, those materials show no more than that the direction of travel may be towards a destination where the law will in future become different from what he decided.

288. None of the additional materials relied on by the claimant is conclusive either against the applicability of article 301 to foreign currency bank deposits, where there is no international transfer right, or against the validity of the tender and deposit procedure.

289. The debate continues. The views of the experts remain opposed as they were in *Khalifeh*. The law remains not fully settled. The Court of Cassation has yet to pronounce on the issue. The issue is particularly suitable for determination by that court, since it engages questions of public policy concerning the money supply and national sovereignty.

290. I am therefore not prepared to depart from the decision of Foxton J, which for the time being continues to stand as authority in favour of the Bank's position. For those brief reasons, if there were no international transfer right in this case, the Bank would have discharged its debt by providing a cheque drawn on the BDL and depositing it with the notary, in whose hands the cheque has cleared.

Issue 7: to what remedy or remedies, if any, is the claimant entitled? In particular, what is the relevant interest rate if the claimant is entitled to specific performance or an equivalent remedy in debt or damages?

291. Professor Najm cited various materials for her view that specific performance is not only permissible but normally the mandatory remedy where a bank has failed to carry out a valid transfer instruction. I do not think it is necessary to set them all out because the Bank's resistance to specific performance as the appropriate remedy was not seriously pursued at trial.

292. In its written opening, the Bank denied the availability of the remedy, founding its contentions on the view of President Maamari that a bank could not be compelled to provide what he called "execution in kind". That view was based on commentaries from two authors, Bou Nassif and Estoup. The Bank did not dispute that both Picken J in *Manoukian* and Freedman J in *Bitar v. Bank of Beirut* had ordered specific performance in materially identical circumstances.

293. As the claimant pointed out, Bou Nassif was referring to cases where performance is impossible due to *force majeure*, destruction of assets or the like; or where performance would interfere with the debtor's physical freedom. Estoup, for his part, referred to cases where the obligation is one other than payment of money; or where an order to make payment is not complied with and the creditor is unable to obtain "forced execution of the measure".

294. At trial, President Maamari accepted that a Lebanese court would have power to order specific performance of a Bank's international transfer obligation. Although the Bank did not formally abandon its position that specific performance is not available as a remedy, Mr Hinks in his oral closing submissions made no comment on the issue.

295. I have no difficulty in accepting that specific performance is available and is the appropriate remedy here. It is therefore unnecessary to consider the alternative claim in debt or for damages. Before providing this judgment in draft to the parties, I made an order for specific performance of the Bank's obligation and, I am told, it has been complied with.

296. As for interest: the claimant claims it at the rate of 9 per cent per annum from the date of each demand, on the amount demanded; i.e. 9 per cent on USD 3.5 million from 31 August 2020 and 9 per cent on the net balance in the account (less the USD 3.5 million) from 5 November 2020. The Banks says that the rate of interest should be 0.1 per cent per annum, which is the amount payable for sums standing to the credit of the account.

297. Article 257 of the LCC provides that "[i]n commercial matters, the legal rate of interest is fixed at 9 per cent." And article 265 of the LCOC states, so far as material:

> "Where the debt is a sum of money, default damages consist, in the absence of clauses to the contrary in the contract or the law, in interest on the amount due, calculated according to the statutory interest rate. …"

298. In his report before trial, President Maamari expressed the view (paragraph 281) that the rate of interest "for debts in [LBP] is 9% and for debts in foreign currency the average of the interest rate applicable to debit banking accounts opened in such currency." At paragraphs 282 and 283 he referred to a 2013 Court of Cassation decision supporting the latter proposition, while recognising that "there are also some decisions in the opposite direction", referring to a 2019 Court of Cassation decision.

299. Professor Najm's view was and is that the rate of 9 per cent applies to foreign currency debts as well as debts payable in LBP. She accepted that Lebanese courts have sometimes applied a lower rate for decisions awarding payment in foreign currency. But, she said (in the joint statement), referring to the same Court of Cassation decision:

> "in the latest decision on the issue (dated 21 February 2019) the Court of Cassation has ruled that Article 265 LCOC does not differentiate between the national currency and the foreign currencies with respect to interest … . On this basis, the interest rate of 9% applies to judgments ordering payments in foreign currencies".

300. At the start of the trial, the parties' written openings reflected those opposed positions. Each side acknowledged that there were decisions on the point that went different ways. The claimant said the 2019 Court of Cassation decision (no. 10/2019) should be taken to have settled the point and would be followed in future. The Bank said the law was as stated by the same court in the earlier 2013 case going the other way.

301. On the first day, I permitted the Bank to amend its pleading to add a late plea that the rate should be based on Barclays Bank rates over the relevant period, with the caveat that I would be unlikely to allow the Bank to benefit from that amendment to the prejudice of the claimant through the latter not having had sufficient opportunity to adduce evidence of how he would have invested the money, had it been paid to that account when it should have been.

302. Freedman J decided in *Bitar v. Bank of Beirut* at [153] and [154], and in his conclusions at [155(12)], based on the same 2019 Court of Cassation decision, that the correct rate was 9 per cent per annum for foreign currency awards and not just for awards made in LBP. That decision allows the claimant to rely on the presumption of correctness under section 4(2) of the 1972 Act.

303. The claimant relied also on the absence of any differentiation in the wording of the LCC, article 257, and in that of the LCOC, article 265, between LBP debts and foreign currency debts. The LCC deals with commercial matters and the fixed rate of 9 per cent could not in that context realistically be confined to debts owed only in LBP and in no other currency. There is no separate provision dealing with foreign currency debts, as one would expect if the Bank was right.

304. Professor Najm said in oral evidence that while there is no system of binding precedent, the most recent Court of Cassation decisions are the most likely to be followed and the 2019 Court of Cassation case is the most authoritative source. She was asked about earlier decisions of the Court of Cassation going the other way, not mentioned in her report.

305. Some of these were produced by the Bank during the trial; others had already been exhibited to President Maamari's report. After the cross-examination of Professor Najm had ended, the claimant's legal team produced two yet further decisions of the Court of Cassation (from 1995 and 2005) and one of the Court of Appeal (from October 2014) supporting the applicability of the 9 per cent rate to debts payable in foreign currency.

306. When I was told about this, during the cross-examination of President Maamari, I suggested that the Bank should be permitted to discuss the new cases with President Maamari and to have Professor Najm recalled to deal with any questions on them. President Maamari and Professor Najm read the cases during an adjournment.

307. The Bank decided not to ask Professor Najm further questions, stating that it did not seek her recall and would deal with the point in submissions. Her oral evidence therefore stood, unchanged and not supplemented by further questions or answers. She was not asked about the three new cases that had emerged during her cross-examination.

308. President Maamari was cross-examined briefly on the interest rate issue. He was shown article 265 of the LCOC and article 257 of the LCC. The following exchange took place:

> "Q. … If we could go to Article 265. And this provision applies to debts in any currency, doesn't it?
>
> A. Yes.
>
> Q. … And if you look under Article 257 this provides for a statutory rate of 9%, correct?
>
> A. Yes.
>
> MR CUTRESS: … My Lord, I don't have any further questions.
>
> [Judge]: Thank you very much. Any re-examination?
>
> MR PILLAI: No re-examination, thank you. …"

309. I made clear during the parties' closing submissions that while the new case law materials had emerged piecemeal and late, I would allow them to be adduced so that all potentially relevant materials were before the court. Mr Cutress submitted that they added nothing because President Maamari had accepted that article 265 of the LCOC applies to "debts in any currency", thereby abandoning his previous position.

310. In closing, Mr Hinks submitted that the weight of the decisions is in favour of the Bank and that President Maamari's view that the 9 per cent rate does not apply to foreign currency debts should be preferred. Mr Hinks argued that the underlying purpose of interest is to compensate the payee for having been kept out of their money. They should not be over-compensated. The 9 per cent rate for commercial debts under article 257 of the LCC must have been chosen by the legislature with debts in LBP in mind.

311. As for the evidence, the Bank submitted that while President Maamari (at the end of a long session with an interpreter) accepted that the LCOC provision, article 265, applied

to debts in any currency, and that the LCC provision, article 257, provided for a statutory rate of 9 per cent, it was not put to him and he did not accept that the latter provision applied the statutory rate of 9 per cent to debts in any currency. He should not be taken to have performed a *volte-face*.

312. The claimant could, the Bank argued, have provided evidence of losses flowing from the Bank's alleged breach of contract, as he had indicated he would do in his pleaded reply. The appropriate course is to presume from the absence of any contrary evidence that the money would have stayed in the Barclays Bank account from November 2020 until trial and to award the appropriate rates payable on monies deposited with that bank over that period.

313. In his closing reply at the end of the trial, Mr Cutress submitted that the late flurry of cases did not, on analysis, show a weight of authority in favour of the Bank's position at all; while there were decisions against the use of a 9 per cent rate for foreign currency debts, they were outliers and were wrongly decided. The court should follow the lead of the Court of Cassation in its most recent 2019 decision and of Freedman J in *Bitar v. Bank of Beirut*.

314. I come to my reasoning and conclusions on this final issue. I had thought at first that President Maamari did agree in cross-examination that the 9 per cent rate is applicable to foreign currency debts. I can well understand why Mr Cutress did not ask him directly if he accepted that the 9 per cent rate applies to debts in any currency. But I do not think he would have answered yes if he had been asked that direct question, as that would be inconsistent with his report.

315. I therefore turn to consider the cases relied on by each side. In 1995, a Penal Chamber of the Court of Cassation (decision no. 179/95) referred to the 9 per cent rate of interest being the same under article 265 of the LCOC and article 257 of the LCC (and another provision not before me), whether the currency is national or foreign.

316. In decision no. 111/2005, a Civil Chamber of the same court rejected an appeal against a 9 per cent rate for a USD debt. The court referred to article 265 and article 767 of the LCOC. The latter states that if the parties have stipulated interest but the rate is not fixed in the loan instrument, "the legal rate" applies. The Court of Appeal had been right, it was held, to specify a rate of 9 per cent rather than a maximum of 3 per cent contended for by the appellant debtor.

317. The Court of Cassation noted that the appellant had failed to point to a provision confining the rate of 9 per cent to debts in Lebanese currency. The court's approach was therefore to look for a provision confining the 9 per cent rate to LBP debts, rather than to require that there should be a provision expressly applying that rate to foreign currency debts.

318. However, in 2013, another Civil Chamber of the Court of Cassation indicated (in decision no. 162/2013) that the "constant jurisprudence" of the Commercial Chamber of the same court was that "the legal interest on foreign currency is not the one applicable to national currency" and that by deciding that the rate was the same for both the court below and in specifying 9 per cent on a USD debt the court below had erred:

> "Whereas as a principle the interest is the result of the currency invested in the loan its rate cannot be the same on all currencies of any kind but could differ depending [on] the type of currency subject of the loan because it is intrinsically linked to it and as long as the legal interest is calculated according to the law of the location where the payment will take place therefore its calculation is determined depending on the civil interest rate on US Dollars based on the average applied between the banks according to a certificate issued by the Central Bank…"

319. Two decisions are referred to dating from 2014. The first is decision no. 1313/2014 of the Court of Appeal, in October 2014. The court decided that article 265 of the LCOC does not distinguish between debts payable in LBP and foreign currency debts and that it explicitly provides for interest to be calculated at the legal rate, whether the currency is LBP or foreign.

320. In November 2014 in decision no. 124/2014, a Civil Chamber of the Court of Cassation decided a largely successful appeal by an employee against his employer or former employer, overturning decisions below that had denied him certain rights to compensation or monies due under his contract of employment. Interest was made payable from the date of the decision of the Court of Cassation. On the proportion of the compensation payable in USD:

> "the calculation … requires adopting the average interest rate imposed on the deposits in the aforesaid currency [USD]".

321. In May 2016, in decision no. 55/2016, a Civil Chamber of the Court of Cassation rejected two cassation appeals in a dispute about (among other things) a penalty clause in an independent management contract. The court stated, according to part of the report:

> "… whereas in respect of the interest and taking into consideration that legal interest only applies to amounts specified in the local currency, this requires that the Appellant be obligated with the average interest on a bank deposit in US currency … and the first instance judgment is amended in this aspect."

322. And in February 2018 in decision no. 15/2018, a Civil Chamber of the Court of Cassation decided, according to a brief translated extract before me, that interest must run "at the rate applicable between the banks on debit amounts, pursuant to a certificate issued by [BDL]". There is no mention of any code provisions or any further reasoning in the brief extract provided to me.

323. That brings me to the most recent Court of Cassation decision, no. 10/2019 primarily relied on by the claimant. It was decided by a Civil Chamber of the court in February 2019. By the end of the trial I had three different translated extracts or versions of the decision. The last of the three is the most helpful as it addresses the very point at issue here directly and by reference to article 265 of the LCOC.

324. The cassation appeal had been brought back in October 2016 against a decision of the Court of Appeal made in 2015. The proceedings were against a bank, following an insolvency. The Court of Cassation accepted the appeal but dismissed it on its merits. The translation includes the following:

"And whereas it does not appear from the documents of the file that the appealing party had invoked during the trial of the appeal, i.e., before the Court of Appeal, the matter that the legal rate of interest which is provided by Article 265 LCOC is applicable only on the amounts that are fixed in Lebanese pounds and not on the amounts that are fixed in US Dollars and therefore the appealed decision did not tackle this, and did not examine the matter, and therefore has not violated the application or the interpretation of the provisions of Article 265 LCOC and all contradictory allegations are rejected,

And whereas assuming the appellant invoked before the Court of Appeal the aforementioned issue, but Article 265 LCOC did not distinguish between the national currency and the foreign currencies,

And whereas there is no legal text which determines the legal interest with regard to foreign currencies and in particular the US Dollars,

And whereas the legal interest which is determined with regard to the Lebanese currency is 9% after the closing of the account,

And whereas the Lebanese legislator allowed the dealing in foreign currency which requires therefore the adoption of the legally fixed rate for the Lebanese currency,

And whereas according to the foregoing the application or the interpretation of the provisions of Article 265 LCOC have been violated or distorted or breached by the decision of appeal which therefore requires the rejection of the reason invoked in this matter.

And whereas after the court has rejected the two invoked grounds of cassation the decision rendered by the Court of Appeal is considered legally correct and must be confirmed and ratified.

…. ."

325. Such were the cases cited to me. It is inescapable that there are decisions both ways on the point at issue here. Both parties accept this. There are diametrically opposed views emerging from the jurisprudence. The inconsistency of the case law is uncomfortable for a common lawyer, but probably less so for a lawyer from a civil law jurisdiction who is used to the absence of binding precedent.

326. The decision of Freedman J in *Bitar v. Bank of Beirut* was founded on the last of the Court of Cassation decisions. He was not taken to the others. At [153] he said:

"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."

327. President Maamari's researches were, evidently, more diligent than Dr Moghaizel's. The divergent court decisions, not drawn to Freedman J's attention, have been drawn to mine. Nonetheless, Freedman J's decision attracts the presumption of correctness under section 4(2) of the 1972 Act. I have therefore had to consider carefully whether

the presumption is rebutted by the cases against the applicability of the 9 per cent rate to foreign currency debts.

328. After careful reflection, I have concluded that those cases do not persuade me that Freedman J's decision on the point was wrong. I still consider that his decision correctly states Lebanese law. The most obvious reason is that the 2019 decision is the most recent. It was made about nine months before the financial crisis in Lebanon began. However, it did not come out of the blue.

329. It was preceded by the 1995 and 2005 Court of Cassation decisions in which the essence of the reasoning was the same. The foundation of all three decisions is the absence of any code provision differentiating between LBP debts and foreign currency debts. The same reasoning appears to underpin the decision of the Court of Appeal no. 1313/2014, made in October 2014. All three decisions made explicit reference to article 265 of the LCOC.

330. The cases supporting the Bank's position are less fully reasoned. They were decided during a time of low inflation and low interest rates, though that may be coincidental and I attach little weight to the point. The Court of Cassation decision no. 162/2013 referred to prior commercial cases supporting its decision. I do not know of those cases. And in decision no. 162/2013 I find no discussion about or explanation of the absence of a provision excepting foreign currency cases from the scope of article 265 of the LCOC.

331. The later Court of Cassation decisions of 2014, 2016 and 2018 all support using the average rate applicable to amounts deposited at the relevant banks or a rate applicable "between the banks on debit amounts" in the latter case. But in none of them, or in none of the extracts provided to me in translation, was there any mention of article 265 of the LCOC, nor any discussion about its silence on the issue of whether the debt is payable in LBP or some other currency.

332. It follows that none of the cases in the Bank's favour is founded on any express code provision. Those supporting the claimant do rely on express provisions, namely article 265 of the LCOC, read with article 257 of the LCC. The cases supporting the Bank rely less convincingly on a largely unreasoned pronouncement that foreign currency debts are somehow different. It is not clear to me why they should, in principle, be different.

333. For those reasons, although Freedman J should have been given more assistance than he was, his conclusion is not displaced by an examination of the cases and I am content to follow his decision, applying the presumption in the 1972 Act and finding that it is not rebutted. The rate of interest on the amount that must be transferred is therefore 9 per cent running from the dates of the relevant demands, on the amounts demanded.

Conclusion and Disposal

334. For those reasons, the claim succeeds. The bank is obliged to transfer the credit balance in the account, in USD, to the claimant's account with Barclays Bank in London. I have already so ordered, in advance of this judgment. The Bank's counterclaim for a declaration that it has discharged its debt by means of the tender and deposit procedure is dismissed.

335. I conclude by expressing my thanks to all those involved in presenting the case and giving evidence; in particular, to counsel, the solicitors, the experts and the interpreter. Their help has been of great value to the court and is much appreciated.