International Business Transactions

Cross-Border Transactions

Hours 1 and 2

16 June a.m.

Formation of Transnational Contracts

Choice of Law

A. The Restatement Approach
B. The U.C.C. Approach

17 June a.m.

Terms

A. Incoterms
B. U.C.C.

18 June a.m.

A. Bills of Lading
B. The Draft

18 June p.m.

Force Majeure

18 June p.m.

Financing the Transaction by Letter of Credit

19 June a.m.

Enjoining Letters of Credit for Fraud

19 June p.m.

A. Standby Letters of Credit
B. Enforcement of Foreign Judgments

attachment 1

UCP 600

UCP 600 are the latest revision of the Uniform Customs and Practice that govern the operation of letters of credit.

UCP 600 comes into effect on 01 July 2007

The 39 articles of UCP 600 are a comprehensive and practical working aid to bankers, lawyers, importers, and exporters, transport executives, educators, and everyone involved in letter of credit transactions worldwide.

ICC Uniform Customs and Practice for Documentary Credits (UCP 600)

Foreword

This revision of the Uniform Customs and Practice for Documentary Credits (commonly called "UCP") is the sixth revision of the rules since they were first promulgated in 1933. It is the fruit of more than three years of work by the International Chamber of Commerce's (ICC) Commission on Banking Technique and Practice.

ICC, which was established in 1919, had as its primary objective facilitating the flow of international trade at a time when nationalism and protectionism posed serious threats to the world trading system. It was in that spirit that the UCP were first introduced -- to alleviate the confusion caused by individual countries' promoting their own national rules on letter of credit practice. The objective, since attained, was to create a set of contractual rules that would establish uniformity in that practice, so that practitioners would not have to cope with a plethora of often conflicting national regulations. The universal acceptance of the UCP by practitioners in countries with widely divergent economic and judicial systems is a testament to the rules' success.

It is important to recall that the UCP represent the work of a private international organization, not a governmental body. Since its inception, ICC has insisted on the central role of self-regulation in business practice. These rules, formulated entirely by experts in the private sector, have validated that approach. The UCP remain the most successful set of private rules for trade ever developed.

A range of individuals and groups contributed to the current revision, which is entitled UCP 600. These include the UCP Drafting Group, which sifted through more than 5000 individual comments before arriving at this consensus text; the UCP Consulting Group, consisting of members from more than 25 countries, which served as the advisory body reacting to and proposing changes to the various drafts; the more than 400 members of the ICC Commission on Banking Technique and Practice who made pertinent suggestions for changes in the text; and ICC national committees worldwide which took an active role in consolidating comments from their members. ICC also expresses its gratitude to practitioners in the transport and insurance industries, whose perceptive suggestions honed the final draft.

Guy Sebban
Secretary General
International Chamber of Commerce

Introduction

In May 2003, the International Chamber of Commerce authorized the ICC Commission on Banking Technique and Practice (Banking Commission) to begin a revision of the Uniform Customs and Practice for Documentary Credits, ICC Publication 500.

As with other revisions, the general objective was to address developments in the banking, transport and insurance industries. Additionally, there was a need to look at the language and style used in the UCP to remove wording that could lead to inconsistent application and interpretation.

When work on the revision started, a number of global surveys indicated that, because of discrepancies, approximately 70% of documents presented under letters of credit were being rejected on first presentation. This obviously had, and continues to have, a negative effect on the letter of credit being seen as a means of payment and, if unchecked, could have serious implications for maintaining or increasing its market share as a recognized means of settlement in international trade. The introduction by banks of a discrepancy fee has highlighted the importance of this issue, especially when the underlying discrepancies have been found to be dubious or unsound. Whilst the number of cases involving litigation has not grown during the lifetime of UCP 500, the introduction of the ICC's Documentary Credit Dispute Resolution Expertise Rules (DOCDEX) in October 1997 (subsequently revised in March 2002) has resulted in more than 60 cases being decided.

To address these and other concerns, the Banking Commission established a Drafting Group to revise UCP 500. It was also decided to create a second group, known as the Consulting Group, to review and advise on early drafts submitted by the Drafting Group. The Consulting Group, made up of over 40 individuals from 26 countries, consisted of banking and transport industry experts. Ably co-chaired by John Turnbull, Deputy General Manager, Sumitomo Mitsui Banking Corporation Europe Ltd, London and Carlo Di Ninni, Adviser, Italian Bankers Association, Rome, the Consulting Group provided valuable input to the Drafting Group prior to release of draft texts to ICC national committees.

The Drafting Group began the review process by analyzing the content of the official Opinions issued by the Banking Commission under UCP 500. Some 500 Opinions were reviewed to assess whether the issues involved warranted a change in, an addition to or a deletion of any UCP article. In addition, consideration was given to the content of the four Position Papers issued by the Commission in September 1994, the two Decisions issued by the Commission (concerning the introduction of the euro and the determination of what constituted an original document under UCP 500 sub-article 20(b) and the decisions issued in DOCDEX cases.

During the revision process, notice was taken of the considerable work that had been completed in creating the International Standard Banking Practice for the Examination of Documents under Documentary Credits (ISBP), ICC Publication 645. This publication has evolved into a necessary companion to the UCP for determining compliance of documents with the terms of letters of credit. It is the expectation of the Drafting Group and the Banking Commission that the application of the principles contained in the ISBP, including subsequent revisions thereof, will continue during the time UCP 600 is in force. At the time UCP 600 is implemented, there will be an updated version of the ISBP to bring its contents in line with the substance and style of the new rules.

The four Position Papers issued in September 1994 were issued subject to their application under UCP 500; therefore, they will not be applicable under UCP 600. The essence of the Decision covering the determination of an original document has been incorporated into the text of UCP 600. The outcome of the DOCDEX cases were invariably based on existing ICC Banking Commission Opinions and therefore contained no specific issues that required addressing in these rules.

One of the structural changes to the UCP is the introduction of articles covering definitions (article 2) and interpretations (article 3). In providing definitions of roles played by banks and the meaning of specific terms and events, UCP 600 avoids the necessity of repetitive text to explain their interpretation and application. Similarly, the article covering interpretations aims to take the ambiguity out of vague or unclear language that appears in letters of credit and to provide a definitive elucidation of other characteristics of the UCP or the credit.

During the course of the last three years, ICC national committees were canvassed on a range of issues to determine their preferences on alternative texts submitted by the Drafting Group. The results of this exercise and the considerable input from national committees on individual items in the text is reflected in the content of UCP 600. The Drafting Group considered, not only the current practice relative to the documentary credit, but also tried to envisage the future evolution of that practice.

This revision of the UCP represents the culmination of over three years of extensive analysis, review, debate and compromise amongst the various members of the Drafting Group, the members of the Banking Commission and the respective ICC national committees. Valuable comment has also been received from the ICC Commission on Transport and Logistics, the Commission on Commercial Law and Practice and the Committee on Insurance.

It is not appropriate for this publication to provide an explanation as to why an article has been worded in such a way or what is intended by its incorporation into the rules. For those interested in understanding the rationale and interpretation of the articles of UCP 600, this information will be found in the Commentary to the rules, ICC Publication 601, which represents the Drafting Group's views.

On behalf of the Drafting Group I would like to extend our deep appreciation to the members of the Consulting Group, ICC national committees and members of the Banking Commission for their professional comments and their constructive participation in this process.

Special thanks are due to the members of the Drafting Group and their institutions, who are listed below in alphabetical order.

Nicole Keller – Vice President, Service International Products, Dresdner Bank AG, Frankfurt, Germany; Representative to the ICC Commission on Banking Technique and Practice;

Laurence Kooy – Legal Adviser, BNP Paribas, Paris, France; Representative to the ICC Commission on Banking Technique and Practice.

Katja Lehr – Business Manager, Trade Services Standards, SWIFT, La Hulpe, Belgium, then Vice President, Membership Representation, International Financial Services Association, New Jersey, USA; Representative to the ICC Commission on Banking Technique and Practice;

Ole Malmqvist – Vice President, Danske Bank, Copenhagen, Denmark; Representative to the ICC Commission on Banking Technique and Practice;

Paul Miserez – Head of Trade Finance Standards, SWIFT, La Hulpe, Belgium; Representative to the ICC Commission on Banking Technique and Practice;

René Mueller – Director, Credit Suisse, Zurich, Switzerland; Representative to the ICC Commission on Banking Technique and Practice;

Chee Seng Soh – Consultant, Association of Banks in Singapore, Singapore; Representative to the ICC Commission on Banking Technique and Practice;

Dan Taylor – President and CEO, International Financial Services Association., New Jersey USA; Vice Chairman, ICC Commission on Banking Technique and Practice;

Alexander Zelenov – Director, Vnesheconombank, Moscow, Russia; Vice Chairman, ICC Commission on Banking Technique and Practice;

Ron Katz – Policy Manager, ICC Commission on Banking Technique and Practice, International Chamber of Commerce, Paris, France.

The undersigned had the pleasure of chairing the Drafting Group.

It was through the generous giving of their knowledge, time and energy that this revision was accomplished so successfully. As Chair of the Drafting Group, I would like to extend to them and to their institutions my gratitude for their contribution, for a job well done and for their friendship. I would also like to extend my sincere thanks to the management of ABN AMRO Bank N.V., for their understanding, patience and support during the course of this revision process.

Gary Collyer
Corporate Director,
ABN AMRO Bank N.V., London, England
and Technical Adviser to the ICC Commission on Banking Technique and Practice
November 2006

UCP 600 - Article 1

Application of UCP

The Uniform Customs and Practice for Documentary Credits, 2007 Revision, ICC Publication no. 600 ("UCP") are rules that apply to any documentary credit ("credit") (including, to the extent to which they may be applicable, any standby letter of credit) when the text of the credit expressly indicates that it is subject to these rules. They are binding on all parties thereto unless expressly modified or excluded by the credit.

UCP 600 - Article 2

Definitions

For the purpose of these rules:

Advising bank means the bank that advises the credit at the request of the issuing bank.

Applicant means the party on whose request the credit is issued.

Banking day means a day on which a bank is regularly open at the place at which an act subject to these rules is to be performed.

Beneficiary means the party in whose favour a credit is issued.

Complying presentation means a presentation that is in accordance with the terms and conditions of the credit, the applicable provisions of these rules and international standard banking practice.

Confirmation means a definite undertaking of the confirming bank, in addition to that of the issuing bank, to honour or negotiate a complying presentation.

Confirming bank means the bank that adds its confirmation to a credit upon the issuing bank's authorization or request.

Credit means any arrangement, however named or described, that is irrevocable and thereby constitutes a definite undertaking of the issuing bank to honour a complying presentation.

Honour means:

a. to pay at sight if the credit is available by sight payment.

b. to incur a deferred payment undertaking and pay at maturity if the credit is available by deferred payment.

c. to accept a bill of exchange ("draft") drawn by the beneficiary and pay at maturity if the credit is available by acceptance.

Issuing bank means the bank that issues a credit at the request of an applicant or on its own behalf.

Negotiation means the purchase by the nominated bank of drafts (drawn on a bank other than the nominated bank) and/or documents under a complying presentation, by advancing or agreeing to advance funds to the beneficiary on or before the banking day on which reimbursement is due to the nominated bank.

Nominated Bank means the bank with which the credit is available or any bank in the case of a credit available with any bank.

Presentation means either the delivery of documents under a credit to the issuing bank or nominated bank or the documents so delivered.

Presentor means a beneficiary, bank or other party that makes a presentation.

UCP 600 - Article 3

Interpretations

For the purpose of these rules:

Where applicable, words in the singular include the plural and in the plural include the singular.

A credit is irrevocable even if there is no indication to that effect.

A document may be signed by handwriting, facsimile signature, perforated signature, stamp, symbol or any other mechanical or electronic method of authentication.

A requirement for a document to be legalized, visaed, certified or similar will be satisfied by any signature, mark, stamp or label on the document which appears to satisfy that requirement.

Branches of a bank in different countries are considered to be separate banks.

Terms such as "first class", "well known", "qualified", "independent", "official", "competent" or "local" used to describe the issuer of a document allow any issuer except the beneficiary to issue that document.

Unless required to be used in a document, words such as "prompt", "immediately" or "as soon as possible" will be disregarded.

The expression "on or about" or similar will be interpreted as a stipulation that an event is to occur during a period of five calendar days before until five calendar days after the specified date, both start and end dates included.

The words "to", "until", "till", "from" and "between" when used to determine a period of shipment include the date or dates mentioned, and the words "before" and "after" exclude the date mentioned.

The words "from" and "after" when used to determine a maturity date exclude the date mentioned.

The terms "first half" and "second half" of a month shall be construed respectively as the 1st to the 15th and the 16th to the last day of the month, all dates inclusive.

The terms "beginning", "middle" and "end" of a month shall be construed respectively as the 1st to the 10th, the 11th to the 20th and the 21st to the last day of the month, all dates inclusive.

UCP 600 - Article 4

Credits v. Contracts

a. A credit by its nature is a separate transaction from the sale or other contract on which it may be based. Banks are in no way concerned with or bound by such contract, even if any reference whatsoever to it is included in the credit. Consequently, the undertaking of a bank to honour, to negotiate or to fulfil any other obligation under the credit is not subject to claims or defences by the applicant resulting from its relationships with the issuing bank or the beneficiary.

A beneficiary can in no case avail itself of the contractual relationships existing between banks or between the applicant and the issuing bank.

b. An issuing bank should discourage any attempt by the applicant to include, as an integral part of the credit, copies of the underlying contract, proforma invoice and the like.

UCP 600 - Article 5

Documents v. Goods, Services or Performance

Banks deal with documents and not with goods, services or performance to which the documents may relate.

UCP 600 - Article 6

Availability, Expiry Date and Place for Presentation

a. A credit must state the bank with which it is available or whether it is available with any bank. A credit available with a nominated bank is also available with the issuing bank.

b. A credit must state whether it is available by sight payment, deferred payment, acceptance or negotiation.

c. A credit must not be issued available by a draft drawn on the applicant.

d.

i. A credit must state an expiry date for presentation. An expiry date stated for honour or negotiation will be deemed to be an expiry date for presentation.

ii. The place of the bank with which the credit is available is the place for presentation. The place for presentation under a credit available with any bank is that of any bank. A place for presentation other than that of the issuing bank is in addition to the place of the issuing bank.

e. Except as provided in sub-article 29 (a), a presentation by or on behalf of the beneficiary must be made on or before the expiry date.

UCP 600 - Article 7

Issuing Bank Undertaking

a. Provided that the stipulated documents are presented to the nominated bank or to the issuing bank and that they constitute a complying presentation, the issuing bank must honour if the credit is available by:

i. sight payment, deferred payment or acceptance with the issuing bank;

ii. sight payment with a nominated bank and that nominated bank does not pay;

iii. deferred payment with a nominated bank and that nominated bank does not incur its deferred payment undertaking or, having incurred its deferred payment undertaking, does not pay at maturity;

iv. acceptance with a nominated bank and that nominated bank does not accept a draft drawn on it or, having accepted a draft drawn on it, does not pay at maturity;

v. negotiation with a nominated bank and that nominated bank does not negotiate.

b. An issuing bank is irrevocably bound to honour as of the time it issues the credit.

c. An issuing bank undertakes to reimburse a nominated bank that has honoured or negotiated a complying presentation and forwarded the documents to the issuing bank. Reimbursement for the amount of a complying presentation under a credit available by acceptance or deferred payment is due at maturity, whether or not the nominated bank prepaid or purchased before maturity. An issuing bank's undertaking to reimburse a nominated bank is independent of the issuing bank's undertaking to the beneficiary.

UCP 600 - Article 8

Confirming Bank Undertaking

a. Provided that the stipulated documents are presented to the confirming bank or to any other nominated bank and that they constitute a complying presentation, the confirming bank must:

i. honour, if the credit is available by

a. sight payment, deferred payment or acceptance with the confirming bank;

b. sight payment with another nominated bank and that nominated bank does not pay;

c. deferred payment with another nominated bank and that nominated bank does not incur its deferred payment undertaking or, having incurred its deferred payment undertaking, does not pay at maturity;

d. acceptance with another nominated bank and that nominated bank does not accept a draft drawn on it or, having accepted a draft drawn on it, does not pay at maturity;

e. negotiation with another nominated bank and that nominated bank does not negotiate.

ii. negotiate, without recourse, if the credit is available by negotiation with the confirming bank.

b. A confirming bank is irrevocably bound to honour or negotiate as of the time it adds its confirmation to the credit.

c. A confirming bank undertakes to reimburse another nominated bank that has honoured or negotiated a complying presentation and forwarded the documents to the confirming bank. Reimbursement for the amount of a complying presentation under a credit available by acceptance or deferred payment is due at maturity, whether or not another nominated bank prepaid or purchased before maturity. A confirming bank's undertaking to reimburse another nominated bank is independent of the confirming bank's undertaking to the beneficiary.

d. If a bank is authorized or requested by the issuing bank to confirm a credit but is not prepared to do so, it must inform the issuing bank without delay and may advise the credit without confirmation.

UCP 600 - Article 9

Advising of Credits and Amendments

a. A credit and any amendment may be advised to a beneficiary through an advising bank. An advising bank that is not a confirming bank advises the credit and any amendment without any undertaking to honour or negotiate.

b. By advising the credit or amendment, the advising bank signifies that it has satisfied itself as to the apparent authenticity of the credit or amendment and that the advice accurately reflects the terms and conditions of the credit or amendment received.

c. An advising bank may utilize the services of another bank ("second advising bank") to advise the credit and any amendment to the beneficiary. By advising the credit or amendment, the second advising bank signifies that it has satisfied itself as to the apparent authenticity of the advice it has received and that the advice accurately reflects the terms and conditions of the credit or amendment received.

d. A bank utilizing the services of an advising bank or second advising bank to advise a credit must use the same bank to advise any amendment thereto.

e. If a bank is requested to advise a credit or amendment but elects not to do so, it must so inform, without delay, the bank from which the credit, amendment or advice has been received.

f. If a bank is requested to advise a credit or amendment but cannot satisfy itself as to the apparent authenticity of the credit, the amendment or the advice, it must so inform, without delay, the bank from which the instructions appear to have been received. If the advising bank or second advising bank elects nonetheless to advise the credit or amendment, it must inform the beneficiary or second advising bank that it has not been able to satisfy itself as to the apparent authenticity of the credit, the amendment or the advice.

UCP 600 - Article 10

Amendments

a. Except as otherwise provided by article 38, a credit can neither be amended nor cancelled without the agreement of the issuing bank, the confirming bank, if any, and the beneficiary.

b. An issuing bank is irrevocably bound by an amendment as of the time it issues the amendment. A confirming bank may extend its confirmation to an amendment and will be irrevocably bound as of the time it advises the amendment. A confirming bank may, however, choose to advise an amendment without extending its confirmation and, if so, it must inform the issuing bank without delay and inform the beneficiary in its advice.

c. The terms and conditions of the original credit (or a credit incorporating previously accepted amendments) will remain in force for the beneficiary until the beneficiary communicates its acceptance of the amendment to the bank that advised such amendment. The beneficiary should give notification of acceptance or rejection of an amendment. If the beneficiary fails to give such notification, a presentation that complies with the credit and to any not yet accepted amendment will be deemed to be notification of acceptance by the beneficiary of such amendment. As of that moment the credit will be amended.

d. A bank that advises an amendment should inform the bank from which it received the amendment of any notification of acceptance or rejection.

e. Partial acceptance of an amendment is not allowed and will be deemed to be notification of rejection of the amendment.

f. A provision in an amendment to the effect that the amendment shall enter into force unless rejected by the beneficiary within a certain time shall be disregarded.

UCP 600 - Article 11

Teletransmitted and Pre-Advised Credits and Amendments

a. An authenticated teletransmission of a credit or amendment will be deemed to be the operative credit or amendment, and any subsequent mail confirmation shall be disregarded.

If a teletransmission states "full details to follow" (or words of similar effect), or states that the mail confirmation is to be the operative credit or amendment, then the teletransmission will not be deemed to be the operative credit or amendment. The issuing bank must then issue the operative credit or amendment without delay in terms not inconsistent with the teletransmission.

b. A preliminary advice of the issuance of a credit or amendment ("pre-advice") shall only be sent if the issuing bank is prepared to issue the operative credit or amendment. An issuing bank that sends a pre-advice is irrevocably committed to issue the operative credit or amendment, without delay, in terms not inconsistent with the pre-advice.

UCP 600 - Article 12

Nomination

a. Unless a nominated bank is the confirming bank, an authorization to honour or negotiate does not impose any obligation on that nominated bank to honour or negotiate, except when expressly agreed to by that nominated bank and so communicated to the beneficiary.

b. By nominating a bank to accept a draft or incur a deferred payment undertaking, an issuing bank authorizes that nominated bank to prepay or purchase a draft accepted or a deferred payment undertaking incurred by that nominated bank.

c. Receipt or examination and forwarding of documents by a nominated bank that is not a confirming bank does not make that nominated bank liable to honour or negotiate, nor does it constitute honour or negotiation.

UCP 600 - Article 13

Bank-to-Bank Reimbursement Arrangements

a. If a credit states that reimbursement is to be obtained by a nominated bank ("claiming bank") claiming on another party ("reimbursing bank"), the credit must state if the reimbursement is subject to the ICC rules for bank-to-bank reimbursements in effect on the date of issuance of the credit.

b. If a credit does not state that reimbursement is subject to the ICC rules for bank-to-bank reimbursements, the following apply:

i.An issuing bank must provide a reimbursing bank with a reimbursement authorization that conforms with the availability stated in the credit. The reimbursement authorization should not be subject to an expiry date.

ii.A claiming bank shall not be required to supply a reimbursing bank with a certificate of compliance with the terms and conditions of the credit.

iii.An issuing bank will be responsible for any loss of interest, together with any expenses incurred, if reimbursement is not provided on first demand by a reimbursing bank in accordance with the terms and conditions of the credit.

iv.A reimbursing bank's charges are for the account of the issuing bank. However, if the charges are for the account of the beneficiary, it is the responsibility of an issuing bank to so indicate in the credit and in the reimbursement authorization. If a reimbursing bank's charges are for the account of the beneficiary, they shall be deducted from the amount due to a claiming bank when reimbursement is made. If no reimbursement is made, the reimbursing bank's charges remain the obligation of the issuing bank.

c. An issuing bank is not relieved of any of its obligations to provide reimbursement if reimbursement is not made by a reimbursing bank on first demand.

UCP 600 - Article 14

Standard for Examination of Documents

a. A nominated bank acting on its nomination, a confirming bank, if any, and the issuing bank must examine a presentation to determine, on the basis of the documents alone, whether or not the documents appear on their face to constitute a complying presentation.

b. A nominated bank acting on its nomination, a confirming bank, if any, and the issuing bank shall each have a maximum of five banking days following the day of presentation to determine if a presentation is complying. This period is not curtailed or otherwise affected by the occurrence on or after the date of presentation of any expiry date or last day for presentation.

c. A presentation including one or more original transport documents subject to articles 19, 20, 21, 22, 23, 24 or 25 must be made by or on behalf of the beneficiary not later than 21 calendar days after the date of shipment as described in these rules, but in any event not later than the expiry date of the credit.

d. Data in a document, when read in context with the credit, the document itself and international standard banking practice, need not be identical to, but must not conflict with, data in that document, any other stipulated document or the credit.

e. In documents other than the commercial invoice, the description of the goods, services or performance, if stated, may be in general terms not conflicting with their description in the credit.

f. If a credit requires presentation of a document other than a transport document, insurance document or commercial invoice, without stipulating by whom the document is to be issued or its data content, banks will accept the document as presented if its content appears to fulfil the function of the required document and otherwise complies with sub-article 14 (d).

g. A document presented but not required by the credit will be disregarded and may be returned to the presenter.

h. If a credit contains a condition without stipulating the document to indicate compliance with the condition, banks will deem such condition as not stated and will disregard it.

i. A document may be dated prior to the issuance date of the credit, but must not be dated later than its date of presentation.

j. When the addresses of the beneficiary and the applicant appear in any stipulated document, they need not be the same as those stated in the credit or in any other stipulated document, but must be within the same country as the respective addresses mentioned in the credit. Contact details (telefax, telephone, email

and the like) stated as part of the beneficiary's and the applicant's address will be disregarded. However, when the address and contact details of the applicant appear as part of the consignee or notify party details on a transport document subject to articles 19, 20, 21, 22, 23, 24 or 25, they must be as stated in the credit.

k. The shipper or consignor of the goods indicated on any document need not be the beneficiary of the credit.

l. A transport document may be issued by any party other than a carrier, owner, master or charterer provided that the transport document meets the requirements of articles 19, 20, 21, 22, 23 or 24 of these rules.

UCP 600 - Article 15

Complying Presentation

a. When an issuing bank determines that a presentation is complying, it must honour.

b. When a confirming bank determines that a presentation is complying, it must honour or negotiate and forward the documents to the issuing bank.

c. When a nominated bank determines that a presentation is complying and honours or negotiates, it must forward the documents to the confirming bank or issuing bank.

UCP 600 - Article 16

Discrepant Documents, Waiver and Notice

a. When a nominated bank acting on its nomination, a confirming bank, if any, or the issuing bank determines that a presentation does not comply, it may refuse to honour or negotiate.

b. When an issuing bank determines that a presentation does not comply, it may in its sole judgement approach the applicant for a waiver of the discrepancies. This does not, however, extend the period mentioned in sub-article 14 (b).

c. When a nominated bank acting on its nomination, a confirming bank, if any, or the issuing bank decides to refuse to honour or negotiate, it must give a single notice to that effect to the presenter.

The notice must state:

i. that the bank is refusing to honour or negotiate; and

ii. each discrepancy in respect of which the bank refuses to honour or negotiate; and

iii.

a) that the bank is holding the documents pending further instructions from the presenter; or

b) that the issuing bank is holding the documents until it receives a waiver from the applicant and agrees to accept it, or receives further instructions from the presenter prior to agreeing to accept a waiver; or

c) that the bank is returning the documents; or

d) that the bank is acting in accordance with instructions previously received from the presenter.

d. The notice required in sub-article 16 (c) must be given by telecommunication or, if that is not possible, by other expeditious means no later than the close of the fifth banking day following the day of presentation.

e. A nominated bank acting on its nomination, a confirming bank, if any, or the issuing bank may, after providing notice required by sub-article 16 (c) (iii) (a) or (b), return the documents to the presenter at any time.

f. If an issuing bank or a confirming bank fails to act in accordance with the provisions of this article, it shall be precluded from claiming that the documents do not constitute a complying presentation.

g. When an issuing bank refuses to honour or a confirming bank refuses to honour or negotiate and has given notice to that effect in accordance with this article, it shall then be entitled to claim a refund, with interest, of any reimbursement made.

UCP 600 - Article 17

Original Documents and Copies

a. At least one original of each document stipulated in the credit must be presented.

b. A bank shall treat as an original any document bearing an apparently original signature, mark, stamp, or label of the issuer of the document, unless the document itself indicates that it is not an original.

c. Unless a document indicates otherwise, a bank will also accept a document as original if it:

i. appears to be written, typed, perforated or stamped by the document issuer's hand; or

ii. appears to be on the document issuer's original stationery; or

iii. states that it is original, unless the statement appears not to apply to the document presented.

d. If a credit requires presentation of copies of documents, presentation of either originals or copies is permitted.

e. If a credit requires presentation of multiple documents by using terms such as "in duplicate", "in two fold" or "in two copies", this will be satisfied by the presentation of at least one original and the remaining number in copies, except when the document itself indicates otherwise.

UCP 600 - Article 18

Commercial Invoice

a. A commercial invoice:

i. must appear to have been issued by the beneficiary (except as provided in article 38);

ii. must be made out in the name of the applicant (except as provided in sub-article 38 (g));

iii. must be made out in the same currency as the credit; and

iv. need not be signed.

b. A nominated bank acting on its nomination, a confirming bank, if any, or the issuing bank may accept a commercial invoice issued for an amount in excess of the amount permitted by the credit, and its decision will be binding upon all parties, provided the bank in question has not honoured or negotiated for an amount in excess of that permitted by the credit.

c. The description of the goods, services or performance in a commercial invoice must correspond with that appearing in the credit.

UCP 600 - Article 19

Transport Document Covering at Least Two Different Modes of Transport

a. A transport document covering at least two different modes of transport (multimodal or combined transport document), however named, must appear to:

i. indicate the name of the carrier and be signed by:

- the carrier or a named agent for or on behalf of the carrier, or

- the master or a named agent for or on behalf of the master.

Any signature by the carrier, master or agent must be identified as that of the carrier, master or agent.

Any signature by an agent must indicate whether the agent has signed for or on behalf of the carrier or for or on behalf of the master.

II. Indicate that the goods have been dispatched, taken in charge or shipped on board at the place stated in the credit, by:

- pre-printed wording, or

- a stamp or notation indicating the date on which the goods have been dispatched, taken in charge or shipped on board.

The date of issuance of the transport document will be deemed to be the date of dispatch, taking in charge or shipped on board, and the date of shipment. However, if the transport document indicates, by stamp or notation, a date of dispatch, taking in charge or shipped on board, this date will be deemed to be the date of shipment.

III. Indicate the place of dispatch, taking in charge or shipment and the place of final destination stated in the credit, even if:

a. the transport document states, in addition, a different place of dispatch, taking in charge or shipment or place of final destination,

or

b. the transport document contains the indication "intended" or similar qualification in relation to the vessel, port of loading or port of discharge.

iv. be the sole original transport document or, if issued in more than one original, be the full set as indicated on the transport document.

v. contain terms and conditions of carriage or make reference to another source containing the terms and conditions of carriage (short form or blank back transport document). Contents of terms and conditions of carriage will not be examined.

vi. contain no indication that it is subject to a charter party.

b. For the purpose of this article, transhipment means unloading from one means of conveyance and reloading to another means of conveyance (whether or not in different modes of transport) during the carriage from the place of dispatch, taking in charge or shipment to the place of final destination stated in the credit.

c.

i. A transport document may indicate that the goods will or may be transhipped provided that the entire carriage is covered by one and the same transport document.

ii. A transport document indicating that transhipment will or may take place is acceptable, even if the credit prohibits transhipment.

UCP 600 - Article 20

Bill of Lading

a.A bill of lading, however named, must appear to:

i. indicate the name of the carrier and be signed by:

the carrier or a named agent for or on behalf of the carrier, or

- the master or a named agent for or on behalf of the master.

Any signature by the carrier, master or agent must be identified as that of the carrier, master or agent.

Any signature by an agent must indicate whether the agent has signed for or on behalf of the carrier or for or on behalf of the master.

ii. indicate that the goods have been shipped on board a named vessel at the port of loading stated in the credit by:

- pre-printed wording, or

an on board notation indicating the date on which the goods have been shipped on board.

The date of issuance of the bill of lading will be deemed to be the date of shipment unless the bill of lading contains an on board notation indicating the date of shipment, in which case the date stated in the on board notation will be deemed to be the date of shipment.

If the bill of lading contains the indication "intended vessel" or similar qualification in relation to the name of the vessel, an on board notation indicating the date of shipment and the name of the actual vessel is required.

iii. indicate shipment from the port of loading to the port of discharge stated in the credit.

If the bill of lading does not indicate the port of loading stated in the credit as the port of loading, or if it contains the indication "intended" or similar qualification in relation to the port of loading, an on board notation indicating the port of loading as stated in the credit, the date of shipment and the name of the vessel is required. This provision applies even when loading on board or shipment on a named vessel is indicated by pre-printed wording on the bill of lading.

iv. be the sole original bill of lading or, if issued in more than one original, be the full set as indicated on the bill of lading.

v. contain terms and conditions of carriage or make reference to another source containing the terms and conditions of carriage (short form or blank back bill of lading). Contents of terms and conditions of carriage will not be examined.

vi. contain no indication that it is subject to a charter party.

b. For the purpose of this article, transhipment means unloading from one vessel and reloading to another vessel during the carriage from the port of loading to the port of discharge stated in the credit.

c.

i. A bill of lading may indicate that the goods will or may be transhipped provided that the entire carriage is covered by one and the same bill of lading.

ii. A bill of lading indicating that transhipment will or may take place is acceptable, even if the credit prohibits transhipment, if the goods have been shipped in a container, trailer or LASH barge as evidenced by the bill of lading.

d. Clauses in a bill of lading stating that the carrier reserves the right to tranship will be disregarded.

UCP 600 - Article 21

Non-Negotiable Sea Waybill

a. A non-negotiable sea waybill, however named, must appear to:

i. indicate the name of the carrier and be signed by:

the carrier or a named agent for or on behalf of the carrier, or

- the master or a named agent for or on behalf of the master.

Any signature by the carrier, master or agent must be identified as that of the carrier, master or agent.

Any signature by an agent must indicate whether the agent has signed for or on behalf of the carrier or for or on behalf of the master.

ii. indicate that the goods have been shipped on board a named vessel at the port of loading stated in the credit by:

- pre-printed wording, or

- an on board notation indicating the date on which the goods have been shipped on board.

The date of issuance of the non-negotiable sea waybill will be deemed to be the date of shipment unless the non-negotiable sea waybill contains an on board notation indicating the date of shipment, in which case the date stated in the on board notation will be deemed to be the date of shipment.

If the non-negotiable sea waybill contains the indication "intended vessel" or similar qualification in relation to the name of the vessel, an on board notation indicating the date of shipment and the name of the actual vessel is required.

iii. indicate shipment from the port of loading to the port of discharge stated in the credit.

If the non-negotiable sea waybill does not indicate the port of loading stated in the credit as the port of loading, or if it contains the indication "intended" or similar qualification in relation to the port of loading, an on board notation indicating the port of loading as stated in the credit, the date of shipment and the name of the vessel is required. This provision applies even when loading on board or shipment on a named vessel is indicated by pre-printed wording on the non-negotiable sea waybill.

iv. be the sole original non-negotiable sea waybill or, if issued in more than one original, be the full set as indicated on the non-negotiable sea waybill.

v. contain terms and conditions of carriage or make reference to another source containing the terms and conditions of carriage (short form or blank back non-negotiable sea waybill). Contents of terms and conditions of carriage will not be examined.

vi. contain no indication that it is subject to a charter party.

b. For the purpose of this article, transhipment means unloading from one vessel and reloading to another vessel during the carriage from the port of loading to the port of discharge stated in the credit.

c.

i. A non-negotiable sea waybill may indicate that the goods will or may be transhipped provided that the entire carriage is covered by one and the same non-negotiable sea waybill.

ii. A non-negotiable sea waybill indicating that transhipment will or may take place is acceptable, even if the credit prohibits transhipment, if the goods have been shipped in a container, trailer or LASH barge as evidenced by the non-negotiable sea waybill.

d. Clauses in a non-negotiable sea waybill stating that the carrier reserves the right to tranship will be disregarded.

UCP 600 - Article 22

Charter Party Bill of Lading

a. A bill of lading, however named, containing an indication that it is subject to a charter party (charter party bill of lading), must appear to:

i. be signed by:

- the master or a named agent for or on behalf of the master, or

- the owner or a named agent for or on behalf of the owner, or

- the charterer or a named agent for or on behalf of the charterer.

Any signature by the master, owner, charterer or agent must be identified as that of the master, owner, charterer or agent.

Any signature by an agent must indicate whether the agent has signed for or on behalf of the master, owner or charterer.

An agent signing for or on behalf of the owner or charterer must indicate the name of the owner or charterer.

ii. indicate that the goods have been shipped on board a named vessel at the port of loading stated in the credit by:

- pre-printed wording, or

- an on board notation indicating the date on which the goods have been shipped on board.

The date of issuance of the charter party bill of lading will be deemed to be the date of shipment unless the charter party bill of lading contains an on board notation indicating the date of shipment, in which case the date stated in the on board notation will be deemed to be the date of shipment.

iii. indicate shipment from the port of loading to the port of discharge stated in the credit. The port of discharge may also be shown as a range of ports or a geographical area, as stated in the credit.

iv. be the sole original charter party bill of lading or, if issued in more than one original, be the full set as indicated on the charter party bill of lading.

b. A bank will not examine charter party contracts, even if they are required to be presented by the terms of the credit.

UCP 600 - Article 23

Air Transport Document

a. An air transport document, however named, must appear to:

i. indicate the name of the carrier and be signed by:

- the carrier, or

- a named agent for or on behalf of the carrier.

Any signature by the carrier or agent must be identified as that of the carrier or agent.

Any signature by an agent must indicate that the agent has signed for or on behalf of the carrier.

ii.indicate that the goods have been accepted for carriage.

iii. indicate the date of issuance. This date will be deemed to be the date of shipment unless the air transport document contains a specific notation of the actual date of shipment, in which case the date stated in the notation will be deemed to be the date of shipment.

Any other information appearing on the air transport document relative to the flight number and date will not be considered in determining the date of shipment.

iv. indicate the airport of departure and the airport of destination stated in the credit.

v. be the original for consignor or shipper, even if the credit stipulates a full set of originals.

vi. contain terms and conditions of carriage or make reference to another source containing the terms and conditions of carriage. Contents of terms and conditions of carriage will not be examined.

b. For the purpose of this article, transhipment means unloading from one aircraft and reloading to another aircraft during the carriage from the airport of departure to the airport of destination stated in the credit.

c.

i. An air transport document may indicate that the goods will or may be transhipped, provided that the entire carriage is covered by one and the same air transport document.

ii. An air transport document indicating that transhipment will or may take place is acceptable, even if the credit prohibits transhipment.

UCP 600 - Article 24

Road, Rail or Inland Waterway Transport Documents

a. A road, rail or inland waterway transport document, however named, must appear to:

i. indicate the name of the carrier and:

- be signed by the carrier or a named agent for or on behalf of the carrier, or

- indicate receipt of the goods by signature, stamp or notation by the carrier or a named agent for or on behalf of the carrier.

Any signature, stamp or notation of receipt of the goods by the carrier or agent must be identified as that of the carrier or agent.

Any signature, stamp or notation of receipt of the goods by the agent must indicate that the agent has signed or acted for or on behalf of the carrier.

If a rail transport document does not identify the carrier, any signature or stamp of the railway company will be accepted as evidence of the document being signed by the carrier.

ii. indicate the date of shipment or the date the goods have been received for shipment, dispatch or carriage at the place stated in the credit. Unless the transport document contains a dated reception stamp, an indication of the date of receipt or a date of shipment, the date of issuance of the transport document will be deemed to be the date of shipment.

iii. indicate the place of shipment and the place of destination stated in the credit.

b.

i. A road transport document must appear to be the original for consignor or shipper or bear no marking indicating for whom the document has been prepared.

ii. A rail transport document marked "duplicate" will be accepted as an original.

iii. A rail or inland waterway transport document will be accepted as an original whether marked as an original or not.

c. In the absence of an indication on the transport document as to the number of originals issued, the number presented will be deemed to constitute a full set.

d. For the purpose of this article, transhipment means unloading from one means of conveyance and reloading to another means of conveyance, within the same mode of transport, during the carriage from the place of shipment, dispatch or carriage to the place of destination stated in the credit.

e.

i. A road, rail or inland waterway transport document may indicate that the goods will or may be transhipped provided that the entire carriage is covered by one and the same transport document.

ii. A road, rail or inland waterway transport document indicating that transhipment will or may take place is acceptable, even if the credit prohibits transhipment.

UCP 600 - Article 25

Courier Receipt, Post Receipt or Certificate of Posting

a. A courier receipt, however named, evidencing receipt of goods for transport, must appear to:

i. indicate the name of the courier service and be stamped or signed by the named courier service at the place from which the credit states the goods are to be shipped; and

ii. indicate a date of pick-up or of receipt or wording to this effect. This date will be deemed to be the date of shipment.

b. A requirement that courier charges are to be paid or prepaid may be satisfied by a transport document issued by a courier service evidencing that courier charges are for the account of a party other than the consignee.

c. A post receipt or certificate of posting, however named, evidencing receipt of goods for transport, must appear to be stamped or signed and dated at the place from which the credit states the goods are to be shipped. This date will be deemed to be the date of shipment.

UCP 600 - Article 26

On Deck", "Shipper's Load and Count", "Said by Shipper to Contain" and Charges Additional to Freight

a. A transport document must not indicate that the goods are or will be loaded on deck. A clause on a transport document stating that the goods may be loaded on deck is acceptable.

b. A transport document bearing a clause such as "shipper's load and count" and "said by shipper to contain" is acceptable.

c. A transport document may bear a reference, by stamp or otherwise, to charges additional to the freight.

UCP 600 - Article 27

Clean Transport Document

A bank will only accept a clean transport document. A clean transport document is one bearing no clause or notation expressly declaring a defective condition of the goods or their packaging. The word "clean" need not appear on a transport document, even if a credit has a requirement for that transport document to be "clean on board".

UCP 600 - Article 28

Insurance Document and Coverage

a. An insurance document, such as an insurance policy, an insurance certificate or a declaration under an open cover, must appear to be issued and signed by an insurance company, an underwriter or their agents or their proxies.

Any signature by an agent or proxy must indicate whether the agent or proxy has signed for or on behalf of the insurance company or underwriter.

b. When the insurance document indicates that it has been issued in more than one original, all originals must be presented.

c. Cover notes will not be accepted.

d. An insurance policy is acceptable in lieu of an insurance certificate or a declaration under an open cover.

e. The date of the insurance document must be no later than the date of shipment, unless it appears from the insurance document that the cover is effective from a date not later than the date of shipment.

f.

i.The insurance document must indicate the amount of insurance coverage and be in the same currency as the credit.

ii. A requirement in the credit for insurance coverage to be for a percentage of the value of the goods, of the invoice value or similar is deemed to be the minimum amount of coverage required.

If there is no indication in the credit of the insurance coverage required, the amount of insurance coverage must be at least 110% of the CIF or CIP value of the goods.

When the CIF or CIP value cannot be determined from the documents, the amount of insurance coverage must be calculated on the basis of the amount for which honour or negotiation is requested or the gross value of the goods as shown on the invoice, whichever is greater.

iii. The insurance document must indicate that risks are covered at least between the place of taking in charge or shipment and the place of discharge or final destination as stated in the credit.

g. A credit should state the type of insurance required and, if any, the additional risks to be covered. An insurance document will be accepted without regard to any risks that are not covered if the credit uses imprecise terms such as "usual risks" or "customary risks".

h. When a credit requires insurance against "all risks" and an insurance document is presented containing any "all risks" notation or clause, whether or not bearing the heading "all risks", the insurance document will be accepted without regard to any risks stated to be excluded.

i. An insurance document may contain reference to any exclusion clause.

j. An insurance document may indicate that the cover is subject to a franchise or excess (deductible).

UCP 600 - Article 29

a. If the expiry date of a credit or the last day for presentation falls on a day when the bank to which presentation is to be made is closed for reasons other than those referred to in article 36, the expiry date or the last day for presentation, as the case may be, will be extended to the first following banking day.

b. If presentation is made on the first following banking day, a nominated bank must provide the issuing bank or confirming bank with a statement on its covering schedule that the presentation was made within the time limits extended in accordance with sub-article 29 (a).

c. The latest date for shipment will not be extended as a result of sub-article 29 (a).

UCP 600 - Article 30

Tolerance in Credit Amount, Quantity and Unit Prices

a. The words "about" or "approximately" used in connection with the amount of the credit or the quantity or the unit price stated in the credit are to be construed as allowing a tolerance not to exceed 10% more or 10% less than the amount, the quantity or the unit price to which they refer.

A bank assumes no liability or responsibility for the consequences arising out of delay, loss in transit, mutilation or other errors arising in the transmission of any messages or delivery of letters or documents, when such messages, letters or documents are transmitted or sent according to the requirements stated in the credit, or when the bank may have taken the initiative in the choice of the delivery service in the absence of such instructions in the credit.

If a nominated bank determines that a presentation is complying and forwards the documents to the issuing bank or confirming bank, whether or not the nominated bank has honoured or negotiated, an issuing bank or confirming bank must honour or negotiate, or reimburse that nominated bank, even when the documents have been lost in transit between the nominated bank and the issuing bank or confirming bank, or between the confirming bank and the issuing bank.

A bank assumes no liability or responsibility for errors in translation or interpretation of technical terms and may transmit credit terms without translating them.

UCP 600 - Article 36

Force Majeure

A bank assumes no liability or responsibility for the consequences arising out of the interruption of its business by Acts of God, riots, civil commotions, insurrections, wars, acts of terrorism, or by any strikes or lockouts or any other causes beyond its control.

A bank will not, upon resumption of its business, honour or negotiate under a credit that expired during such interruption of its business.

UCP 600 - Article 37

Disclaimer for Acts of an Instructed Party

a. A bank utilizing the services of another bank for the purpose of giving effect to the instructions of the applicant does so for the account and at the risk of the applicant.

b. An issuing bank or advising bank assumes no liability or responsibility should the instructions it transmits to another bank not be carried out, even if it has taken the initiative in the choice of that other bank.

c. A bank instructing another bank to perform services is liable for any commissions, fees, costs or expenses ("charges") incurred by that bank in connection with its instructions.

If a credit states that charges are for the account of the beneficiary and charges cannot be collected or deducted from proceeds, the issuing bank remains liable for payment of charges.

A credit or amendment should not stipulate that the advising to a beneficiary is conditional upon the receipt by the advising bank or second advising bank of its charges.

d. The applicant shall be bound by and liable to indemnify a bank against all obligations and responsibilities imposed by foreign laws and usages.

UCP 600 - Article 38

Transferable Credits

a. A bank is under no obligation to transfer a credit except to the extent and in the manner expressly consented to by that bank.

b. For the purpose of this article:

Transferable credit means a credit that specifically states it is "transferable". A transferable credit may be made available in whole or in part to another beneficiary ("second beneficiary") at the request of the beneficiary ("first beneficiary").

k. Presentation of documents by or on behalf of a second beneficiary must be made to the transferring bank.

UCP 600 - Article 39

Assignment of Proceeds

The fact that a credit is not stated to be transferable shall not affect the right of the beneficiary to assign any proceeds to which it may be or may become entitled under the credit, in accordance with the provisions of applicable law. This article relates only to the assignment of proceeds and not to the assignment of the right to perform under the credit.

UCC Provisions

§1-102 Purposes; Rules of Construction; Variation by Agreement

(3) The effect of provisions of this Act may be varied by agreement, except as otherwise provided in this Act and except that the obligations of good faith, diligence, reasonableness and care prescribed by this Act may not be disclaimed by agreement but the parties may by agreement determine the standards by which the performance of such obligations is to be measured if such standards are not manifestly unreasonable.

§2-319 F.O.B. and F.A.S. Terms

(1) Unless otherwise agreed the term F.O.B. (which means "free on board") at a named place, even though used only in connection with the stated price, is a delivery term under which

(a) when the term is F.O.B. the place of shipment, the seller must at that place ship the goods in the manner provided in this Article (Section 2-504) and bear the expense and risk of putting them into the possession of the carrier; or

(b) when the term is F.O.B. the place of destination, the seller must at his own expense and risk transport the goods to that place and there tender delivery of them in the manner provided in this Article (Section 2-503);

(c) when under either (a) or (b) the term is also F.O.B. vessel, car or other vehicle, the seller must in addition at his own expense and risk load the goods on board. If the term is F.O.B. vessel the buyer must name the vessel and in an appropriate case the seller must comply with the provisions of this Article on the form of bill of lading (Section 2-323).

(2) Unless otherwise agreed the term F.A.S. vessel (which means "free alongside") at a named port, even though used only in connection with the stated price, is a delivery term under which the seller must

(a) at his own expense and risk deliver the goods alongside the vessel in the manner usual in that port or on a dock designated and provided by the buyer; and

(b) obtain and tender a receipt for the goods in exchange for which the carrier is under a duty to issue a bill of lading.

(3) Unless otherwise agreed in any case falling within subsection (1)(a) or (c) or subsection (2) the buyer must seasonably give any needed instructions for making delivery, including when the term is F.A.S. or F.O.B. the loading berth of the vessel and in an appropriate case its name and sailing date. The seller may treat the failure of needed instructions as a failure of cooperation under this Article (Section 2-311). He may also at his option move the goods in any reasonable manner preparatory to delivery or shipment.

(4) Under the term F.O.B. vessel or F.A.S. unless otherwise agreed the buyer must make payment against tender of the required documents and the seller may not tender nor the buyer demand delivery of the goods in substitution for the documents.

Attachment 2

§2-320 C.I.F. & C.&F. Terms

(1) The term C.I.F. means that the price includes in a lump sum the cost of the goods and the insurance and freight to the named destination. The term C.&F. or C.F. means that the price so includes cost and freight to the named destination.

(2) Unless otherwise agreed and even though used only in connection with the stated price and destination, the term C.I.F. destination or its equivalent requires the seller at his own expense and risk to

(a) put the goods into the possession of a carrier at the port for shipment and obtain a negotiable bill or bills of lading covering the entire transportation to the named destination; and

(b) load the goods and obtain a receipt from the carrier (which may be contained in the bill of lading) showing that the freight has been paid or provided for; and

(c) obtain a policy or certificate of insurance, including any war risk insurance, of a kind and on terms then current at the port of shipment in the usual amount, in the currency of the contract, shown to cover the same goods covered by the bill of lading and providing for payment of loss to the order of the buyer or for the account of whom it may concern; but the seller may add to the price the amount of the premium for any such war risk insurance; and

(d) prepare an invoice of the goods and procure any other documents required to effect shipment or to comply with the contract; and

(e) forward and tender with commercial promptness all the documents in due form and with any indorsement necessary to perfect the buyer's rights.

(3) Unless otherwise agreed the term C.&F. or its equivalent has the same effect and imposes upon the seller the same obligations and risks as a C.I.F. term except the obligation as to insurance.

(4) Under the term C.I.F. or C.&F. unless otherwise agreed the buyer must make payment against tender of the required documents and the seller may not tender nor the buyer demand delivery of the goods in substitution for the documents.

"Free on Board" means that the seller fulfils his obligation to deliver when the goods have passed over the ship's rail at the named port of shipment. This means that the buyer has to bear all costs and risks of loss of or damage to the goods from that point.

The FOB term requires the seller to clear the goods for export.

This term can only be used for sea or inland waterway transport. When the ship's rail serves no-practical purpose, such as in the case of roll-on/roll off or container traffic the FCA term is more appropriate to use.

A. THE SELLER'S OBLIGATIONS

A.1. Provision of goods in conformity with the contract

Provide the goods and the commercial invoice, or its equivalent electronic message, in conformity with the contract of sale and any other evidence of conformity which may be required by the contract.

A.2. Licenses, Authorization and formalities

Obtain at his own risk and expense any export licence or other official authorisation and carry out all customs formalities necessary for the exportation of the goods.

A.3. Contract of carriage and insurance

a) Contract of carriage

No obligation.

b) Contract of insurance

No obligation.

A.4. Delivery

Deliver the goods on board the vessel named by the buyer at the named port of shipment on the date or within the period stipulated and in the manner customary at the port.

A.5. Transfer of risks

Subject to the provisions of B.5., bear all risks of loss of or damage to the goods until such time as they have passed the ship's rail at the named port of shipment.

A.6. Division of Costs

Subject to the provisions of B.6.

- pay all costs relating to the goods until such time as they have passed the ship's rail at the named port of shipment;

- pay the costs of customs formalities necessary for exportation as well as duties, taxes and other official charges payable upon exportation.

A.7. Notice to the buyer

Give the buyer sufficient notice that the goods have been delivered on board.

A.8. Proof of delivery, transport document or equivalent electronic message

Provide the buyer at the seller's expense with the usual document in proof of delivery in accordance with A.4.

Unless the document referred to in the preceding paragraph is the transport document render the buyer, at the latter's request, risk and expense, every assistance in obtaining a transport document for the contract of carriage (for example, a negotiable bill of lading, a non-negotiable sea waybill, an inland waterway document, or a multimodal transport document).

Where the seller and the buyer have agreed to communicate electronically, the document referred to in the preceding paragraph may be replaced by an equivalent electronic data interchange(EDI) message.

A.9. Checking-packaging-marking

Pay the costs of those checking operations (such as checking quality, measuring, weighing, counting) which are necessary for the purpose of delivering the goods in accordance with A.4.

Provide at his own expense packaging (unless it is usual for the particular trade to ship the goods of the contract description unpacked) which is required for the transport of the goods, to the extent that the circumstances relating to the transport (e.g. modalities, destination) are made known to the seller before the contract of sale is concluded.

Packaging is to be marked appropriately.

A.10. Other obligations

Render the buyer at the latter's request, risk and expense, every assistance in obtaining any documents or equivalent electronic messages (other than those mentioned in A..8.) issued or transmitted in the country of shipment and/or of origin which the buyer they require for the. importation of the goods and, where necessary, for their transit through another country.

Provide the buyer, upon request, with the necessary information for procuring insurance.

B. THE BUYER'S OBLIGATIONS

B.1. Payment of the price

Pay the price as provided in the contract of sale.

B.2. Licenses, Authorizations and Formalities

Obtain at his own risk and expense any import licence or other official arthorisation and carry out all customs formalities for the importation of the goods and, where necessary. for their transit through another country.

B.3. Contract of carriage

Contract at his own expense for the carriage of the goods from the named port of shipment.

B.4. Taking Delivery

Take delivery of the goods in accordance with A.4.

B.5. Transfer of risks

Bear all risks of loss of or damage to the goods from the time they have passed the ship's rail at the named port of shipment.

Should he fail to give notice in accordance with B.7., or should the vessel named by him fail to arrive on time, or be unable to take the goods, or close for cargo earlier than the stipulated time, bear all risks of loss of or damage to the goods from the agreed date or the expiry date of the period stipulated for delivery provided, however, that the goods have been duly appropriated to the contract, that is to say, clearly set aside or otherwise identified as the contract goods.

B.6. Division of costs

Pay all costs relating to the goods from the time they have passed the ship's rail at the named port of shipment.

Pay any additional costs incurred, either because the vessel named by him has failed to arrive on time, or is unable to take the goods, or will close for cargo earlier than the stipulated date, or because the buyer has failed to give appropriate notice in accordance with B.7. provided, however, that the goods have been duly appropriated to the contract, that is to say, clearly set aside or otherwise identified as the contract goods.

Pay all duties, taxes and other official charges as well as the costs of carrying out customs formalities payable upon importation of the goods and, where necessary, for their transit through another country.

B.7. Notice to the seller

Give the seller sufficient notice of the vessel name, loading point and required delivery time.

B.8. Proof of delivery, transport document or equivalent electronic message

Accept the proof of delivery in accordance with A.8.

B.9. Inspection of goods

Pay, unless otherwise agreed, the costs of pre-shipment inspection except when mandated by the authorities of the country of export.

B.10. Other obligations

Pay all costs and charges incurred in obtaining the documents or equivalent electronic messages mentioned in A.10. and reimburse those incurred by the seller in rendering his assistance in accordance therewith.

§ 2-615. Excuse by Failure of Presupposed Conditions.

Except so far as a seller may have assumed a greater obligation and subject to the preceding section on substituted performance:

(a) Delay in delivery or non-delivery in whole or in part by a seller who complies with paragraphs (b) and (c) is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.
(b) Where the causes mentioned in paragraph (a) affect only a part of the seller's capacity to perform, he must allocate production and deliveries among his customers but may at his option include regular customers not then under contract as well as his own requirements for further manufacture. He may so allocate in any manner which is fair and reasonable.
(c) The seller must notify the buyer seasonably that there will be delay or non-delivery and, when allocation is required under paragraph (b), of the estimated quota thus made available for the buyer.

Article 79. Impediment Excusing Party from Damages

(1) A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.
(2) If the party's failure is due to the failure by a third person whom he has engaged to perform the whole or a part of the contract, that party is exempt from liability only if:
    a. he is exempt under the preceding paragraph; and
    b. the person whom he has so engaged would be so exempt if the provisions of that paragraph were applied to him.
(3) The exemption provided by this article has effect for the period during which the impediment exists.
(4) The party who fails to perform must give notice to the other party of the impediment and its effect on his ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, he is liable for damages resulting from such non-receipt.
(5) Nothing in this article prevents either party from exercising any right other than to claim damages under this Convention.

UCC

Revised UCC § 5-107. Confirmer, Nominate Person, and Adviser

(a) A confirmer is directly obligated on a letter of credit and has the rights and obligations of an issuer to the extent of its confirmation. The confirmer also has rights against and obligations to the issuer as if the issuer were an applicant and the confirmer had issued the letter of credit at the request and for the account of the issuer.

(b) A nominated person who is not a confirmer is not obligated to honor or otherwise give value for a presentation.

(c) A person requested to advise may decline to act as an adviser. An adviser that is not a confirmer is not obligated to honor or give value for a presentation. An adviser undertakes to the issuer and to the beneficiary accurately to advise the terms of the letter of credit, confirmation, amendment, or advice received by that person and undertakes to the beneficiary to check the apparent authenticity of the request to advise. Even if the advice is inaccurate, the letter of credit, confirmation, or amendment is enforceable as issued.

Revised UCC § 5-108. Issuer's Right and Obligations

(a) Except as otherwise provided in Section 5-109, an issuer shall honor a presentation that, as determined by the standard practice referred to in subsection (e), appears on its face strictly to comply with the terms and conditions of the letter of credit. Except as otherwise provided in Section 5-113 and unless otherwise agreed with the applicant, an issuer shall dishonor a presentation that does not appear so to comply.

(b) An issuer has a reasonable time after presentation, but not beyond the end of the seventh business day of the issuer after the day of its receipt of documents:

(1) to honor,

(2) if the letter of credit provides for honor to be completed more than seven business days after presentation, to accept a draft or incur a deferred obligations, or

(3) to give notice to the presenter of discrepancies in the presentation.

(c) Except at otherwise provided in subsection (d), an issuer is precluded from asserting as a basis for dishonor any discrepancy if timely notice is not given, or any discrepancy not stated in the notice if timely notice is given.

(d) failure to give the notice specified in subsection (b) or to mention fraud, forgery, or expiration in the notice does not preclude the issuer from asserting as a basis for dishonor fraud or forgery as described in Section 5-109(a) or expiration of the letter of credit before presentation.

(e) An issuer shall observe standard practice of financial institutions that regularly issue letters of credit. Determination of the issuer's observance of the standard practice is a matter of interpretation for the court. The court shall offer the parties a reasonable opportunity to present evidence of the standard practice.

(f) An issuer is not responsible for:

(1) the performance or nonperformance of the underlying contract, arrangement, or transaction,

(2) an act or omission of others, or

(3) observance or knowledge of the usage of a particular trade other than the standard practice referred to in subsection (e)

(g) If an undertaking constituting a letter of credit under Section 5-102(a)(10) contains nondocumentary conditions, an issuer shall disregard the nondocumentary conditions and treat them as if they were not stated.

(h) An issuer that has dishonored a presentation shall return the documents or hold them at the disposal of, and send advice to that effect to, the presenter

(i) An issuer that has honored a presentation as permitted or required by this article

(1) is entitled to be reimbursed by the applicant in immediately available funds not later than the date of its payment of funds;

(2) takes the documents free of claims of the beneficiary or presenter;

(3) is precluded from asserting a right of recourse on a draft under Sections 3-414 and 3-415

(4) except as otherwise provided in Sections 5-110 and 5-117, is precluded from restitution of money paid or other value given by mistake to the extent the mistake concerns discrepancies in the documents or tender which are apparent on the face of the presentation; and

(5) is discharged to the extent of its performance under the letter of credit unless the issuer honored a presentation in which a required signature of a beneficiary was forged

Revised UCC § 5-116. Choice of Law and Forum

(a) The liability of an issuer, nominated person, or adviser for action or omission is governed by the law of the jurisdiction chosen by an agreement in the form of a record signed or otherwise authenticated by the affected parties in the manner provided in Section 5-104 or by a provision in the person's letter of credit, confirmation, or other undertaking. The jurisdiction whose law is chosen need not bear any relation to the transaction.

(b) Unless subsection (a) applies, the liability of an issuer, nominated person, or adviser for action or omission is governed by the law of the jurisdiction in which the person is located. The person is considered to be located at the address indicated in the person's undertaking. If more than one address is indicated, the person is considered to be located at the address from which the person's undertaking was issued. For the purpose of jurisdiction, choice of law, and

recognition of interbranch letters of credit, but not enforcement of a judgment, all branches of a bank are considered separate juridical entities and a bank is considered to be located at the place where its relevant branch is considered to be located under this subseetion.

(c) Except as otherwise provided in this subsection, the liability of an issuer, nominated person, or adviser is governed by any rules of custom or practice, such as the Uniform Customs and Practice for Documentary Credits, to which the letter of credit, confirmation, or other undertaking is expressly made subject. If (i) this article would govern the liability of an issuer, nominated person, or adviser under subsection (a) or (b), (ii) the relevant undertaking incorporates rules of custom or practice, and (iii) there is conflict between this article and those rules as applied to that undertaking, those rules govern except to the extent of any conflict with the nonvariable provisions specified in Section 5-103(c).

(d) If there is conflict between this article and Article 3, 4, 4A, or 9, this article governs.

(e) The forum for settling disputes arising out of an undertaking within this article may be chosen in the manner and with the binding effect that governing law may be chosen in accordance with subsection (a)

f. If the remitting bank draws the attention of the Issuing Bank and/or Confirming Bank, if any, to any discrepancy(ies) in the document(s) or advises such banks that it has paid, incurred a deferred payment undertaking, accepted Draft(s) or negotiated under reserve or against an indemnity in respect of such discrepancy(ies), the Issuing Bank and/or Confirming Bank, if any, shall not be thereby relieved from any of their obligations under any provision of this Article. Such reserve or indemnity concerns only the relations between the remitting bank and the party towards whom the reserve was made, or from whom, or on whose behalf, the indemnity was obtained

Article 37: Commercial Invoices

c. The description of goods in the commercial invoice must correspond with the description in the Credit. In all other documents, the goods may be described in general terms not inconsistent with the description of the goods in the Credit.

UCC

Revised § 5-109: Fraud and Forgery

(a) If a presentation is made that appears on its face strictly to comply with the terms and conditions of the letter of credit, but a required document is forged or materially fraudulent, or honor of the presentation would facilitate a material fraud by the beneficiary on the issuer or applicant:

(1) the issuer shall honor the presentation, if honor is demanded by (i) a nominated person who has given value in good faith and without notice of forgery or material fraud, (ii) a confirmer who has honored its confirmation in good faith, (iii) a holder in due course of a draft drawn under the letter of credit which was taken after acceptance by the issuer or nominated person, or (iv) an assignee of the issuer's or nominated person's deferred obligation that was taken for value and without notice of forgery or material fraud after the obligation was incurred by the issuer or nominated person; and

(2) the issuer, acting in good faith, may honor or dishonor the presentation in any other case.

(b) If an applicant claims that a required document is forged or materially fraudulent or that honor of the presentation would facilitate a material fraud by the beneficiary on the issuer or applicant, a court of competent jurisdiction may temporarily or permanently enjoin the issuer from honoring a presentation or grant similar relief against the issuer or other persons only if the court finds that:

(1) the relief is not prohibited under the law applicable to an accepted draft or deferred obligation incurred by the issuer;

(2) a beneficiary, issuer, or nominated person who may be adversely affected is adequately protected against loss that it may suffer because the relief is granted;

(3) all of the conditions to entitle a person to the relief under the law of this State have been met; and

(4) on the basis of the information submitted to the court, the applicant is more likely than not to succeed under its claim of forgery or material fraud and the person demanding honor does not qualify for protection under subsection (a)(1)

UCC Provisions

§ 1-105. Territorial Application of the Act; Parties' Power to Choose Applicable Law

(1) Except as provided hereafter in this section, when a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties. Failing such agreement this Act applies to transactions bearing an appropriate relation to this state.

(2) Where one of the following provisions of this Act specifies the applicable law, that provision governs and a contrary agreement is effective only to the extent permitted by the law (including the conflict of laws rules) so specified:

§2-207. Additional Terms in Acceptance or Confirmation

(1) A definite and seasonable expression of acceptance or a written confirmation sent within a reasonable amount of time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.

(2) The additional terms will be construed as proposals for addition to the contract. Between merchants such terms will become part of the contract unless (a) the offer expressly limits acceptance to the terms of the offer, (b) they materially alter it, or (c) notification of objection to those terms has been given within a reasonable time after notice of them is received.

(3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case, the terms of the particular contract consist of those terms which the writing of the parties agree, together with any supplementary terms incorporated under any provisions of this act.

Note: Additional Terms: Unlike at common law, under the UCC terms in an acceptance that fail to match those in the offer can nonetheless become part of the contract in some circumstances.

§ 2-314. Implied Warranty; Merchantability; Usage of Trade

(1) Unless excluded or modified (Section 2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.

(2) Goods to be merchantable must be at least such as

(a) pass without objection in the trade under the contract description; and

(b) in the case of fungible goods, are of fair average quality within the description; and

(c) are fit for the ordinary purposes for which such goods are used; and

(d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and

(e) are adequately contained, packaged, and labeled as the agreement may require; and

(f) conform to the promise or affirmations of fact made on the container or label if any.

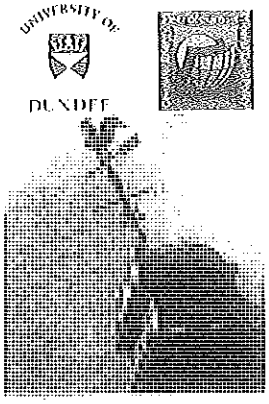
(3) Unless excluded or modified (Section 2-316) other implied warranties may arise from course of dealing or usage of trade.

§ 2-315. Implied Warranty: Fitness for Particular Purpose

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.

attachment 3

FORCE MAJEURE AND THE PERFORMANCE EXCUSE: A REVIEW OF THE ENGLISH DOCTRINE OF FRUSTRATION AND ARTICLE 2-615 OF THE UNIFORM COMMERCIAL CODE.



Babatunde Osadare*

ABSTRACT: *The world has become the center stage for international business transactions and the speed and ease with which business deals are sealed is rather amazing. With this in mind business executives want to be certain that the obligations assumed under their contracts would be performed. This perhaps is the underlying premise of the international principle of pacta sunt servanda which recognizes the sanctity of contractual obligations. However, obligations assumed under a contract are primarily hinged on factors that are foreseeable at the time the contract is entered into. Where the contractual character of such obligations is changed due to unforeseen and unavoidable events, a party may be excused from the pacta sunt servanda principle epitomized and recognized as force majeure in most jurisdictions across the world. The aim of this paper is to examine the doctrine of force majeure under English law and under the Uniform Commercial Code of the United States. The paper will examine the doctrine of frustration at common law and the impracticability doctrine under the UCC against the background of executive decisions on choice of law and the legal consequences of the doctrine. The paper will find that the application of the doctrine in both jurisdictions is not radically dissimilar.*

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LIST OF ABBREVIATIONS

CISG	Convention for the International Sale of Goods
COLUM. L. REV	Columbia Law Review
ENG. REP.	English Reports
F. 2d.	Federal Reporter 2nd Series
J. Int'l Arb.	Journal of International Arbitration
K.B.	Kings Bench
L.R. C.P.	Law Reports Common Pleas
Lloyds Rep	Lloyds Reports
Macph HL	Macpherson's Sessions
N.Y.S. 2d	New York Supplement 2nd Series
P. 2d.	Pacific Reporter 2nd Series
UCC Rep. Serv.	Uniform Commercial Code Report Service
UCC	Uniform Commercial Code
W.N.	Weekly Notes

1. Introduction

The autonomy of parties to dictate the terms of their contract remains potent in international trade. This is often reflected in the principle of pacta sunt servanda recognizing the sanctity of contract.[1] If a party therefore, knowing the risks involved in a venture, proceeds to contract on terms that are harmful to its interest, there appears to be no good reason why remedial reliefs should be granted to it;[2] since that party had the opportunity of providing against that harm in its contract.[3] To this end, national efforts at codifying contractual principles are usually made subject to the will of the parties.

After contracting however, unforeseen situations may arise to make performance of obligations under a contract more onerous, difficult or impossible. Mere difficulty alone will not absolve a party of the duty to perform its obligations.[4] The difficult circumstances are usually referred to as supervening events leading to frustration, force majeure or commercial impracticability.[5] With the occurrence of these events, a party may be excused from the performance of its obligations under the contract or the effect might be to postpone performance or bring about some other consequences that parties may have expressly provided for in their contract.

The aim of this paper is to consider the performance excuse of contractual obligations under English law and the law of the United States noting the similarities and the differences in their approach. It is not intended to consider in detail scope the doctrine of force majeure across national jurisdictions but to limit the scope of the paper to the legal regime of force majeure and performance excuse especially as it relates to the sale of goods in England and the United States.

Part two of this paper will examine the elements of force majeure noting its nature and characteristics. Part three will focus on the doctrine of frustration and the legal consequences under English law, the impracticability doctrine under Article 2-615 of

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[1] Berman, H. J., *Excuse of Non-Performance in the Light of Contract Practices in International Trade*, 63 COLUM. L. REV. 1413 (1963)
[2] See Treitel, G. H., Frustration and Force Majeure (London: Sweet and Maxwell, 1994), p. 458.
[3] See Paradine v. Jane 82 Eng. Rep. 897 (K.B. 1647)
[4] Berman, H. J., supra note 1.
[5] The former under English law and the Latter, under U.S. law.

the Uniform Commercial Code (UCC), the rationale for the doctrine under the Code and the legal consequences. Part three will also examine briefly the judicial approach in the two jurisdictions and the paper will conclude in part four.

2. Elements of Force Majeure in International Business Contracts

2.1 Meaning of force majeure

The doctrine of force majeure is generally recognized across several jurisdictions in the business world. The doctrine had its origin in French law based on the Roman doctrine of Vis Major. The Vis major concept was referred to as acts of God[6] and was limited to events of natural causes. The doctrine of force majeure has however been expanded to cover events induced by men and nature.[7] In its simplest characteristics, force majeure refers to those situations outside the control of parties and which prevent them from performing the obligations assumed under the contract.[8] These events may include the destruction of the subject matter, unavailability of the subject matter, death of a person, performance impossibility etc.[9] Force majeure may be said to have occurred "when the law recognizes that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which the performance is called for would render it impossible. I promised to do this but I cannot due to some irresistible unforeseeable and uncontrollable event."[10]

2.2 Characteristics of Force Majeure

Under French law, the plea of force majeure will avail a party seeking to be excused from performance if he can show that the supervening event was unforeseeable,

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[6] *See* Tennents v. Earl of Glasgow (1864) 2 Macph Ht. 22 where the English House of Lords defined it as "a circumstance which no human foresight can provide against and of which human prudence is not bound to recognize the possibility."

[7] Borkowski, A., Textbook on Roman Law, 2nd ed. (Oxford: Oxford University Press, 2003), p. 274

[8] *See* generally Treitel, G. H., Frustration and Force Majeure (London: Sweet and Maxwell, 1994), p. 13.

[9] *Ibid.*, p.83

[10] Puelinckx, A.H., *Frustration, Hardship, Force majeure, imprévision, Wegfall der Geschäftsgrundlage, Unmöglichkeit, Changed Circumstances*, 1986 J. Int'l Arb. 47 (1986).

insurmountable, external and impossibility of performance persists.[11] These conditions are somewhat recognized under English and American Jurisprudence with arguable relaxed difference in the United States.[12] The doctrine of force majeure is not a traditional Common law doctrine as what is operative under the English common law is the doctrine of frustration. The courts will however give effect to the force majeure doctrine if parties have expressed it in their contract. This operates in the United States as the Impracticability doctrine which permits excused performance where the following can be shown:

Unforseability: This refers to the event rendering performance of the contract impossible under English law[13] or Impracticable under the American law. This is why a party will not be excused from performance simply because performance has become more onerous. A good example is post contract price escalation which will not be a ground for discharge because parties could have inserted a price escalation clause in their contract to deal with unforeseen changes.[14]

Unavoidability: This refers to the fact of not been able to avoid the occurrence of the force majeure event and its effects.

Uncontrollability: The person seeking to be discharged of its contractual obligations must show that he had no control over the event. The event must not have arisen from the acts or omission of the party or from those acts under his control.

2.3 Classes of Force Majeure Events

It is common practice for parties to insert in their contract a force majeure clause stating that the performance of undertaken obligations shall be excused upon the occurrence of events which render performance impossible or impracticable. In drafting the force majeure clause, parties may adopt the traditional approach or the modern approach.

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[11] See Articles 1147 and 1148 of the French Civil Code. See also for detailed discussion Firoozmand, M. R.,The Impact of Supervening Events on the Performance of Contractual Obligations: The Concept of Force Majeure in International Petroleum Contracts (Phd. Thesis, University of Dundee, 2006), p. 52.
[12] This refers to the impracticability doctrine.
[13] For example death of the promisor in Whincup v. Hughes [1870] L.R. 6 C.P. 78
[14] Brauer and Co. v. James Clark, 1952 W.N. 422 (Eng. 1952).

2.3.1 The Traditional Approach and its Legal Consequences

The traditional approach of drafting a force majeure clause is to list specific events that may be triggered by natural, human or other factors.[15] These events may include acts of god, insurrection, riots, war, flood, thunderstorms, earthquakes, explosion, terrorism etc. It is also not unusual for such clauses to be ended by wrap up clauses intended to make the list of force majeure events open ended. The problem with this approach is that it makes a contract very clumsy and unnecessarily cumbersome to the non-legally trained mind and the difficulty of determining beforehand what may constitute a force majeure in a particular contract is inherent.

In the eye of the law however, an event specific force majeure clause with a wrap up clause may be subject to the ejusdem generis[16] rule of interpretation to restrict force majeure claims outside the classes of specifically listed events. The approach of the courts to this issue appears not to be uniform across jurisdictions. Whilst the English Courts would not interprete a wrap up clause restrictively, it appears the U.S. Courts would not interprete wrap up clauses beyond specifically mentioned events.[17]

A suggested approach other than listing wide specific events to avoid the ejusdem generis rule is to state that the wrap up clauses would apply whether or not the events relate to the listed events.[18]

Despite the difficulties inherent in the traditional approach, it appears to be popular amongst contract draftsmen. An alternative approach however is the modern approach which is discussed next.

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[15] *See* generally Firoozmand, F. R., supra note 11, P.182

[16] It is a rule of interpretation which states that general words following specifically mentioned words should be interpreted in the light of the specifically mentioned words.

[17] *See* Constantini, C. J., *Allocating Risk in Take or Pay Contracts: Are Force Majeure and Commercial Impracticability the Same Defence?* Southwestern Law Journal, 42, 1989, 1047 at 1061; Berg, A., *The Detailed Drafting of Force Majeure Clauses*, In McKendrick, E., Force Majeure and Frustration of Contracts (London: Lloyds of London, 1995), p. 59, cited in Firoozmand, M. R. supra page 187.

[18] *See* Firoozmand, M. R., supra p. 187.

2.3.2 The Modern Approach and the Rationale Thereof

The modern approach aims to keep modern contract drafting simple in language and easy to understand without sacrificing professionalism on the alter of modernism. The approach is to avoid mentioning specific events that may trigger force majeure under the contract but by making a general statement that a party may be relieved of its contractual obligations due to a force majeure event. The task of determining whether a force majeure event has occurred is therefore, left to the courts or arbitral tribunal that would almost always be able to identify whether in the surrounding circumstances of a case, a force majeure event has arisen.

An example of this type of clause can be seen in the 1998 Brazilian Model Concession Contract which provides that "the parties shall only be permitted to relinquish fulfillment of the obligations assumed under this contract in the event of an Act of God or Force Majeure, in accordance with Article 1058 of the Brazilian Code of Civil Procedure"[19]

The benefit of this approach is to relieve parties of the burden of listing several specific events and usually a wrap up clause that may be subject to the ejusdem generis principle of interpretation. Where the principle applies, a party may not be excused of the performance of its obligations. What then is the nature of excused performance under English law and the U.S. Law? These will be considered in the next part.

3. Force Majeure in English Law and under Article 2-615 of the Uniform Commercial Code UCC

3.1 Legal Doctrine of Frustration at Common Law and Force Majeure Clauses

As already observed, force majeure is not a traditional common law doctrine. Whilst the doctrine of frustration is implied into every contract by operation of law, force majeure is a matter of contract amongst parties. Therefore, where parties have made a

[19] Article 30.1 of the 1998 Brazilian Model Concession Contract for Exploration, Development, and Production of Oil and/or Gas. Cited in Firoozmand, F. R., supra p. 180, fn. 15.

provision in their contract on force majeure, the common law principle of frustration will not apply in accordance with the pacta sunt servanda and party autonomy principle.

The doctrine of frustration grew gradually from the absolute contract principle at common law.[20] A case law authority for this is the case of **Paradine v. Jane**[21] where a tenant had been held liable for the payment of rents for periods during which he was dispossessed of the leased property by alien enemies. The rationale for this was stated by the court to be that "when the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by the contract."[22]

About two centuries after the **Jane v. Paradine** case was decided, the courts introduced the theory of implied terms into a contract to exempt the performance of obligations assumed under the contract.[23] Blackburn J. in relation to bailment contracts stated the qualification thus: "if the performance of the ... promise of the bailee to return the thing lent or bailed becomes impossible because it has perished, this impossibility (if not arisen from the fault of the borrower or bailee from some risk which he has taken upon himself) excuses the bailee from the performance of his promise to redeliver"[24] Thus, impossibility of performance as an exception was introduced into English law and this became known as the doctrine of frustration following especially from the famous Coronation cases[25] where as a result of the illness of King Edward VII, contracts for the rent of rooms overlooking the routes of the coronation procession were held to have been discharged due to the postponement of the ceremonies.[26]

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[20] Treitel, G. H., Frustration and Force Majeure (London: Sweet and Maxwell, 1994), p. 13.
[21] 82 Eng. Rep. 897 (K.B. 1647)
[22] *Ibid.*
[23] *See* Taylor v. Caldwell (1863) 3 B & S 826
[24] *Ibid.* at 839.
[25] *See* Krell v. Henry, 2 K.B. 740 (Eng. 1903)
[26] *Ibid.*

construction project. The Plaintiff failed to fully perform this obligation as a result of the prohibitive costs i.e. 10 to 12 times more in taking gravel below water level. The Defendant's excuse for non-performance was accepted by the Court.

The impracticability doctrine remains good law in the US having been codified into the UCC and having been applied by the courts. For instance the court in the case of **Asphalt International v. Enterprise Shipping SA**[42] applied the commercial impracticability doctrine to absolve the Defendant of the duty to repair its ship on charter because the cost of repairs far outweigh the economic value of the ship.

3.3.2 Rationale and Legal Consequences of the Doctrine of Impracticability

The rationale for the doctrine in the U.S. due to the need to give practical considerations to the commercial sense in which the impracticable defense is raised by a party based on the surrounding circumstances of a particular case.[43] Impracticability could be made to cover situations of severe and increased difficulty, costs, expenses, loss, or injury to a party. To this extent therefore, the doctrine appears to be more flexible and wider when compared with the impossibility approach adopted by the English courts. But have the U.S. courts shown liberality in the application of the doctrine? This will be considered next with the point presently being made that the legal consequences of applying the doctrine is to discharge a party from the obligation to perform even though performance remains absolutely possible.

3.4 Impracticability v. Impossibility

Whilst there are authorities which permit discharge on the ground of impracticability, the trend of cases in recent years is to decline the defence of impracticability based on changed financial situation. The first of these cases are related to the energy crises of the early 70s where parties were relieved of their contractual obligations based on increased costs of performance.[44] With the points noted in these cases, the courts in the U.S. have subsequently shown reluctance to uphold the defence of impracticability

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[42] 667 F. 2d 261 (1981)

[43] *See* Rimko, J., supra, note 27.

[44] *See* Gay v. Seafarer Fiberglass Yachts, 14 UCC Rep. Serv. 1335; Mansfield Propane Gas Co. v. Folger Gas Co. 204 S.E. 2d. 625(1974); see Treitel, G.H. op.cit., p. 243 for fuller discussion.

The impracticability doctrine is related to the extent that even though performance remains possible, parties may be discharged on grounds of impracticability. The Supreme Court of California in **Lloyd v. Murphy**[51] restated this point even though it refused to excuse performance on the ground that governmental acts, especially where reasonably foreseeable, rendering performance of contractual obligations unprofitable or more difficult will not suffice to excuse performance under the doctrine of impracticability.

3.5 Choice of Law Decision Making and the Doctrine of Impracticability

As a result of the seemingly wide and flexible force majeure doctrine of commercial impracticability under the U.S. law, it will appear that executive decision making on choice of law issues in concluding international contracts will be biased. Sellers will prefer to adopt the law of a State in the U.S. while buyers will be slow to adopting such laws. This is understandable because every buyer wants to be relatively assured that the seller will deliver under the terms of the contract and will not seek refuge under some legal provisions excusing performance on the ground of economic impracticability.

The trend however is that the impracticability doctrine has been narrowly and strictly construed so as to restrict cases of performance excuse to impossibility of performance as obtained under English law.[52] As a result of this approach, the choice of law decision against U.S. law may not have changed much.

4. Summary/Conclusion

The nature and character of force majeure under English law have been discussed and its legal consequences have also been seen as to how it may discharge parties of their obligations under a contract or at least suspend the performance of such obligations. Where parties have not included a force majeure provision in their contract, the doctrine of frustration will apply to discharge the parties. The difficulty and harshness

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[51] 153 P. 2d. 47 (1944)
[52] *See* generally Wallack, supra, note 45.

BIBLIOGRAPHY

Primary Sources

National Legislation

French Civil Code

Law Reform Frustrated Contracts) Act, 1943.

Uniform Commercial Code § 2-615 (1979)

Judicial Decisions

Appleby v. Myers (1867) L.R. 2 P.C. 651

Asphalt International v. Enterprise Shipping SA, 667 F. 2d 261 (1981)

Brauer and Co. v. James Clark, 1952 W.N. 422 (Eng. 1952).

Gay v. Seafarer Fiberglass Yachts, 14 UCC Rep. Serv. 1335

Krell v. Henry, 2 K.B. 740 (Eng. 1903)

Lloyd v. Murphy 153 P. 2d. 47 (1944)

Maple Farms Inc. v. City School District of Elmira 352 N.Y.S. 2d 4784 (1974)

Mansfield Propane Gas Co. v. Folger Gas Co. 204 S.E. 2d. 625(1974)

Minera Park Land Co. v. Howard 156 P. 458 (1916)

Neal Cooper Grain Co. v. Texas Sulphur Co 508 F. 2d. 208 (1974)

Paul Wilson & Co. AS v. Partenreederei Hannah Blumenthal [1983] 1 Lloyds Rep. 103

Paradine v. Jane 82 Eng. Rep. 897 (K.B. 1647)

Taylor v. Caldwell (1863) 3 B & S 826

Tennents v. Earl of Glasgow (1864) 2 Macph HL 22

Thames Valley Power Limited v Total Gas & Power Limited (2006) 1 Lloyd's Rep 441

Whincup v. Hughes [1870] L.R. 6 C.P. 78

Secondary Sources

Books

Borkowski, A., Textbook on Roman Law, 2nd ed. (Oxford: Oxford Univeersity Press, 2003)

Commercial Contracts, Pace Review of the Convention on Contracts for the International Sale of Goods, Kluwer (1999-2000), Available online at <http://www.cisg.law.pace.edu/cisg/biblio/rinke.html>

Jenkins, S. H., *Exemption for Non-performance - UCC, CISG, UNIDROIT Principles: A Comaparative Assessment*, 72, Tulane Law Review 1988 (2015 - 2030) available at http://www.cisg.law.pace.edu/cisg/ biblio/jenkins.html (last visited 13th July 2009).

Other Sources

Brazilian Model Concession Contract for Exploration, Development, and Production of Oil and/or Gas, 1998.

Restatement (Second) of Contracts 261 (1979).

attachment 4

Restatement (Second) of Conflict of Laws

§ 6. Choice of Law Principles

(1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.

(2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include

(a) the needs of the interstate and international systems,

(b) the relevant policies of the forum,

(c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,

(d) the protection of justified expectations,

(e) the basic policies underlying the particular field of law,

(f) certainty, predictability and uniformity of result, and

(g) ease in the determination and application of the law to be applied.

§ 188. Law Governing in Absence of Effective Choice by the Parties

(1) The rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties under the principles stated in § 6.

(2) In the absence of an effective choice of law by the parties (see s 187), the contacts to be taken into account in applying the principles of s 6 to determine the law applicable to an issue include:

(a) the place of contracting,

(b) the place of negotiation of the contract,

(c) the place of performance,

(d) the location of the subject matter of the contract, and

(e) the domicil, residence, nationality, place of incorporation and place of business of the parties.

These contacts are to be evaluated according to their relative importance with respect to the particular issue.

(3) If the place of negotiating the contract and the place of performance are in the same state, the local law of this state will usually be applied, except as otherwise provided in ss 189-199 and 203.

Convention on the Law Applicable to Contractual Obligations (EEC)

Article 1: Scope of the Convention

1. The rules of this Convention shall apply to contractual obligations in any situation involving a choice between the laws of different countries.

. . .

Article 3: Freedom of choice

1. A contract shall be governed by the law chosen by the parties. The choice must be expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or a part only of the contract.

2. The parties may at any time agree to subject the contract to a law other than that which previously governed it, whether us a result of an earlier choice under this Article or of other provisions of this Convention. Any variation by the parties of the law to be applied made after the conclusion of the contract shall not prejudice its formal validity under Article 9 or adversely affect the rights of third parties.

3. The fact that the parties have chosen a foreign law, whether or not accompanied by the choice of a foreign tribunal, shall not, where all the other elements relevant to the situation at the time of the choice are connected with one country only, prejudice the application of rules of the law of that country which cannot be derogated from by contract, hereinafter called mandatory rules'.

4. The existence and validity of the consent of the parties as to the choice of the applicable law shall be determined in accordance with the provisions of Articles 8, 9 and 11.

Article 4: Applicable law in the absence of choice

1. To the extent that the law applicable to the contract has not been chosen in accordance with Article 3, the contract shall be governed by the law of the country with which it is most closely connected. Nevertheless, a severable part of the contract which has a closer connection with another country may by way of exception be governed by the law of that other country.

2. Subject to the provisions of paragraph 5 of this Article, it shall be presumed that the contract is most closely connected with the country where the party who is to effect the performance which is characteristic of the contract has, at the time of conclusion of the contract, his habitual residence, or, in the case of a body corporate or unincorporate, its central administration. However, if the contract is entered into in the course of that party's trade or profession, that country shall be the country in which the principal place of business is situated or, where under the terms of the contract the performance is to be effected through a place of business other than the principal place of business, the country in which that other place of business is situated.

3. Notwithstanding the provisions of paragraph 2 of this Article, to the extent that the subject matter of the contract is a right in immovable property or a right to use immovable property it shall be presumed that the contract is most closely connected with the country where immovable property is situated.

4. A contract for the carriage of goods shall not be subject to the presumption in paragraph 2. In such a contract if the country in which, at the time the contract is concluded, the carrier has his principal place of business is also the country in which the place of loading or the place of discharge or the principal place of business of the consignor is situated, it shall be presumed that the contract is most closely connected with that country. In applying this paragraph single voyage charter-parties and other countries the main purpose of which is the carriage of goods shall be treated as contracts for the carriage of goods.

5. Paragraph 2 shall not apply if the characteristic performance cannot be determined, and the presumptions in paragraphs 2, 3 and 4 shall be disregarded if it appears from the circumstances as a whole that the contract is more closely connected with another country.

Convention on the International Sale of Goods (CISG)

Article 1

(1) This Convention applies to contracts of sale of goods between parties whose places of business are in different States:

(a) when the States are Contracting States; or

(b) when the rules of private international law lead to the application of the law of a Contracting State.

(2) The fact that the parties have their places of business in different States is to be disregarded whenever this fact does not appear either from the contract or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract.

(3) Neither the nationality of the parties nor the civil or commercial character of the parties or of the contract is to be taken into consideration in determining the application of this Convention.

Article 6

The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions.

Article 18

(1) A statement made by or other conduct of the offeree indicating assent to an offer is an acceptance. Silence or inactivity does not in itself amount to acceptance.

(2) An acceptance of an offer becomes effective at the moment the indication of assent reaches the offeror. An acceptance is not effective if the indication of assent does not reach the offeror within the time he has fixed or, if no time is fixed, within a reasonable time, due account being taken of the circumstances of the transaction, including the rapidity of the means of communication employed by the offeror. An oral offer must be accepted immediately unless the circumstances indicate otherwise.

(3) However, if, by virtue of the offer or as a result of practices which the parties have established between themselves or of usage, the offeree may indicate assent by performing an act, such as one relating to the dispatch of the goods or payment of the price, without notice to the offeror, the acceptance is effective at the moment the act is performed, provided that the act is performed within the period of time laid down in the preceding paragraph.

Article 19

(1) A reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer.

(2) However, a reply to an offer which purports to be an acceptance but contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance, unless the offeror, without undue delay, objects orally to the discrepancy or dispatches a notice to that effect. If he does not so object, the terms of the contract are the terms of the offer with the

modifications contained in the acceptance.

(3) Additional or different terms relating, among other things, to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes are considered to alter the terms of the offer materially.

Article 35

(1) The seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract.

(2) Except where the parties have agreed otherwise, the goods do not conform with the contract unless they:

(a) are fit for the purposes for which goods of the same description would ordinarily be used;

(b) are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgment;

(c) possess the qualities of goods which the seller has held out to the buyer as a sample or model;

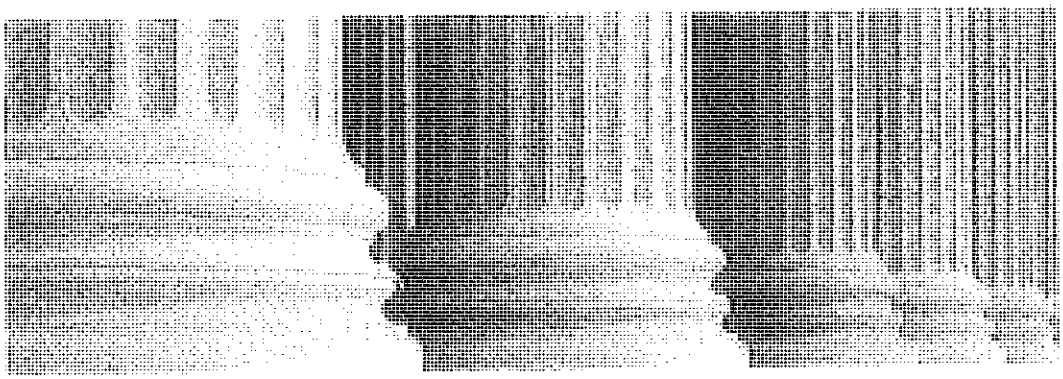
(d) are contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods.

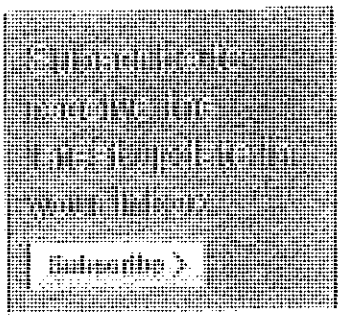
(3) The seller is not liable under subparagraphs (a) to (d) of the preceding paragraph for any lack of conformity of the goods if at the time of the conclusion of the contract the buyer knew or could not have been unaware of such lack of conformity.

Article 36

(1) The seller is liable in accordance with the contract and this Convention for any lack of conformity which exists at the time when the risk passes to the buyer, even though the lack of conformity becomes apparent only after that time.

(2) The seller is also liable for any lack of conformity which occurs after the time indicated in the preceding paragraph and which is due to a breach of any of his obligations, including a breach of any guarantee that for a period of time the goods will remain fit for their ordinary purpose or for some particular purpose or will retain specified qualities or characteristics.





JULY - AUGUST

CIF CONTRACTS IN INTERNATIONAL SALES OF GOODS

by Tariq Idais - t.idais@tamimi.com

A Cost, Insurance and Freight (CIF) contract is an agreement to sell goods at a price inclusive of the cost of the goods, insurance coverage and freight.

Article 141 of the UAE Commercial Transactions Law (Federal Law 18 of 1993) states: 'A CIF sale is one concluded against a lump sum price covering the price of the item sold, the maritime insurance charges and freight by vessel to the port of destination.'

This article explains the essential features of a CIF contract. A CIF contract requires the vendor to ship at the port of shipment the agreed goods in the underlying contract of sale, to procure a contract of carriage (bill of lading) under which the goods will be delivered to the agreed destination, to arrange for insurance which will be available for the benefit of the purchaser, to make out a commercial invoice and finally to tender these documents to the buyer who must be ready and willing to pay the price of the shipped goods. In such a case, the title of the goods may pass either on shipment or on tender of the documents. The risk generally passes on shipments or as from shipments, but possession does not pass until the documents which represent the goods are handed over in exchange for the price. As a result, the buyer, after receipt of the documents, can claim against the carrier for breach of the contract of carriage and against the underwriter for any loss covered by the policy.

Under a CIF contract, the purchaser is obliged to pay against the tender of a clean bill of lading that covers the goods contracted to be sold, an insurance policy and a commercial invoice that shows the price. The purchaser is obliged to pay against the tender of the documents notwithstanding of fact that the goods have been lost or damaged at sea after the shipment. In the event of loss, the purchaser must pay the price on tender of the documents and his remedies, if any, will be against the carrier as per the bill of lading or against the underwriter as per the insurance policy, but not against the vendor under the contract of sale. If the purchaser refuses to pay against the documents without any legitimate reason, he shall be liable to compensate the vendor for damage that may result, as per Article 150 of the Commercial Transactions Law.

English case law, which forms the basis for many international shipping contracts, has established that it is irrelevant whether both buyer and seller knew of the loss of the ship before the latter tendered the documents; the buyer must pay the price. Hence, the vendor can tender the documents even though he possesses, at the time of tender, actual

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knowledge of the loss of the ship or the goods. Consequently, in the event of loss, the purchaser will receive the documents rather than the goods for which he contracted. Even if the purchaser had already paid the price, he cannot demand its return. In addition, a vendor under a CIF contract for the sale of goods who has shipped the agreed goods under a clean bill of lading and obtained the proper documents, can tender those documents to the purchaser notwithstanding he knows at the time of such tender of the loss of the goods.

Under a CIF contract, the vendor performs his obligations by tendering the documents to the purchaser. He is not obliged to deliver the goods to the agreed destination but he is under a negative duty not to prevent the goods from being delivered to the purchaser at their destination. This might done by preventing the carrier from delivering them to the purchaser or by sending them to a different destination. However, if the contract contains a clause that imposes on the vendor an obligation to deliver the goods to the agreed destination, it is not considered as a CIF contract, even if the letters of 'CIF' appear in the contract. Not every contract which is expressed to be a CIF contract is such. Article 155 of the Commercial Transactions Law states that 'a contract which contains such conditions as will render the seller liable for the perishing of the goods after shipment, or makes the performance of the contract conditional on the safe arrival of the vessel, or which vests the buyer with an option to accept the goods according to the contract or according to the pro-forma delivered to him at the time of contracting, shall neither be a CIF nor a FOB sale, but shall be deemed to be a sale conditional upon delivery at the place of arrival.'

In a CIF contract, the documents which must be tendered by the vendor to the purchaser will include a bill of lading. However, the contract may stipulate for tender of a delivery order or give the vendor the option of tendering a delivery order. It has been recognised, since the English case of Re Denbigh Cowan & Co and R Atcherley & Co [1921] 90 LJKB 836, that the mere substitution of a delivery order for a bill of lading under the terms of the contracts does not impart any obligation to deliver the actual goods, so as to prevent the contract from being a true CIF contract. Nevertheless, in another English case, The Julia [1949] AC 293, a contract for the sale of rye 'CIF Antwerp' gave the seller the option of tendering bills of lading or delivery orders. The seller shipped the rye in bulk and tendered a delivery order in respect of a quantity smaller than the entire shipment. This order was directed to the seller's agent in Antwerp. Accordingly, it was held that the contract was not a CIF contract but one for the delivery of the goods in Antwerp. As the goods were not so delivered, there was a total failure of consideration. Here it can be said that if the seller in the Julia case had chosen to tender a bill of lading, he would have performed his obligations and it would have been a CIF contract.

Further, if a contract gives the purchaser the option of tendering documents or goods, it is not a CIF contract, so the seller is not bound to tender the documents. A true CIF contract does not give the seller this option; the seller must tender the documents and cannot perform by instead tendering goods alone.

Conclusion

In light of the above, it can be concluded that under a CIF contract the purchaser cannot refuse the documents and demand from the vendor the actual goods. Nor can the vendor withhold the documents and tender the goods. Furthermore, the performance of a CIF contract is fulfilled by delivery of the documents and not by the actual delivery of the goods by the vendor. Accordingly, it has been argued that a CIF contract is not a sale of goods but a sale of documents. As a result, the feature of an ordinary CIF contract is to be fulfilled by delivery of the documents and not by the actual physical delivery of the goods by the vendor. On the other hand, it could be argued that although under CIF contracts shipping documents are very important for the performance of these contracts, CIF contracts cannot be deemed as a sale of documents. Otherwise Book Two, Part Two, Chapter Two of the Commercial Transactions Law, which deals with the 'certain types of commercial sales' including CIF contracts, would not govern such contracts.

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History

About the middle of the nineteenth century, it was found that English traders engaged in transoceanic commerce quoting prices "c.i.f." the buyer's place of business-blanket figures covering invoice cost of the goods, freight charges to their destination, and the expense of insurance for the buyer's benefit while the goods were in transit. Mails travel faster than freight; and upon receipt of the shipping documents, the buyer acquired control over the goods, with the consequent ability to resell immediately, possibly months before their arrival. Payment against documents, the essential feature of a c.i.f. transaction, substan-tially reduced the credit risk of the seller; and risks of transportation, though not of fluctuation in the cost of freight and insurance, were avoided on the ground that the "property" passed to the buyer on ship-ment. Such a contract came before a court for the first time in 1861 ; and by 1872 its legal implications were well understood in England, where it has been litigated with much thoroughness.On the other hand, legal recognition of the contract dates from the late war, and the cases have been very few.

INTRODUCTION

THE c.i.f. contract is a comparative newcomer among the institutions' of the law merchant. Firmly established today as "an indispensable instrument of overseas trade," its use in trans-actions involving the sale and shipment of goods from one country to another is the rule rather than the exception. Few customs of merchants have had more far-reaching consequences on the con-duct of international commerce, or have played a more important part in the shaping of mercantile practice. The achievement how-ever has been largely one of the present century; for although the broad outlines of the contract have been familiar to merchants and to commercial lawyers for a much longer period, In Couturier v. Hastie, 8 Ex. 40 (1852), a contract for the sale of corn provided that it was to be shipped " free on board, and including freight and insurance to a safe port in the United Kingdom." In Ireland v. Livingston, L. R. 5 H. L. 395, 406 (1872), Blackburn, J., observed that " The terms at a price, 'to cover cost, freight, and insurance, payment by acceptance on receiving shipping documents,' are very usual, and are perfectly well understood in practice." One of the earliest French cases involving a c.i.f. contract appears to have been Ouvry c. England et Cie., 1862 Havre 2.255 (Imperial Court of Rouen). It remained for the tremendous world developments of the last thirty years to bring out its latent possibilities. Only since the first world war have problems arising from the use of such contracts engaged the attention of legal writers in the great commercial countries.

The words 'C.I.F.' stand for cost, insurance and freight. A CIF contract is a type of contract wherein the price includes cost, insurance and freight charges. Under a CIF contract the seller is required to insure the goods, deliver them to the shipping company, arrange for their affreightment and send the bill of lading and insurance policy together with the invoice and a certificate of origin to a bank. The documents are usually delivered by the bank against payment of seller since he continues to be the owner of goods until the buyer pays for them and obtains the documents. The property in the goods passes to the buyer on the delivery of documents. The buyer is equally protected as he is called upon to pay only against the documents and the moment he pays, he obtains the documents, which enable him to get delivery of the goods. If in

the meantime the goods are lost neither the buyer nor the seller is put to loss, whoever is the owner at the time of the loss can recover it from the insurer.
Under the CIF contact, the seller is required to deliver the goods on board of the vessel at the agreed port of delivery
According to the CIF contract, the seller has to bear all costs relating to the goods until delivery of the goods on board the vessel. However, under the CIF contract, the seller's duty to provide a contract of carriage and has to insure the goods under the insurance contract. Moreover, the insurance policy has to protect to the buyer. Otherwise, the seller commits to breach of the contract(2Hickox v Adams [1876] 34 L.T.404.)

. Under the English Law, there is no general rule to obtain an export licence. It depends on the contract, which the party, who has the best position to obtain it. According to Brandt &co. case is that, "..... both seller and buyer were British traders albeit that the buyer was securing goods from an overseas merchant so he has to apply for the export licence, because he alone knows full facts regarding the destination of the goods."(33 Brandt & co. v Morris &co. Ltd. [1917] 2 K.B. 784)

On the other hand, if the seller is in a better position than the buyer, he is responsible to provide a licence. Under the CIF contract, it is also seller's responsibility to provide an export licence.

CIF contracts are generally attractive to both the seller and the buyer.As far as the seller is concerned, he can charge a higher price taking into account the extra services that is obtaining shipping space and insurance he provides.His margin of profit in a CIF contract could be substationally higher than in an FoB contracts since he may be able to obtainreasonable rates for freight and insurance depending on the prevailing economic conditions. The seller usually gets paid for the goods before their arrival at the destination, since payment for the goodsbefore their arrival at the destinationsince payment for the goods in

CIF contracts often takes place when the documents are tendered to the buyer or to the bank in the event of a documentary credit arrangement between the seller and the buyer. However, it must be noted that payment does not always take place against tender of documents. The parties may have agreed to deferred payment credit.
The attractiveness of CIF contract as far as the buyer is concerned, is that he does not have to undertake the task of finding shipping space or insurance, which may be all the more difficult in a foreign country due to unfamiliarity with local business practices. The buyer could appoint an agent in the country of export to undertake the tasks of obtaining shipping space and insurance cover, but this assumes that the costsof an agent can be covered, or reliable and trustworthy agent can be found for a reasonable remuneration. The risk of any increases in transportation an insurance costs also remains with the seller. Further, the goods do not have to be paid for until the relevant documents are tendered. Once the necessary documents are acquired he is able to sell the goods to a third party on the strength of the documents. The buyer also acquires the right to sue the carrier, under the Carriage of Goods by sea act 1992, with the transfer of the bill of lading.

CIF contracts are undoubtedly the most important of the contracts based on the carriage of goods by sea.

• The classical judicial definition of a CIF contract was given by Lord Atkinson in Johnson v Taylor Bros. [1920] AC 144 at 145 [1920] AC 144 at 145 [Lord Atkinson]
• The vendor ...is bound by his contract to do six things. First, to make out an invoice of the goods sold. Secondly, to ship at the port of shipment goods of the contract description. Third, to procure a contract of affreightment under which the goods will be delivered at the destination contemplated by the contract. Fourth, to arrange for an insurance upon the terms current in the trade which will be available for the benefit of the buyer. Fifthly, with all reasonable despatch to send forward and tender to the buyer three 'shipping documents', namely, the invoice, bill of lading and policy of insurance, delivery of which to the buyer is symbolical of delivery of the goods purchased.
In Smyth & Co. Ltd v Bailey, Son [1940] 3 All ER 60 [Per Lord Wright]

"The initials [CIF] indicates that the price is to include cost, insurance and freight. It is a type of contract which is more widely and more frequently in use than any other contracts used for the purposes of seaborne commerce."

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The Julia [1949] AC 293 [Lord Porter]

The obligations imposed on a seller under a CIF contract include the tender of a BL covering the goods contracted to be sold, coupled with an insurance policy in the normal fonn and accompanied by nn invoice which shows the price. Against tender of these documents the purchaser must pay the price. ... The buyer, after receipt of the documents, can claim against the ship for breach of the contract of carriage and against the underwritor for any loss covered by the policy. Although the parties to the contract may state that it is on CIF terms, it is not conclusive. In The Julia, Lord Porter said:"The true effect of all its terms must be taken into account, though, of course, the description CIF must not be ignored entirely".(foot note)

In Arnold Karberg & Co. v Blythe Green Jourdain & Co. [1915] 2 KB 379 at , Scrutton J stated: "A CIF sale is not a sale of goods, but a sale of documents relating to goods." There are, however, factors that militate against this rule One important objection is the fact that even if the CIF seller has tendered valid documents, the buyer will still have the right to reject the actual goods if they do not conform to the requirements of the contract.Moreover, the dictum of Scrutton J was expressly dissented from by the Court of Appeal in the same case.
In Arnold g Karberg v Blytho [1916] 1 KB 495 at 510(CA) Bankes L J "I am not able to agree with that view of the contract, that it is a sale of documents relating to goods. I prefer to look upon it as "a contract for the sale of goods to be performed by the delivery of documents".

In Arnold Karberg [1916] 1 KB 495 at 514 [Warrington L J]

The contracts are contracts for the sale and purchase of goods, but they are contracts which may be performed in a particular manner... that the delivery of the goods my be effected first by placing them on board ship, and secondly by transferring to the purchaser the shipping documents. Documents play a central role Documents play a central role In any case, we have to admit that documents play a central role in the CIF contract (that is why some writers call it as a 'documentary sale') and goods are in one sense secondary. The seller does not undertake that the goods will arrive, but merely that the buyer will have possession of documents, conferring on him:

(a) The right to immediate possession of the goods from tho carrier on arrival at the port of destination and the benefit of a contractual claim against the carrier; and (b) The benefit of a contractual claim against the insurers.

Duties of the seller under C.I.F contract
(1) To make a contract of carriage for the goods to the named port of destination.
(2) To insure the goods for the contractual voyage.
(3) To provide the buyer with a commercial invoice, a clean bill of lading and an insurance policy
(4) To ship the goods conforming to the contract

· The seller is not himself obliged to ship the goods unless the contract requires. He may instead purchase the goods afloat and appropriato them to the contract.
· Subject to the terms of the contract, a CIF sellerhas the following duties in respect of shipment:

(I) The seller must ship or appropriate goods on a ship which departed from the port of shipment on the date or within the period of shipping specified in the contract. Failure to do so is a repudiatory breach. In Ashmore v Cox [1899] 1 QB 436.

(ii) The ship must be bound for the agreed port of destination and following the contractual or if none the usual or reasonable route.

(iii) Unless there is provision for 'deviation', the seller is in breach if the ship in fact deviates. The buyer could reject the goods on this basis, and the seller's recourse would be against the carrier provided that the contract of carriage had provided deviation.

The seller is under an obligation to deliver the goods in accordance with the terms of the contract of sale under section 27 of sales of goods act 1979, he should deliver the goods to the right

place on right time Section 32(1)and section 29(3) sale of goods act 1979 respectively.

Where the seller is bound to send the goods to the buyer but no time is fixed in such situation the seller is required to send the goods in reasonable time period.(section 29 (3)). Furthermore there is a general duty owed by the seller to the buyer that is to deliver the goods of the description mentioned by the buyer under Section 13(1) sale of goods act 1979, moreover there is an implied term that the goods will correspond with the decription. In Ashington Piggeries v hill [1972] AC 441, HL manufacturor of animal feed bought one of the ingridiants from a Norwegian supplier. The contract was for "Norwegian herring meal, fair average quality of the season". The goods sipplied were contaminated .

The HOL held that "fair average quality of the season" was not part of the contract description for the purposes of section 13. In international sales, stipulation as to the time and place of shipment are considered part of the description (Bowes v Shand) (1877) 2 App

There is also an express term when it come to the description of the goods, in Cehave v Bremer [1976] QB 44 here the issue was of the not good condition of the citrus pulp pellets. Moroovor the sale of goods act 1979 also provides implied terms. Under section 14(2) there is a basic obligation that the goods must be fit for common purpose or of satisfactory quality (14(2A)) in other words goods are of satisfactory quality if they meet the standerd that a reasonable person would regard as satisfactory, tacking account of any description of the goods, the price and all the other relevant circumstances. (Jones v Just) (1868) LR 3QB 197,··· Mash & Murrell v Emanuel [1961] 1 ALL ER 485.

There is an implied term that the goods must be of more specific condition mentioned by the buyer that is fitness for the buyers actual purpose (section 14(3) Sales of goods act 1979) (Ashington Piggeries v hill [1972] AC 441)

Documents in CIF contracts

The term CIF indicates the three documents central to such a sale and these are: (i) A commercial invoice, representing the cost element (sales contract); (ii) An insurance policy, representing the insurance element (insurance contract); and (iii) A bill of lading, representing the freight element (contract of carriage).
A bill of lading is a document issued by or on behalf of the actual sea-carrier of goods to the person (usually called the shipper) with whom he has contracted to transport the goods.

• A bill of lading has three functions:

(i) A receipt for the goods shipped;
(ii) Evidence of the contract of carriage; and
(iii) A document of title.

The bill must be a shipped bill of lading
• In the absence of agreement to the contrary, the bill of lading to be tendered under a CIF contract must be a 'shipped bill of lading
(B) The bill must be clean on its face

• The bill of lading must be clean and not clausod or fouled. A clean bill of lading is one which bears no superimposed clauses declaring a defective condition of the goods or packaging.
(c) The bill must cover the entire voyage

• The CIF buyer is entitled to continuous documentary cover throughout the voyage. The BL must cover the entirety of the transit of goods; any break in cover might mean that the buyer may be left without a right of suit against an errant carrier.

In Landauer & Co. v Craven [1912] 2 KB 94.

• A CIF London sale of hemp involved shipment at Manila. It was the trade practice to transship at Hong Kong. The bill of lading tendered, however, did not cover the Manila to Hong Kong leg of the journey and was therefore held to be defective. The Landauer case was followed in Hansson case where it was held that in such a case the buyer may repudiate the contract.
In Hansson v Hamel & Horley Ltd [1922] 2 AC 36

• The cargo of cod guano was to be shipped CIF Kobe or Yokohama from Norway. There were however no ships sailing directly from Norway to Japan. Transshipment had to be made and the goods were placed on a local ship to be carried to Hamburg before transshipped to Japan. The bill of lading issued at the port of Hamburg made no reference to the leg between Norway and Hamburg. Held: The bill of lading in this case afforded the buyer no protection in regard to the first voyage. Although labeled a 'through bill of lading', it was not really so. The buyer was left with a considerable lacuna in the documentary cover to which the contract entitled him. Therefore, he was entitled to repudiate the contract.
(D) The bill must be freely Transferable (negotiable)

• Subjects to the terms of the contract, the bill must be made "to order" (negotiable), so as to entitle the consignor to transfer the rights to a sub-buyer or any other person. • However, it is possible for the sale agreement to envisage the production of "straight consigned bill" (non-negotiable). This happens where the consignee of the goods has no intention to transfer his rights to any third party.

(E) The bill must be valid and effective
• The bill would not be effective if it is not transferable on its face as, when e.g. it is marked "Not transferable".
• A bill is also not effective if the contract it represents is for any reason void.

Arnold Karberg v Blyth [1916] 1 KB 495
Goods were sold CIF Naples and shipped on a German ship. Though both seller and buyer were British the contract of carriage became void for illegality on the outbreak of war in 1914. The tender of the bill of lading was therefore not valid and effective.

(F) Other substitutes
• The parties to CIF contract may agree that some other documents, such as sea waybill or delivery order shall replace the bill of lading.
• (1) A Sea waybill – is a document which contains an undertaking by 'the carrier' to the shipper to deliver to the person who is for the time being identified as being entitled to delivery. A sea waybill is a receipt for the goods but is non-transferable and is not a document of title.
• (2) A ship's delivery order – Sometimes it is not possible for the seller to procure bill of lading, especially when he has shipped a large consignment of goods. Normally, there will be just one bill of lading for the bulk cargo. It cannot be divided up. The seller must use delivery order as an alternative.

• A delivery order is an order in writing given by an owner of goods (seller) to a person in possession of them, e.g. as carrier or warehouseman directing the latter to deliver the goods to the person named in the order.

Tender of the documents
• The shipping documents are extremely important to the seller who relies on them to be paid; and for the buyer they allow him to claim the goods and to have property in the goods.
• Where the buyer relies on his bank to settle the invoice, the documents are equally important for the bank to serve as security for money advanced.
• It is therefore imperative that the seller ensures that the documents as tendered conform to the contractual requirements in order to be paid.

Must be tendered within time limit or as soon as possible
If the contract expresses or implies any time limit for tender, the buyer is entitled to reject the documents if they are not tendered within this limit. If there is no time limit in the contract, the seller must tender the shipping documents to the buyer 'as soon as possible'

TWO RIGHTS OF REJECTION REJECTION

• Since documents are central to a CIF sale, the buyer has two rights of rejection for non-conformity:
(1) The right to reject the documents;
And
(2) The right to reject the goods

In Kwei Tek Tek Chao v British Traders & Shippers Ltd. [1954] 2 QB 459 Lord Devlin
"There is a right to reject the documents and a right to reject the goods and the two things are quite distinct. ...So far as the goods are concerned a CIF seller must put on board at the port of shipment goods in conformity with the contract description. He must also forward documents and those documents must comply with the contract.... A right to reject is merely a particular form of the right to rescind."
• Held: The two rights of rejection being distinct in a CIF contract, the disposal of the goods by the buyer did not result in the loss of their right to reject the documents as not being in accordance with the contract and they were entitled to claim damages for being prevented from rejecting the documents.

Rejection of goods

• If the goods are not in conformity with the contract the buyer may reject the goods. • It does not mean that the buyer must always reject the non-conforming goods. He has the option. He may accept them and sue for damages as in the case of breach of warranty. The normal measure of damages will apply, namely, the difference between the contractual value of the goods and their actual value as at the date of delivery.

Rejection of documents

The seller must tender to the buyer documents stipulated by the contract. If the documents do not conform to the contract then the buyer is entitled to reject those documents and the seller will be in repudiatory breach of contract, subject to the seller's ability to re-tender conforming documents within the time allowed by the contract. (Borrowman, Phillips & Co. v Free & Hollis (1878) 4 QBD 500.)
The relevant documents must be tendered by the seller within the time stipulated by the contract or, if no time is stipulated, within a reasonable time. (Toepfer v Lenersan- Poortman [1980] 1 Lloyd's L.R. 143.)

A CIF contract stipulated, "Documents to be tendered not later than 20 days after issuance of the BL". BLs were issued on 11 December 1974. The documents were tendered in February 1975 but were rejected by the buyers as being out of time.

Held: they were entitled to do so in view of the express clause. The buyer must be aware that the right to reject the documents is lost when he or the bank takes up the documents, even if inaccurate, and pays against them without objection.

attachment 7

OCEAN TRAMP TANKERS CORP. v. V/O SOVFRACHT (THE EUGENIA)

Court of Appeal, 1963.
[1964] 1 All E.R. 161.

LORD DENNING, M.R.: On July 26, 1956, the Government of Egypt nationalised the Suez Canal. Soon afterwards the United Kingdom and France began to build up military forces in Cyprus. It was obvious to all mercantile men that English and French forces might be sent to seize the canal, and that this might lead to it becoming impassable to traffic. It was in this atmosphere that negotiations took place for the chartering of the vessel Eugenia. She flew the Liberian flag. The proposal was to charter her to a Russian State Trading Corporation, called V/O Sovfracht. The Russians wanted her to carry iron and steel from the Black Sea to India. The negotiations took place in London between the agents of the parties from Aug. 29 to Sept. 9, 1956. The agents of both sides realised that there was a risk that the Suez Canal might be closed, and each agent suggested terms to meet the possibility. But they came to no agreement. And, in the end, they concluded the bargain on the terms of the Baltime Charter without any express clause to deal with the matter. That meant that, if the canal were to be closed, they would "leave it to the lawyers to sort out". The charterparty was concluded on Sept. 9, 1956, but was dated Sept. 8, 1956. The vessel was then at Genoa. By the charterparty, she was let to the charterers for a "trip out to India via Black Sea". It was a time-charter in this sense, that the charterers had to pay hire for the vessel at a fixed rate per month from the time of the vessel's delivery until her re-delivery. The charterers had, however, no wide limits at their disposal. They could not direct her anywhere they wished, but only within the following limits "Genoa via Black Sea thence to India". The charter included the printed war clause without modification. It was in these terms:

> 21(A) The vessel unless the consent of the owners be first obtained not to be ordered nor continue to any place or on any voyage nor be used on any service which will bring her within a zone which is dangerous as the result of any actual or threatened act of war, war, hostilities, warlike operations * * * (B) Should the vessel approach or be brought or ordered within such zone * * * (i) the owners to be entitled from time to time to insure their interests in the vessel * * * on such terms as they shall think fit, the charterers to make a refund to the owners of the premium on demand; and (ii) * * * hire to be paid for all time lost * * *

The Eugenia was delivered at Genoa on Sept. 20, 1956. The charterers ordered her to proceed first to Novorossik and then to Odessa (both on the Black Sea) to load. A few days later the charterers sub-chartered her to two other Russian State Trading Corporations who agreed to pay, by way of freight, whatever the charterers had to pay the owners, plus five per cent. The two sub-charterers loaded her with iron and steel goods (joists, girders, etc.). The master signed bills of lading. These made the cargo deliverable to shipper's order at Vizagapatam and Madras (both on the East Coast of India), freight pre-paid. On Oct. 25, 1956, the Eugenia sailed from Odessa. The customary route at this time to India was still by the Suez Canal. The charterers told the master to cable their agent in Port Said when he was within twenty-four hours' sailing of Port Said. He did so. The Eugenia arrived off Port Said at 11.00 a.m. on Oct. 30, 1956, and entered port at 4.30 p.m. At that time Egyptian anti-aircraft guns were in action against hostile reconnaissance planes. It was quite apparent that Port Said and the Suez Canal were zones which were "dangerous" within this war clause. Indeed, on the morning of Oct. 30, the owners' London agent called on the charterers' London agent to take action under the war clause to ensure that the ship should not enter Port Said or the Suez Canal. The charterers' agent in London, however, took no action. He let things be. But at Port Said the charterers' agent had taken action. He boarded the vessel and stated that he had made arrangements for the vessel to enter the canal the next morning. In consequence, the vessel entered the canal at 9.35 a.m. on Oct. 31 and proceeded in convoy fifty-eight kilometres south. Then the convoy tied up to allow a northbound convoy to pass. Soon afterwards English and French aircraft began to drop bombs on Egyptian targets. That evening the Egyptian Government blocked the canal by sinking ships at Port Said and Suez and in the canal and by blowing up bridges. So the Eugenia was trapped where she was. On Nov. 7, 1956, there was a cease-fire. Early in January, 1957, a passage was cleared northwards. But there was no hope of southward passage for a long time. So the Eugenia started to move north. She anchored in Port Said Roads on Jan. 8, 1957. On Jan. 11, 1957, she went to Alexandria and arrived there on Jan. 12, 1957.

Meanwhile, however, the charterers, on Jan. 4, 1957, claimed that the charterparty had been frustrated by the blocking of the canal. The owners denied that it had been frustrated and treated the charterers' conduct as a repudiation. So on either view the charter was at an end. On Jan. 15, 1957, the owners entered into a new charterparty direct with the original sub-charterers. This new charter was an ordinary Gencon voyage charter by which the owners agreed to carry the cargo already on board via the Cape of Good Hope to India. The freight was very high, for the freight market had risen rapidly; so much so, that the owners did well out of the new charter. Indeed, they might not have suffered any loss were it not for the long spell during which the ship was trapped in the canal. The owners wish to claim hire so as to cover the period in the canal, but the charterers dispute it. Hence their claim that the charter was frustrated. On Jan. 20,

1957, under this new charterparty, the Eugenia left Alexandria and went round the Cape. She arrived at Vizagapatam about Apr. 5, 1957, unloaded part of her cargo there, then went to Madras and unloaded the rest there, and finished discharging on May 22, 1957. The southern exit from the canal was not cleared until April, 1957. So the Eugenia arrived at her destination earlier by going northward out of the canal than if she had waited to get out by the southern exit.

Such being the facts, the first question is whether the charterers, by allowing the Eugenia to go into the canal on Oct. 31, 1956, were in breach of the war clause. Both the arbitrator and the judge held that they were in breach. * * * I find myself in complete agreement with the arbitrator and the judge on these points.

The second question is whether the charterparty was frustrated by what took place. The arbitrator has held that it was not. The judge has held that it was. Which is right? One thing that is obvious is that the charterers cannot rely on the fact that the Eugenia was trapped in the canal; for that was their own fault. They were in breach of the war clause in entering it. They cannot rely on a self-induced frustration. But they seek to rely on the fact that the canal itself was blocked. They assert that, even if the Eugenia had never gone into the canal but had stayed outside (in which case she would not have been in breach of the war clause), nevertheless she would still have had to go round by the Cape; and that, they say, brings about a frustration, for it makes the venture fundamentally different from what they contracted for. The judge has accepted this view. He has held that, on Nov. 16, 1956, the charterparty was frustrated. The reason for his taking Nov. 16, 1956, was this: Prior to Nov. 16, 1956, mercantile men (even if she had stayed outside) would not have formed any conclusion whether the obstructions in the canal were other than temporary. There was insufficient information available to form a judgment. On Nov. 16, 1956, mercantile men would conclude that the blockage of the southern end would last till March or April, 1957; so that, by that time, it would be clear that the only thing to do (if the ship had never entered the canal) would be to go round the Cape. The judge said:

> I hold that the adventure, involving a voyage round the Cape, is basically or fundamentally different from the adventure involving a voyage via the Suez Canal.

So he held that the contract was frustrated. He was comforted to find that, in *Société Franco Tunisienne D'Armement* v. *Sidermar S.P.A.*, PEARSON, J., came to a similar conclusion. I must confess that I find it difficult to apply the doctrine of frustration to a hypothetical situation, that is, to treat this vessel as if she had never entered the canal and then ask whether the charter was frustrated. The doctrine should be applied to the facts as they really are. But I will swallow this difficulty and ask myself what would be the position if the vessel had never entered the canal but stayed at Port Said. Would the contract be frustrated? This means that, once again, we have had to consider the authorities on this vexed topic of

frustration. But I think that the position is now reasonably clear. It is simply this: If it should happen, in the course of carrying out a contract, that a fundamentally different situation arises for which the parties made no provision—so much so that it would not be just in the new situation to hold them bound to its terms—then the contract is at an end.

It was originally said that the doctrine of frustration was based on an implied term. In short, that the parties, if they had foreseen the new situation, would have said to one another: "If that happens, of course, it is all over between us". But the theory of an implied term has now been discarded by everyone, or nearly everyone, for the simple reason that it does not represent the truth. The parties would not have said: "It is all over between us". They would have differed about what was to happen. Each would have sought to insert reservations or qualifications of one kind or another. Take this very case. The parties realised that the canal might become impassable. They tried to agree on a clause to provide for the contingency. But they failed to agree. So there is no room for an implied term.

It has frequently been said that the doctrine of frustration only applies when the new situation is "unforeseen" or "unexpected" or "uncontemplated", as if that were an essential feature. But it is not so. It is not so much that it is "unexpected", but rather that the parties have made no provision for it in their contract. The point about it, however, is this: If the parties did not foresee anything of the kind happening, you can readily infer that they have made no provision for it. Whereas, if they did foresee it, you would expect them to make provision for it. But cases have occurred where the parties have foreseen the danger ahead, and yet made no provision for it in the contract. Such was the case in the Spanish Civil War when a ship was let on charter to the Republican Government. The purpose was to evacuate refugees. The parties foresaw that she might be seized by the Nationalists. But they made no provision for it in their contract. Yet, when she was seized, the contract was frustrated. So, here, the parties foresaw that the canal might become impassable. It was the very thing that they feared. But they made no provision for it. So the doctrine may still apply, if it be a proper case for it.

We are thus left with the simple test that a situation must arise which renders performance of the contract "a thing radically different from that which was undertaken by the contract". To see if the doctrine applies, you have first to construe the contract and see whether the parties have themselves provided for the situation that has arisen. If they have provided for it, the contract must govern. There is no frustration. If they have not provided for it, then you have to compare the new situation with the old situation for which they did provide. Then you must see how different it is. The fact that it has become more onerous or more expensive for one party than he thought is not sufficient to bring about a frustration. It must be more than merely more onerous or more expensive. It must be positively unjust to hold the parties bound. It is often difficult to draw the

line. But it must be done, and it is for the courts to do it as a matter of law.

Applying these principles to this case, I have come to the conclusion that the blockage of the canal did not bring about a "fundamentally different situation" such as to frustrate the venture. My reasons are these: (i) The venture was the *whole* trip from delivery at Genoa, out to the Black Sea, there load cargo, thence to India, unload cargo, and re-delivery. The time for this vessel from Odessa to Vizagapatam via the Suez Canal would be twenty-six days, and via the Cape fifty-six days. But that is not the right comparison. You have to take the whole venture from delivery at Genoa to re-delivery at Madras. We were told that the time for the whole venture via the Suez Canal would be 108 days, and via the Cape 138 days. The difference over the whole voyage is not so radical as to produce a frustration. (ii) The cargo was iron and steel goods which would not be adversely affected by the longer voyage, and there was no special reason for early arrival. The vessel and crew were at all times fit and sufficient to proceed via the Cape. (iii) The cargo was loaded on board at the time of the blockage of the canal. If the contract was frustrated, it would mean, I suppose, that the ship could throw up the charter and unload the cargo wherever she was, without any breach of contract. (iv) The voyage round the Cape made no great difference except that it took a good deal longer and was more expensive for the charterers than a voyage through the canal.

attachment 8

AMERICAN BELL INT'L., INC. v. ISLAMIC REPUBLIC OF IRAN

United States District Court, Southern District of New York, 1979.
474 F.Supp. 420.

MACMAHON, DISTRICT JUDGE.

Plaintiff American Bell International Inc. ("Bell") moves for a preliminary injunction enjoining defendant Manufacturers Hanover Trust Company ("Manufacturers") from making any payment under its Letter of Credit No. SC 170027 to defendants the Islamic Republic of Iran or Bank Iranshahr or their agents, instrumentalities, successors, employees and assigns. We held an evidentiary hearing and heard oral argument on August 3, 1979. The following facts appear from the evidence presented:

The action arises from the recent revolution in Iran and its impact upon contracts made with the ousted Imperial Government of Iran and upon banking arrangements incident to such contracts. Bell, a wholly-owned subsidiary of American Telephone & Telegraph Co. ("AT & T"), made a contract on July 23, 1978 (the "Contract") with the Imperial Government of Iran—Ministry of War ("Imperial Government") to provide consulting services and equipment to the Imperial Government as part of a program to improve Iran's international communications system.

The Contract provides a complex mechanism for payment to Bell totalling approximately $280,000,000, including a down payment of $38,800,000. The Imperial Government had the right to demand return of the down payment at any time. The amount so callable, however, was to be reduced by 20% of the amounts invoiced by Bell to which the Imperial Government did not object. Bell's liability for return of the down payment was reduced by application of this mechanism as the Contract was performed, with the result that approximately $30,200,000 of the down payment now remains callable.

In order to secure the return of the down payment on demand, Bell was required to establish an unconditional and irrevocable Letter of Guaranty, to be issued by Bank Iranshahr in the amount of $38,800,000 in favor of the Imperial Government. The Contract provides that it is to be governed by the laws of Iran and that all disputes arising under it are to be resolved by the Iranian courts.

Bell obtained a Letter of Guaranty from Bank Iranshahr. In turn, as required by Bank Iranshahr, Bell obtained a standby Letter of Credit, No. SC 170027, issued by Manufacturers in favor of Bank Iranshahr in the amount of $38,800,000 to secure reimbursement to Bank Iranshahr should

it be required to pay the Imperial Government under its Letter of Guaranty.

The standby Letter of Credit provided for payment by Manufacturers to Bank Iranshahr upon receipt of:

> Your [Bank Iranshahr's] dated statement purportedly signed by an officer indicating name and title or your Tested Telex Reading: (A) Referring Manufacturers Hanover Trust Co. Credit No. SC170027, the amount of our claim $ represents funds due us as we have received a written request from the Imperial Government of Iran Ministry of War to pay them the sum of under our Guarantee No. issued for the account of American Bell International Ine. covering advance payment under Contract No. 138 dated July 23, 1978 and such payment has been made by us * * *.

In the application for the Letter of Credit, Bell agreed—guaranteed by AT & T—immediately to reimburse Manufacturers for all amounts paid by Manufacturers to Bank Iranshahr pursuant to the Letter of Credit.

Bell commenced performance of its Contract with the Imperial Government. It provided certain services and equipment to update Iran's communications system and submitted a number of invoices, some of which were paid.

In late 1978 and early 1979, Iran was wreaked with revolutionary turmoil culminating in the overthrow of the Iranian government and its replacement by the Islamic Republic. In the wake of this upheaval, Bell was left with substantial unpaid invoices and claims under the Contract and ceased its performance in January 1979. Bell claims that the Contract was breached by the Imperial Government, as well as repudiated by the Islamic Republic, in that it is owed substantial sums for services rendered under the Contract and its termination provisions.

* * *

On July 25 and 29, 1979, Manufacturers received demands by Tested Telex from Bank Iranshahr for payment of $30,220,724 under the Letter of Credit, the remaining balance of the down payment. Asserting that the demand did not conform with the Letter of Credit, Manufacturers declined payment and so informed Bank Iranshahr. Informed of this, Bell responded by filing this action and an application by way of order to show cause for a temporary restraining order bringing on this motion for a preliminary injunction. Following argument, we granted a temporary restraining order on July 29 enjoining Manufacturers from making any payment to Bank Iranshahr until forty-eight hours after Manufacturers notified Bell of the receipt of a conforming demand, and this order has been extended pending decision of this motion.

On August 1, 1979, Manufacturers notified Bell that it had received a conforming demand from Bank Iranshahr. At the request of the parties, the court held an evidentiary hearing on August 3 on this motion for a preliminary injunction.

CRITERIA FOR PRELIMINARY INJUNCTIONS

The current criteria in this circuit for determining whether to grant the extraordinary remedy of a preliminary injunction are set forth in *Caulfield v. Board of Education*, 583 F.2d 605, 610 (2d Cir.1978):

> [T]here must be a showing of possible irreparable injury *and* either (1) probable success on the merits *or* (2) sufficiently serious questions going to the merits to make them a fair ground for litigation *and* a balance of hardships tipping decidedly toward the party requesting the preliminary relief.

We are not persuaded that the plaintiff has met the criteria and therefore deny the motion.

A. Irreparable Injury

Plaintiff has failed to show that irreparable injury may possibly ensue if a preliminary injunction is denied. Bell does not even claim, much less show, that it lacks an adequate remedy at law if Manufacturers makes a payment to Bank Iranshahr in violation of the Letter of Credit. It is too clear for argument that a suit for money damages could be based on any such violation, and surely Manufacturers would be able to pay any money judgment against it.

Bell falls back on a contention that it is without any effective remedy unless it can restrain payment. This contention is based on the fact that it agreed to be bound by the laws of Iran and to submit resolution of any disputes under the Contract to the courts of Iran. Bell claims that it now has no meaningful access to those courts.

There is credible evidence that the Islamic Republic is xenophobic and anti-American and that it has no regard for consulting service contracts such as the one here. Although Bell has made no effort to invoke the aid of the Iranian courts, we think the current situation in Iran, as shown by the evidence, warrants the conclusion that an attempt by Bell to resort to those courts would be futile. * * * However, Bell has not demonstrated that it is without adequate remedy in this court against the Iranian defendants under the Sovereign Immunity Act which it invokes in this very case.

Accordingly, we conclude that Bell has failed to demonstrate irreparable injury.

B. Probable Success on the Merits

Even assuming that plaintiff has shown possible irreparable injury, it has failed to show probable success on the merits. * * *

* * * [B]oth the Uniform Commercial Code of New York, which the parties concede governs here, and the courts state that payment is enjoinable where a germane document is forged or fraudulent or there is "fraud in the transaction." N.Y.U.C.C. [§ 5–109(a)]. Bell does not contend

that any documents are fraudulent by virtue of misstatements or omissions. Instead, it argues there is "fraud in the transaction."

The parties disagree over the scope to be given as a matter of law to the term "transaction." Manufacturers, citing voluminous authorities, argues that the term refers only to the Letter of Credit transaction, not to the underlying commercial transaction or to the totality of dealings among the banks, the Iranian government and Bell. On this view of the law, Bell must fail to establish a probability of success, for it does not claim that the Imperial Government or Bank Iranshahr induced Manufacturers to extend the Letter by lies or half-truths, that the Letter contained any false representations by the Imperial Government or Bank Iranshahr, or that they intended misdeeds with it. Nor does Bell claim that the demand contains any misstatements.

Bell argues, citing equally voluminous authorities, that the term "transaction" refers to the totality of circumstances. On this view, Bell has some chance of success on the merits, for a court can consider Bell's allegations that the Government of Iran's behavior in connection with the consulting contract suffices to make its demand on the Letter of Guaranty fraudulent and that the ensuing demand on the Letter of Credit by Bank Iranshahr is tainted with the fraud.

There is some question whether these divergent understandings of the law are wholly incompatible since it would seem impossible to keep the Letter of Credit transaction conceptually distiuct. A demand which facially conforms to the Letter of Credit and which contains no misstatements may, nevertheless, be considered fraudulent if made with the goal of mulcting the party who caused the Letter of Credit to be issued. Be that as it may, we need not decide this thorny issue of law. For, even on the construction most favorable to Bell, we find that success on the merits is not probable. Many of the facts alleged, even if proven, would not constitute fraud. As to others, the proof is insufficient to indicate a probability of success on the merits.

* * * Bell asserts that (1) both the old and new Governments failed to approve invoices for services fully performed; (2) both failed to fund contracted-for independent Letters of Credit in Bell's favor; (3) the new Government has taken steps to renounce altogether its obligations under the Contract; (4) the new Government has made it impossible to assert contract rights in Iranian courts; and (5) the new Government has caused Bank Iranshahr to demand payment on the Manufacturers Letter of Credit, thus asserting rights in a transaction it has otherwise repudiated.
* * *

As to contention (4), it is not immediately apparent how denial of Bell's opportunity to assert rights under the Contract makes a demand on an independent letter of credit fraudulent.

Contentions (1), (2), (3) and the latter part of (5) all state essentially the same proposition—that the Government of Iran is currently repudiat-

ing all its contractual obligations with American companies, including those with Bell. Again, the evidence on this point is uncompelling.

Bell points to (1) an intragovernmental order of July 2, 1979 ordering the termination of Iran's contract with Bell, and (2) hearsay discussions between Bell's president and Iranian officials to the effect that Iran would not pay on the Contract until it had determined whether the services under it had benefited the country. * * * Manufacturers, for its part, points to a public statement in the Wall Street Journal of July 16, 1979, under the name of the present Iranian Government, to the effect that Iran intends to honor all legitimate contracts. * * * Taken together, this evidence does not suggest that Iran has finally and irrevocably decided to repudiate the Bell contract. It suggests equally that Iran is still considering the question whether to perform that contract.

Even if we accept the proposition that the evidence does show repudiation, plaintiff is still far from demonstrating the kind of evil intent necessary to support a claim of fraud. Surely, plaintiff cannot contend that every party who breaches or repudiates his contract is for that reason culpable of fraud. The law of contract damages is adequate to repay the economic harm caused by repudiation, and the law presumes that one who repudiates has done so because of a calculation that such damages are cheaper than performance. Absent any showing that Iran would refuse to pay damages upon a contract action here or in Iran, much less a showing that Bell has even attempted to obtain such a remedy, the evidence is ambivalent as to whether the purported repudiation results from non-fraudulent economic calculation or from fraudulent intent to mulct Bell.

Plaintiff's argument requires us to presume bad faith on the part of the Iranian government. It requires us further to hold that that government may not rely on the plain terms of the consulting contract and the Letter of Credit arrangements with Bank Iranshahr and Manufacturers providing for immediate repayment of the down payment upon demand, without regard to cause. On the evidence before us, fraud is no more inferable than an economically rational decision by the government to recoup its down payment, as it is entitled to do under the consulting contract and still dispute its liabilities under that Contract.

While fraud in the transaction is doubtless a possibility, plaintiff has not shown it to be a probability and thus fails to satisfy this branch of the *Caulfield* test.

C. Serious Questions and Balance of Hardships

If plaintiff fails to demonstrate probable success, he may still obtain relief by showing, in addition to the possibility of irreparable injury, both (1) sufficiently serious questions going to the merits to make them a fair ground for litigation, and (2) a balance of hardships tipping decidedly toward plaintiff. * * * Both Bell and Manufacturers appear to concede the existence of serious questions, and the complexity and novelty of this matter lead us to find they exist. Nevertheless, we hold that plaintiff is

not entitled to relief under this branch of the *Caulfield* test because the balance of hardships does not tip *decidedly* toward Bell, if indeed it tips that way at all.

To be sure, Bell faces substantial hardships upon denial of its motion. Should Manufacturers pay the demand, Bell will immediately become liable to Manufacturers for $30.2 million, with no assurance of recouping those funds from Iran for the services performed. While counsel represented in graphic detail the other losses Bell faces at the hands of the current Iranian government, these would flow regardless of whether we ordered the relief sought. The hardship imposed from a denial of relief is limited to the admittedly substantial sum of $30.2 million.

But Manufacturers would face at least as great a loss, and perhaps a greater one, were we to grant relief. Upon Manufacturers' failure to pay, Bank Iranshahr could initiate a suit on the Letter of Credit and attach $30.2 million of Manufacturers' assets in Iran. In addition, it could seek to hold Manufacturers liable for consequential damages beyond that sum resulting from the failure to make timely payment. Finally, there is no guarantee that Bank Iranshahr or the government, in retaliation for Manufacturers' recalcitrance, will not nationalize additional Manufacturers' assets in Iran in amounts which counsel, at oral argument, represented to be far in excess of the amount in controversy here.

Apart from a greater monetary exposure flowing from an adverse decision, Manufacturers faces a loss of credibility in the international banking community that could result from its failure to make good on a letter of credit.

Conclusion

Finally, apart from questions of relative hardship and the specific criteria of the *Caulfield* test, general considerations of equity counsel us to deny the motion for injunctive relief. Bell, a sophisticated multinational enterprise well advised by competent counsel, entered into these arrangements with its corporate eyes open. It knowingly and voluntarily signed a contract allowing the Iranian government to recoup its down payment on demand, without regard to cause. It caused Manufacturers to enter into an arrangement whereby Manufacturers became obligated to pay Bank Iranshahr the unamortized down payment balance upon receipt of conforming documents, again without regard to cause.

Both of these arrangements redounded tangibly to the benefit of Bell.

* * *

One who reaps the rewards of commercial arrangements must also accept their burdens. One such burden in this case, voluntarily accepted by Bell, was the risk that demand might be made without cause on the funds constituting the down payment. To be sure, the sequence of events that led up to that demand may well have been unforeseeable when the contracts were signed. To this extent, both Bell and Manufacturers have been made the unwitting and innocent victims of tumultuous events

beyond their control. But, as between two innocents, the party who undertakes by contract the risk of political uncertainty and governmental caprice must bear the consequences when the risk comes home to roost.

Accordingly, plaintiff's motion for a preliminary injunction, pursuant to Rule 65(a), Fed.R.Civ.P., is denied.

attachment 9

DOCUMENT 25

UNIFORM FOREIGN-COUNTRY MONEY JUDGMENTS RECOGNITION ACT (2005)

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UNIFORM FOREIGN-COUNTRY MONEY JUDGMENTS RECOGNITION ACT

PREFATORY NOTE

This Act is a revision of the Uniform Foreign Money–Judgments Recognition Act of 1962. That Act codified the most prevalent common law rules with regard to the recognition of money judgments rendered in other countries. The hope was that codification by a state of its rules on the recognition of foreign-country money judgments, by satisfying reciprocity concerns of foreign courts, would make it more likely that money judgments rendered in that state would be recognized in other countries. Towards this end, the Act sets out the circumstances in which the courts in states that have adopted the Act must recognize foreign-country money judgments. It delineates a minimum of foreign-country judgments that must be recognized by the courts of adopting states, leaving those courts free to recognize other foreign-country judgments not covered by the Act

under principles of comity or otherwise. Since its promulgation over forty years ago, the 1962 Act has been adopted in a majority of the states and has been in large part successful in carrying out it purpose of establishing uniform and clear standards under which state courts will enforce the foreign-country money judgments that come within its scope.

This Act continues the hasic policies and approach of the 1962 Act. Its purpose is not to depart from the basic rules or approach of the 1962 Act, which have withstood well the test of time, but rather to update the 1962 Act, to clarify its provisions, and to correct problems created by the interpretation of the provisions of that Act by the courts over the years since its promulgation. Among the more significant issues that have arisen under the 1962 Act which are addressed in this Revised Act are (1) the need to update and clarify the definitions section; (2) the need to reorganize and clarify the scope provisions, and to allocate the burden of proof with regard to establishing application of the Act; (3) the need to set out the procedure by which recognition of a foreign-country money judgment under the Act must be sought; (4) the need to clarify and, to a limited extent, expand upon the grounds for denying recognition in light of differing interpretations of those provisions in the current case law; (5) the need to expressly allocate the burden of proof with regard to the grounds for denying recognition; and (6) the need to establish a statute of limitations for recognition actions.

In the course of drafting this Act, the drafters revisited the decision made in the 1962 Act not to require reciprocity as a condition to recognition of the foreign-country money judgments covered by the Act. After much discussion, the drafters decided that the approach of the 1962 Act continues to be the wisest course with regard to this issue. While recognition of U.S. judgments continnes to be problematic in a number of foreign countries, there was insufficient evidence to establish that a reciprocity requirement would have a greater effect on encouraging foreign recognition of U.S. judgments than does the approach taken by the Act. At the same time, the certainty and uniformity provided by the approach of the 1962 Act, and continued in this Act, creates a stability in this area that facilitates international commercial transactions.

UNIFORM FOREIGN-COUNTRY MONEY JUDGMENTS RECOGNITION ACT

SECTION 1. SHORT TITLE. This [act] may be cited as the [Uniform Foreign-Country Money Judgments Recognition Act].

COMMENT

Source: This section is an updated version of Section 9 of the Uniform Foreign Money-Judgments Recognition Act of 1962.

SECTION 2. DEFINITIONS. In this [act]:

(1) "Foreign country" means a government other than:

(A) the United States;

(B) a state, district, commonwealth, territory, or insular possession of the United States; or

(C) any other government with regard to which the decision in this state as to whether to recognize a judgment of that government's courts is initially subject to determination under the Full Faith and Credit Clause of the United States Constitution.

(2) "Foreign-country judgment" means a judgment of a court of a foreign country.

COMMENT

Source: This section is derived from Section 1 of the Uniform Foreign Money–Judgments Recognition Act of 1962.

1. The defined terms "foreign state" and "foreign judgment" in the 1962 Act have been changed to "foreign country" and "foreign-country judgment" in order to make it clear that the Act does not apply to recognition of sister-state judgments. Some courts have noted that the "foreign state" and "foreign judgment" definitions of the 1962 Act have caused confusion as to whether the Act should apply to sister-state judgments because "foreign state" and "foreign judgment" are terms of art generally used in connection with recognition and enforcement of sister-state judgments. *See, e.g.,* Eagle Leasing v. Amandus, 476 N.W.2d 35 (S.Ct. Iowa 1991) (reversing lower court's application of UFMJRA to a sister-state judgment, but noting lower court's confusion was understandable as "foreign judgment" is term of art normally applied to sister-state judgments). *See also,* Uniform Enforcement of Foreign Judgments Act § 1 (defining "foreign judgment" as the judgment of a sister state or federal court).

The 1962 Act defines a "foreign state" as "any governmental unit other than the United States, or any state, district, commonwealth, territory, insular possession thereof, or the Panama Canal Zone, the Trust Territory of the Pacific Islands, or the Ryuku Islands." Rather than simply updating the list in the 1962 Act's definition of "foreign state," the new definition of "foreign country" in this Act combines the "listing" approach of the 1962 Act's "foreign state" definition with a provision that defines "foreign country" in terms of whether the judgments of the particular government's courts are initially subject to the Full Faith and Credit Clause standards for determining whether those judgments will be recognized. Under this new definition, a governmental unit is a "foreign country" if it is (1) not the United States or a state, district, commonwealth, territory or insular possession of the United States; and (2) its judgments are not initially subject to Full Faith and Credit Clause standards.

The Full Faith and Credit Clause, Art. IV, section 1, provides that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records, and Proceedings

shall be proved, and the Effect thereof." Whether the judgments of a governmental unit are subject to the Full Faith and Credit Clause may be determined by judicial interpretation of the Full Faith and Credit Clause or by statute, or by a combination of these two sources. For example, pursuant to the authority granted by the second sentence of the Full Faith and Credit Clause, Congress has passed 28 U.S.C.A. § 1738, which provides *inter alia* that court records from "any State, Territory, or Possession of the United States" are entitled to full faith and credit under the Full Faith and Credit Clause. In *Stoll v. Gottlieb*, 305 U.S. 165, 170 (1938), the United States Supreme Court held that this statute also requires that full faith and credit be given to judgments of federal courts. States also have made determinations as to whether certain types of judgments are subject to the Full Faith and Credit Clause. *E.g.* Day v. Montana Dept. Of Social & Rehab. Servs., 900 P.2d 296 (Mont. 1995) (tribal court judgment not subject to Full Faith and Credit, and should be treated with same deference shown foreign-country judgments). Under the definition of "foreign country" in this Act, the determination as to whether a governmental unit's judgments are subject to full faith and credit standards should be made by reference to any relevant law, whether statutory or decisional, that is applicable "in this state."

The definition of "foreign country" in terms of those judgments not subject to Full Faith and Credit standards also has the advantage of more effectively coordinating the Act with the Uniform Enforcement of Foreign Judgments Act. That Act, which establishes a registration procedure for the enforcement of sister state and equivalent judgments, defines a "foreign judgment" as "any judgment, decree, or order of a court of the United States or of any other court which is entitled to full faith and credit in this state." Uniform Enforcement of Foreign Judgments Act, § 1 (1964). By defining "foreign country" in the Recognition Act in terms of those judgments not subject to full faith and credit standards, this Act makes it clear that the Enforcement Act and the Recognition Act are mutually exclusive–if a foreign money judgment is subject to full faith and credit standards, then the Enforcement Act's registration procedure is available with regard to its enforcement; if the foreign money judgment is not subject to full faith and credit standards, then the foreign money judgment may not be enforced until recognition of it has been obtained in accordance with the provisions of the Recognition Act.

2. The definition of "foreign-country judgment" in this Act differs significantly from the 1962 Act's definition of "foreign judgment." The 1962 Act's definition served in large part as a scope provision for the Act. The part of the definition defining the scope of the Act has been moved to section 3, which is the scope section.

3. The definition of "foreign-country judgment" in this Act refers to "a judgment" of "a court" of the foreign country. The foreign-country judgment need not take a particular form—any order or decree that meets the requirements of this section and comes within the scope of the Act under Section 3 is subject to the Act. Similarly, any competent government tribunal that issues such a "judgment" comes within the term "court" for purposes of this Act. The judgment, however, must be a judgment of an adjudicative body of the foreign country, and not the result of an alternative dispute mechanism

chosen by the parties. Thus, foreign arbitral awards and agreements to arbitrate are not covered by this Act. They are governed instead by federal law, Chapter 2 of the U.S. Arbitration Act, 9 U.S.C. §§ 201–208, implementing the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards and Chapter 3 of the U.S. Arbitration Act, 9 U.S.C. §§ 301–307, implementing the Inter–American Convention on International Commercial Arbitration. A judgment of a foreign court confirming or setting aside an arbitral award, however, would be covered by this Act.

4. The definition of "foreign-country judgment" does not limit foreign-country judgments to those rendered in litigation between private parties. Judgments in which a governmental entity is a party also are included, and are subject to this Act if they meet the requirements of this section and are within the scope of the Act under Section 3.

SECTION 3. APPLICABILITY.

(a) Except as otherwise provided in subsection (b), this [act] applies to a foreign-country judgment to the extent that the judgment:

(1) grants or denies recovery of a sum of money; and

(2) under the law of the foreign country where rendered, is final, conclusive, and enforceable.

(b) This [act] does not apply to a foreign-country judgment, even if the judgment grants or denies recovery of a sum of money, to the extent that the judgment is:

(1) a judgment for taxes;

(2) a fine or other penalty; or

(3) a judgment for divorce, support, or maintenance, or other judgment rendered in connection with domestic relations.

(c) A party seeking recognition of a foreign-country judgment has the burden of establishing that this [act] applies to the foreign-country judgment.

COMMENT

Source: This section is based on Section 2 of the 1962 Act. Subsection (b) contains material that was included as part of the definition of "foreign judgment" in Section 1(2) of the 1962 Act. Subsection (c) is new.

1. Like the 1962 Act, this Act sets out in subsection 3(a) two basic requirements that a foreign-country judgment must meet before it comes within the scope of this Act—the foreign-country judgment must (1) grant or deny recovery of a sum of money and (2) be final, conclusive and enforceable under the law of the foreign country where it was rendered. Subsection 3(b) then sets out three types of foreign-country judgments that are excluded from the coverage of this Act, even though they meet the criteria of subsection 3(a)—judgments for taxes, judgments constituting fines and other penalties, and judgments in domestic relations matters. These exclusions are comparable to those contained in Section 1(2) of the 1962 Act.

2. This Act applies to a foreign-country judgment only to the extent the foreign-country judgment grants or denies recovery of a sum of money. If a foreign-country judgment both grants or denies recovery of a sum money and provides for some other form of relief, this Act would apply to the portion of the judgment that grants or denies monetary relief, but not to the portion that provides for some other form of relief. The U.S. court, however, would be left free to decide to recognize and enforce the non-monetary portion of the judgment under principles of comity or other applicable law. See Section 11.

3. In order to come within the scope of this Act, a foreign-country judgment must be final, conclusive, and enforceable under the law of the foreign country in which it was rendered. This requirement contains three distinct, although inter-related concepts. A judgment is final when it is not subject to additional proceedings in the rendering court other than execution. A judgment is conclusive when it is given effect between the parties as a determination of their legal rights and obligations. A judgment is enforceable when the legal procedures of the state to ensure that the judgment debtor complies with the judgment are available to the judgment creditor to assist in collection of the judgment.

While the first two of these requirements—finality and conclusiveness—will apply with regard to every foreign-country money judgment, the requirement of enforceability is only relevant when the judgment is one granting recovery of a sum of money. A judgment denying a sum of money obviously is not subject to enforcement procedures, as there is no monetary award to enforce. This Act, however, covers both judgments granting and those denying recovery of a sum of money. Thus, the fact that a foreign-country judgment denying recovery of a sum of money is not enforceable does not mean that such judgments are not within the scope of the Act. Instead, the requirement that the judgment be enforceable should be read to mean that, if the foreign-country judgment grants recovery of a sum of money, it must be enforceable in the foreign country in order to be within the scope of the Act.

Like the 1962 Act, subsection 3(b) requires that the determinations as to finality, conclusiveness and enforceability be made using the law of the foreign country in which the judgment was rendered. Unless the foreign-country judgment is final, conclusive, and (to the extent it grants recovery of a sum of money) enforceable in the foreign country where it was rendered, it will not be within the scope of this Act.

4. Subsection 3(b) follows the 1962 Act by excluding three categories of foreign-country money judgments from the scope of the Act–judgments for taxes, judgments that constitute fines and penalties, and judgments in domestic relations matters. The domestic relations exclusion has been redrafted to make it clear that all judgments in domestic relations matters are excluded from the Act, not just judgments "for support" as provided in the 1962 Act. This is consistent with interpretation of the 1962 Act by the courts, which extended the "support" exclusion in the 1962 Act beyond its literal wording to exclude other money judgments in connection with domestic matters. *E.g.*, Wolff v. Wolff, 389 A.2d 413 (My. App. 1978) ("support" includes alimony).

Recognition and enforcement of domestic relations judgments traditionally has been treated differently from recognition and enforcement of other

judgments. The considerations with regard to those judgments, particularly with regard to jurisdiction and finality, differ from those with regard to other money judgments. Further, national laws with regard to domestic relations vary widely, and recognition and enforcement of such judgments thus is more appropriately handled through comity than through use of this uniform Act. Finally, other statutes, such as the Uniform Interstate Family Support Act and the federal International Child Support Enforcement Act, 42 U.S.C. § 659a (1996), address various aspects of the recognition and enforcement of domestic relations awards. Under Section 11 of this Act, courts are free to recognize money judgments in domestic relations matters under principles of comity or otherwise, and U.S. courts routinely enforce money judgments in domestic relations matters under comity principles.

Foreign-country judgments for taxes and judgments that constitute fines or penalties traditionally have not been recognized and enforced in U.S. courts. *See, e.g.*, Restatement Third of the Foreign Relations Law of the United States § 483 (1986). Both the "revenue rule," under which the courts of one country will not enforce the revenue laws of another country, and the prohibition on enforcement of penal judgments seem to be grounded in the idea that one country does not enforce the public laws of another. *See id.* Reporters' Note 2. The exclusion of tax judgments and judgments constituting fines or penalties from the scope of the Act reflects this tradition. Under Section 11, however, courts remain free to consider whether such judgments should be recognized and enforced under comity or other principles.

A judgment for taxes is a judgment in favor of a foreign country or one of its subdivisions based on a claim for an assessment of a tax. Thus, a judgment awarding a plaintiff restitution of the purchase price paid for an item would not be considered in any part a judgment for taxes, even though one element of the recovery was the sales tax paid by the plaintiff at the time of purchase. Such a judgment would not be one designed to enforce the revenue laws of the foreign country, but rather one designed to compensate the plaintiff. Courts generally hold that the test for whether a judgment is a fine or penalty is determined by whether its purpose is remedial in nature, with its benefits accruing to private individuals, or it is penal in nature, punishing an offense against public justice. *E.g.*, Chase Manhattan Bank, N.A. v. Hoffman, 665 F.Supp 73 (D. Mass. 1987) (finding that Belgium judgment was not penal even though the proceeding forming the basis of the suit was primarily criminal where Belgium court considered damage petition a civil remedy, the judgment did not constitute punishment for an offense against public justice of Belgium, and benefit of the judgment accrued to private judgment creditor, not Belgium). Thus, a judgment that awards compensation or restitution for the benefit of private individuals should not automatically be considered penal in nature and therefore outside the scope of the Act simply because the action is brought on behalf of the private individuals by a government entity. *Cf.* U.S.-Australia Free Trade Agreement, art.14.7.2, U.S.-Austl., May 18, 2004 (providing that when government agency obtains a civil monetary judgment for purpose of providing restitution to consumers, investors, or customers who suffered economic harm due to fraud, judgment generally should not be denied recognition and enforcement on ground that it is penal or revenue in nature, or based on other foreign public law).

5. Under subsection 3(b), a foreign-country money judgment is not within the scope of this Act "to the extent" that it comes within one of the excluded categories. Therefore, if a foreign-country money judgment is only partially within one of the excluded categories, the non-excluded portion will be subject to this Act.

6. Subsection 3(c) is new. The 1962 Act does not expressly allocate the burden of proof with regard to establishing whether a foreign-country judgment is within the scope of the Act. Courts applying the 1962 Act generally have held that the burden of proof is on the person seeking recognition to establish that the judgment is final, conclusive and enforceable where rendered. *E.g.*, Mayekawa Mfg. Co. Ltd. v. Sasaki, 888 P.2d 183, 189 (Wash. App. 1995) (burden of proof on creditor to establish judgment is final, conclusive, and enforceable where rendered); Bridgeway Corp. v. Citibank, 45 F.Supp.2d 276, 285 (S.D.N.Y. 1999) (party seeking recognition must establish that there is a final judgment, conclusive and enforceable where rendered); S.C.Chimexim S.A. v. Velco Enterprises, Ltd., 36 F. Supp.2d 206, 212 (S.D.N.Y. 1999) (Plaintiff has the burden of establishing conclusive effect). Subsection (3)(c) places the burden of proof to establish whether a foreign-country judgment is within the scope of the Act on the party seeking recognition of the foreign-country judgment with regard to both subsection (a) and subsection (b).

SECTION 4. STANDARDS FOR RECOGNITION OF FOREIGN-COUNTRY JUDGMENT.

(a) Except as otherwise provided in subsections (b) and (c), a court of this state shall recognize a foreign-country judgment to which this [act] applies.

(b) A court of this state may not recognize a foreign-country judgment if:

(1) the judgment was rendered under a judicial system that does not provide impartial tribunals or procedures compatible with the requirements of due process of law;

(2) the foreign court did not have personal jurisdiction over the defendant; or

(3) the foreign court did not have jurisdiction over the subject matter.

(c) A court of this state need not recognize a foreign-country judgment if:

(1) the defendant in the proceeding in the foreign court did not receive notice of the proceeding in sufficient time to enable the defendant to defend;

(2) the judgment was obtained by fraud that deprived the losing party of an adequate opportunity to present its case;

(3) the judgment or the [cause of action] [claim for relief] on which the judgment is based is repugnant to the public policy of this state or of the United States;

(4) the judgment conflicts with another final and conclusive judgment;

(5) the proceeding in the foreign court was contrary to an agreement between the parties under which the dispute in question was to be determined otherwise than by proceedings in that foreign court;

(6) in the case of jurisdiction based only on personal service, the foreign court was a seriously inconvenient forum for the trial of the action;

(7) the judgment was rendered in circumstances that raise substantial doubt about the integrity of the rendering court with respect to the judgment; or

(8) the specific proceeding in the foreign court leading to the judgment was not compatible with the requirements of due process of law.

(d) A party resisting recognition of a foreign-country judgment has the burden of establishing that a ground for nonrecognition stated in subsection (b) or (c) exists.

COMMENT

Source: This section is based on Section 4 of the 1962 Act.

1. This Section provides the standards for recognition of a foreign-country money judgment. Section 7 sets out the effect of recognition of a foreign-country money judgment under this Act.

2. Recognition of a judgment means that the forum court accepts the determination of legal rights and obligations made by the rendering court in the foreign country. *See, e.g.* Restatement (Second) of Conflicts of Laws, Ch. 5, Topic 3, Introductory Note (recognition of foreign judgment occurs to the extent the forum court gives the judgment "the same effect with respect to the parties, the subject matter of the action and the issues involved that it has in the state where it was rendered.") Recognition of a foreign-country judgment must be distinguished from enforcement of that judgment. Enforcement of the foreign-country judgment involves the application of the legal procedures of the state to ensure that the judgment debtor obeys the foreign-country judgment. Recognition of a foreign-country money judgment often is associated with enforcement of the judgment, as the judgment creditor usually seeks recognition of the foreign-country judgment primarily for the purpose of invoking the enforcement procedures of the forum state to assist the judgment creditor's collection of the judgment from the judgment debtor. Because the forum court cannot enforce the foreign-country judgment until it has determined that the judgment will be given effect, recognition is a prerequisite to enforcement of the foreign-country judgment. Recognition, however, also has significance outside the enforcement context because a foreign-country judgment also must be recognized before it can be given preclusive effect under res judicata and collateral estoppel principles. The issue of

whether a foreign-country judgment will be recognized is distinct from both the issue of whether the judgment will be enforced, and the issue of the extent to which it will be given preclusive effect.

3. Subsection 4(a) places an affirmative duty on the forum court to recognize a foreign-country money judgment unless one of the grounds for nonrecognition stated in subsection (b) or (c) applies. Subsection (b) states three mandatory grounds for denying recognition to a foreign-country money judgment. If the forum court finds that one of the grounds listed in subsection (b) exists, then it must deny recognition to the foreign-country money judgment. Subsection (c) states eight nonmandatory grounds for denying recognition. The forum court has discretion to decide whether or not to refuse recognition based on one of these grounds. Subsection (d) places the burden of proof on the party resisting recognition of the foreign-country judgment to establish that one of the grounds for nonrecognition exists.

4. The mandatory grounds for nonrecognition stated in subsection (b) are identical to the mandatory grounds stated in Section 4 of the 1962 Act. The discretionary grounds stated in subsection 4(c)(1) through (6) are based on subsection 4(b)(1) through (6) of the 1962 Act. The discretionary grounds stated in subsection 4(c)(7) and (8) are new.

5. Under subsection (b)(1), the forum court must deny recognition to the foreign-country money judgment if that judgment was "rendered under a judicial system that does not provide impartial tribunals or procedures compatible with the requirements of due process of law." The standard for this ground for nonrecognition "has been stated authoritatively by the Supreme Court of the United States in *Hilton v. Guyot*, 159 U.S.113, 205 (1895). As indicated in that decision, a mere difference in the procedural system is not a sufficient basis for nonrecognition. A case of serious injustice must be involved." Cmt § 4, Uniform Foreign Money–Judgment Recognition Act (1962). The focus of inquiry is not whether the procedure in the rendering country is similar to U.S. procedure, but rather on the basic fairness of the foreign-country proceduro. Kam–Tech Systems, Ltd. V. Yardeni, 74 A.2d 644, 649 (N.J. App. 2001) (interpreting the comparable provision in the 1962 Act); *accord*, Society of Lloyd's v. Ashenden, 233 F.3d 473 (7th Cir. 2000) (procedures need not meet all the intricacies of the complex concept of due process that has emerged from U.S. case law, but rather must be fair in the broader international sense) (interpreting comparable provision in the 1962 Act). Procedural differences, such as absence of jury trial or different evidentiary rules are not sufficient to justify denying recognition under subsection (b)(1), so long as the essential elements of impartial administration and basic procedural fairness have been provided in the foreign proceeding. As the U.S. Supreme Court stated in *Hilton*:

> Where there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the

judgment, or any other special reason why the comity of this nation should not allow it full effect then a foreign-country judgment should be recognized. *Hilton*, 159 U.S. at 202.

6. Under section 4(b)(2), the forum court must deny recognition to the foreign-country judgment if the foreign court did not have personal jurisdiction over the defendant. Section 5(a) lists six bases for personal jurisdiction that are adequate as a matter of law to establish that the foreign court had personal jurisdiction. Section 5(b) makes clear that other grounds for personal jurisdiction may be found sufficient.

7. Subsection 4(c)(2) limits the type of fraud that will serve as a ground for denying recognition to extrinsic fraud. This provision is consistent with the interpretation of the comparable provision in subsection 4(b)(2) of the 1962 Act by the courts, which have found that only extrinsic fraud—conduct of the prevailing party that deprived the losing party of an adequate opportunity to present its case—is sufficient under the 1962 Act. Examples of extrinsic fraud would be when the plaintiff deliberately had the initiating process served on the defendant at the wrong address, deliberately gave the defendant wrong information as to the time and place of the hearing, or obtained a default judgment against the defendant based on a forged confession of judgment. When this type of fraudulent action by the plaintiff deprives the defendant of an adequate opportunity to present its case, then it provides grounds for denying recognition of the foreign-country judgment. Extrinsic fraud should be distinguished from intrinsic fraud, such as false testimony of a witness or admission of a forged document into evidence during the foreign proceeding. Intrinsic fraud does not provide a basis for denying recognition under subsection 4(c)(2), as the assertion that intrinsic fraud has occurred should be raised and dealt with in the rendering court.

8. The public policy exception in subsection 4(c)(3) is based on the public policy exception in subsection 4(b)(3) of the 1962 Act, with one difference. The public policy exception in the 1962 Act states that the relevant inquiry is whether "the [cause of action] [claim for relief] on which the judgment is based" is repugnant to public policy. Based on this "cause of action" language, some courts interpreting the 1962 Act have refused to find that a public policy challenge based on something other than repugnancy of the foreign cause of action comes within this exception. *E.g.*, Southwest Livestock & Trucking Co., Inc. v. Ramon, 169 F.3d 317 (5th Cir. 1999) (refusing to deny recognition to Mexican judgment on promissory note with interest rate of 48% because cause of action to collect on promissory note does not violate public policy); Guinness PLC v. Ward, 955 F.2d 875 (4th Cir. 1992) (challenge to recognition based on post-judgment settlement could not be asserted under public policy exception); The Society of Lloyd's v. Turner, 303 F.3d 325 (5th Cir. 2002) (rejecting argument legal standards applied to establish elements of breach of contract violated public policy because cause of action for breach of contract itself is not contrary to state public policy); *cf.* Bachchan v. India Abroad Publications, Inc., 585 N.Y.S.2d 661 (N.Y. Sup. Ct. 1992) (judgment creditor argued British libel judgment should be recognized despite argument it violated First Amendment because New York recognizes a cause of action for libel). Subsection 4(c)(3) rejects this narrow focus by providing that the forum court may deny recognition if either the cause of

action or the judgment itself violates public policy. *Cf.* Restatement (Third) of the Foreign Relations Law of the United States, § 482(2)(d) (1986) (containing a similarly-worded public policy exception to recognition).

Although subsection 4(c)(3) of this Act rejects the narrow focus on the cause of action under the 1962 Act, it retains the stringent test for finding a public policy violation applied by courts interpreting the 1962 Act. Under that test, a difference in law, even a marked one, is not sufficient to raise a public policy issue. Nor is it relevant that the foreign law allows a recovery that the forum state would not allow. Public policy is violated only if recognition or enforcement of the foreign-country judgment would tend clearly to injure the public health, the public morals, or the public confidence in the administration of law, or would undermine "that sense of security for individual rights, whether of personal liberty or of private property, which any citizen ought to feel." Hunt v. BP Exploration Co. (Libya) Ltd., 492 F. Supp. 885, 901 (N.D. Tex. 1980).

The language "or of the United States" in subsection 4(c)(3), which does not appear in the 1962 Act provision, makes it clear that the relevant public policy is that of both the State in which recognition is sought and that of the United States. This is the position taken by the vast majority of cases interpreting the 1962 public policy provision. *E.g.*, Bachchan v. India Abroad Publications, Inc., 585 N.Y.S.2d 661 (Sup.Ct. N.Y. 1992) (British libel judgment denied recognition because it violates First Amendment).

9. Subsection 4(c)(5) allows the forum court to refuse recognition of a foreign-country judgment when the parties had a valid agreement, such as a valid forum selection clause or agreement to arbitrate, providing that the relevant dispute would be resolved in a forum other than the forum issuing the foreign-country judgment. Under this provision, the forum court must find both the existence of a valid agreement and that the agreement covered the subject matter involved in the foreign litigation resulting in the foreign-country judgment.

10. Subsection 4(c)(6) authorizes the forum court to refuse recognition of a foreign-country judgment that was rendered in the foreign country solely on the basis of personal service when the forum court believes the original action should have been dismissed by the court in the foreign country on grounds of *forum non conveniens*.

11. Subsection 4(c)(7) is new. Under this subsection, the forum court may deny recognition to a foreign-country judgment if there are circumstances that raise substantial doubt about the integrity of the rendering court with respect to that judgment. It requires a showing of corruption in the particular case that had an impact on the judgment that was rendered. This provision may be contrasted with subsection 4(b)(1) , which requires that the forum court refuse recognition to the foreign-country judgment if it was rendered under a judicial system that does not provide impartial tribunals. Like the comparable provision in subsection 4(a)(1) of the 1962 Act, subsection 4(b)(1) focuses on the judicial system of the foreign country as a whole, rather than on whether the particular judicial proceeding leading to the foreign-country judgment was impartial and fair. *See, e.g.*, The Society of Lloyd's v. Turner, 303 F.3d 325, 330 (5th Cir. 2002) (interpreting the 1962

Act); CIBC Mellon Trust Co. v. Mora Hotel Corp,. N.V., 743 N.Y.S.2d 408, 415 (N.Y. App. 2002) (interpreting the 1962 Act); Society of Lloyd's v. Ashenden, 233 F.3d 473, 477 (7th Cir. 2000) (interpreting the 1962 Act). On the other hand, subsection 4(c)(7) allows the court to deny recognition to the foreign-country judgment if it finds a lack of impartiality and fairness of the tribunal in the individual proceeding leading to the foreign-country judgment. Thus, the difference is that between showing, for example, that corruption and bribery is so prevalent throughout the judicial system of the foreign country as to make that entire judicial system one that does not provide impartial tribunals versus showing that bribery of the judge in the proceeding that resulted in the particular foreign-country judgment under consideration had a sufficient impact on the ultimate judgment as to call it into question.

12. Subsection 4(c)(8) also is new. It allows the forum court to deny recognition to the foreign-country judgment if the court finds that the specific proceeding in the foreign court was not compatible with the requirements of fundamental fairness. Like subsection 4(c)(7), it can be contrasted with subsection 4(b)(1), which requires the forum court to deny recognition to the foreign-country judgment if the forum court finds that the entire judicial system in the foreign country where the foreign-country judgment was rendered does not provide procedures compatible with the requirements of fundamental fairness. While the focus of subsection 4(b)(1) is on the foreign country's judicial system as a whole, the focus of subsection 4(c)(8) is on the particular proceeding that resulted in the specific foreign-country judgment under consideration. Thus, the difference is that between showing, for example, that there has been such a breakdown of law and order in the particular foreign country that judgments are rendered on the basis of political decisions rather than the rule of law throughout the judicial system versus a showing that for political reasons the particular party against whom the foreign-country judgment was entered was denied fundamental fairness in the particular proceedings leading to the foreign-country judgment.

Subsections 4(c)(7) and (8) both are discretionary grounds for denying recognition, while subsection 4(b)(1) is mandatory. Obviously, if the entire judicial system in the foreign country fails to satisfy the requirements of impartiality and fundamental fairness, a judgment rendered in that foreign country would be so compromised that the forum court should refuse to recognize it as a matter of course. On the other hand, if the problem is evidence of a lack of integrity or fundamental fairness with regard to the particular proceeding leading to the foreign-country judgment, then there may or may not be other factors in the particular case that would cause the forum court to decide to recognize the foreign-country judgment. For example, a forum court might decide not to exercise its discretion to deny recognition despite evidence of corruption or procedural unfairness in a particular case because the party resisting recognition failed to raise the issue on appeal from the foreign-country judgment in the foreign country, and the evidence establishes that, if the party had done so, appeal would have been an adequate mechanism for correcting the transgressions of the lower court.

13. Under subsection 4(d), the party opposing recognition of the foreign-country judgment has the burden of establishing that one of the grounds for nonrecognition set out in subsection 4(b) or (c) applies. The 1962 Act was

silent as to who had the burden of proof to establish a ground for nonrecognition and courts applying the 1962 Act took different positions on the issue. *Compare* Bridgeway Corp. v. Citibank, 45 F.Supp. 2d 276, 285 (S.D.N.Y. 1999) (plaintiff has burden to show no mandatory basis under 4(a) for nonrecognition exists; defendant has burden regarding discretionary bases) *with* The Courage Co. LLC v. The ChemShare Corp., 93 S.W.3d 323, 331 (Tex. App. 2002) (party seeking to avoid recognition has burden to prove ground for nonrecognition). Because the grounds for nonrecognition in Section 4 are in the nature of defenses to recognition, the burden of proof is most appropriately allocated to the party opposing recognition of the foreign-country judgment.

SECTION 5. PERSONAL JURISDICTION.

(a) A foreign-country judgment may not be refused recognition for lack of personal jurisdiction if:

(1) the defendant was served with process personally in the foreign country;

(2) the defendant voluntarily appeared in the proceeding, other than for the purpose of protecting property seized or threatened with seizure in the proceeding or of contesting the jurisdiction of the court over the defendant;

(3) the defendant, before the commencement of the proceeding, had agreed to submit to the jurisdiction of the foreign court with respect to the subject matter involved;

(4) the defendant was domiciled in the foreign country when the proceeding was instituted or was a corporation or other form of business organization that had its principal place of business in, or was organized under the laws of, the foreign country;

(5) the defendant had a business office in the foreign country and the proceeding in the foreign court involved a [cause of action] [claim for relief] arising out of business done by the defendant through that office in the foreign country; or

(6) the defendant operated a motor vehicle or airplane in the foreign country and the proceeding involved a [cause of action] [claim for relief] arising out of that operation.

(b) The list of bases for personal jurisdiction in subsection (a) is not exclusive. The courts of this state may recognize bases of personal jurisdiction other than those listed in subsection(a) as sufficient to support a foreign-country judgment.

COMMENT

Source: This provision is based on Section 5 of the 1962 Act. Its substance is the same as that of Section 5 of the 1962 Act, except as noted in Comment 2 below with regard to subsection 5(a)(4).

1. Under section 4(b)(2), the forum court must deny recognition to the foreign-country judgment if the foreign court did not have personal jurisdic-

tion over the defendant. Section 5(a) lists six bases for personal jurisdiction that are adequate as a matter of law to establish that the foreign court had personal jurisdiction. Section 5(b) makes it clear that these bases of personal jurisdiction are not exclusive. The forum court may find that the foreign court had personal jurisdiction over the defendant on some other basis.

2. Subsection 5(a)(4) of the 1962 Act provides that the foreign court had personal jurisdiction over the defendant if the defendant was "a body corporate" that "had its principal place of business, was incorporated, or had otherwise acquired corporate status, in the foreign state." Subsection 5(a)(4) of this Act extends that concept to forms of business organization other than corporations.

3. Subsection 5(a)(3) provides that the foreign court has personal jurisdiction over the defendant if the defendant agreed before commencement of the proceeding leading to the foreign-country judgment to submit to the jurisdiction of the foreign court with regard to the subject matter involved. Under this provision, the forum court must find both the existence of a valid agreement to submit to the foreign court's jurisdiction and that the agreement covered the subject matter involved in the foreign litigation resulting in the foreign-country judgment.

SECTION 6. PROCEDURE FOR RECOGNITION OF FOREIGN-COUNTRY JUDGMENT.

(a) If recognition of a foreign-country judgment is sought as an original matter, the issue of recognition shall be raised by filing an action seeking recognition of the foreign-country judgment.

(b) If recognition of a foreign-country judgment is sought in a pending action, the issue of recognition may be raised by counterclaim, cross-claim, or affirmative defense.

COMMENT

Source: This section is new.

1. Unlike the 1962 Act, which was silent as to the proper procedure for seeking recognition of a foreign-country judgment, Section 6 of this Act expressly sets out the ways in which the issue of recognition may be raised. Under section 6, the issue of recognition always must be raised in a court proceeding. Thus, section 6 rejects decisions under the 1962 Act holding that the registration procedure found in the Uniform Enforcement of Foreign Judgments Act could be utilized with regard to recognition of a foreign-country judgment. *E.g.* Society of Lloyd's v. Ashenden, 233 F.3d 473 (7th Cir. 2000). The Enforcement Act deals solely with the *enforcement* of sister-state judgments and other judgments entitled to full faith and credit, not with the *recognition* of foreign-country judgments.

More broadly, section 6 rejects the use of any registration procedure in the context of the foreign-country judgments covered by this Act. A registration procedure represents a balance between the interest of the judgment creditor in obtaining quick and efficient recognition and enforcement of a judgment when the judgment debtor has already been provided with an

opportunity to litigate the underlying issues, and the interest of the judgment debtor in being provided an adequate opportunity to raise and litigate issues regarding whether the foreign-country judgment should be recognized. In the context of sister-state judgments, this balance favors use of a truncated procedure such as that found in the Enforcement Act. Recognition of sister-state judgments normally is mandated by the Full Faith and Credit Clause. Courts recognize only a very limited number of grounds for denying full faith and credit to a sister-state judgment–that the rendering court lacked jurisdiction, that the judgment was procured by fraud, that the judgment has been satisfied, or that the limitations period has expired. Thus, the judgment debtor with regard to a sister-state judgment normally does not have any grounds for opposing recognition and enforcement of the judgment. The extremely limited grounds for denying full faith and credit to a sister-state judgment reflect the fact such judgments will have been rendered by a court that is subject to the same due process limitations and the same overlap of federal statutory and constitutional law as the forum state's courts, and, to a large extent, the same body of court precedent and socio-economic ideas as those shaping the law of the forum state. Therefore, there is a strong presumption of fairness and competence attached to a sister-state judgment that justifies use of a registration procedure.

The balance between the benefits and costs of a registration procedure is significantly different, however, in the context of recognition and enforcement of foreign-country judgments. Unlike the limited grounds for denying full faith and credit to a sister-state judgment, this Act provides a number of grounds upon which recognition of a foreign-country judgment may be denied. Determination of whether these grounds apply requires the forum court to look behind the foreign-country judgment to evaluate the law and the judicial system under which the foreign-country judgment was rendered. The existence of these grounds for nonrecognition reflects the fact there is less expectation that foreign-country courts will follow procedures comporting with U.S. notions of fundamental fairness and jurisdiction or that those courts will apply laws viewed as substantively tolerable by U.S. standards than there is with regard to sister-state courts. In some situations, there also may be suspicions of corruption or fraud in the foreign-country proceedings. These differences between sister-state judgments and foreign-country judgments provide a justification for requiring judicial involvement in the decision whether to recognize a foreign-country judgment in all cases in which that issue is raised. Although the threshold for establishing that a foreign-country judgment is not entitled to recognition under Section 4 is high, there is a sufficiently greater likelihood that significant recognition issues will be raised so as to require a judicial proceeding.

2. This Section contemplates that the issue of recognition may be raised either as an original matter or in the context of a pending proceeding. Subsection 6(a) provides that in order to raise the issue of recognition of a foreign-country judgment as an initial matter, the party seeking recognition must file an action for recognition of the foreign-country judgment. Subsection 6(b) provides that when the recognition issue is raised in a pending proceeding, it may be raised by counterclaim, cross-claim or affirmative defense, depending on the context in which it is raised. These rules are

consistent with the way the issue of recognition most often was raised in most states under the 1962 Act.

3. An action seeking recognition of a foreign-country judgment under this Section is an action on the foreign-country judgment itself, not an action on the underlying cause of action that gave rise to that judgment. The parties to an action under Section 6 may not relitigate the merits of the underlying dispute that gave rise to the foreign-country judgment.

4. While this Section sets out the ways in which the issue of recognition of a foreign-country judgment may be raised, it is not intended to create any new procedure not currently existing in the state or to otherwise effect existing state procedural requirements. The parties to an action in which recognition of a foreign-country judgment is sought under Section 6 must comply with all state procedural rules with regard to that type of action. Nor does this Act address the question of what constitutes a sufficient basis for jurisdiction to adjudicate with regard to an action under Section 6. Courts have split over the issue of whether the presence of assets of the debtor in a state is a sufficient basis for jurisdiction in light of footnote 36 of the U.S. Supreme Court decision in Shaffer v. Heitner, 433 U.S. 186, 210 n.36 (1977). This Act takes no position on that issue.

5. In states that have adopted the Uniform Foreign-Money Claims Act, that Act will apply to the determination of the amount of a money judgment recognized under this Act.

SECTION 7. EFFECT OF RECOGNITION OF FOREIGN-COUNTRY JUDGMENT. If the court in a proceeding under Section 6 finds that the foreign-country judgment is entitled to recognition under this [act] then, to the extent that the foreign-country judgment grants or denies recovery of a sum of money, the foreign-country judgment is:

(1) conclusive between the parties to the same extent as the judgment of a sister state entitled to full faith and credit in this state would be conclusive; and

(2) enforceable in the same manner and to the same extent as a judgment rendered in this state.

COMMENT

Source: The substance of subsection 7(1) is based on Section 3 of the 1962 Act. Subsection 7(2) is new.

1. Section 5 of this Act sets out the standards for the recognition of foreign-country judgments within the scope of this Act, and places an affirmative duty on the forum court to recognize any foreign-country judgment that meets those standards. Section 6 of this Act sets out the procedures by which the issue of recognition may be raised. This Section sets out the consequences of the decision by the forum court that the foreign-country judgment is entitled to recognition.

2. Under subsection 7(1), the first consequence of recognition of a foreign-country judgment is that it is treated as conclusive between the

parties in the forum state. Section 7(1) does not attempt to establish directly the extent of that conclusiveness. Instead, it provides that the foreign-country judgment is treated as conclusive to the same extent that a judgment of a sister state that had been determined to be entitled to full faith and credit would be conclusive. This means that the foreign-country judgment generally will be given the same effect in the forum state that it has in the foreign country where it was rendered. Subsection 7(1), however, sets out the minimum effect that must be given to the foreign-country judgment once recognized. The forum court remains free to give the foreign-country judgment a greater preclusive effect in the forum state than the judgment would have in the foreign country where it was rendered. *Cf.* Restatement (Third) of the Foreign Relations Law of the United States, § 481 cmt *c* (1986).

3. Under subsection 7(2), the second consequence of recognition of a foreign-country judgment is that, to the extent it grants a sum of money, it is enforceable in the forum state in accordance with the procedures for enforcement in the forum state and to the same extent that a judgment of the forum state would be enforceable. *Cf.* Restatement (Third) of the Foreign Relations Law of the United States § 481 (1986) (judgment entitled to recognition is enforceable in accordance with the procedure for enforcement of judgments applicable where enforcement is sought). Thus, under subsection 7(2), once recognized, the foreign-country judgment has the same effect and is subject to the same procedures, defenses and proceedings for reopening, vacating, or staying a judgment of a comparable court in the forum state, and can be enforced or satisfied in the same manner as such a judgment of the forum state.

SECTION 8. STAY OF PROCEEDINGS PENDING APPEAL OF FOREIGN-COUNTRY JUDGMENT. If a party establishes that an appeal from a foreign-country judgment is pending or will be taken, the court may stay any proceedings with regard to the foreign-country judgment until the appeal is concluded, the time for appeal expires, or the appellant has had sufficient time to prosecute the appeal and has failed to do so.

COMMENT

Source: This section is the same substantively as section 6 of the 1962 Act, except that it adds as an additional measure for the duration of the stay "the time for appeal expires."

1. Under Section 3 of this Act, a foreign-country judgment is not within the scope of this Act unless it is conclusive and enforceable where rendered. Thus, if the effect of appeal under the law of the foreign country in which the judgment was rendered is to prevent it from being conclusive or enforceable between the parties, the existence of a pending appeal in the foreign country would prevent the application of this Act. Section 8 addresses a different situation. It deals with the situation in which either (1) the party seeking a stay has demonstrated that it intends to file an appeal in the foreign country, although the appeal has not yet been filed or (2) an appeal has been filed in the foreign country, but under the law of the foreign country filing of an

appeal does not affect the conclusiveness or enforceability of the judgment. Section 8 allows the forum court in those situations to determine in its discretion that a stay of proceedings is appropriate.

SECTION 9. STATUTE OF LIMITATIONS. An action to recognize a foreign-country judgment must be commenced within the earlier of the time during which the foreign-country judgment is effective in the foreign country or 15 years from the date that the foreign-country judgment became effective in the foreign country.

COMMENT

Source: This Section is new. The 1962 Act did not contain a statute of limitations. Some courts applying the 1962 Act have used the state's general statute of limitations, *e.g.*, Vrozos v. Sarantopoulos, 552 N.E.2d 1053 (Ill. App. 1990) (as Recognition Act contains no statute of limitations, general five-year statute of limitations applies), while others have used the statute of limitations applicable with regard to enforcement of a domestic judgment, *e.g.*, La Societe Anonyme Goro v. Conveyor Accessories, Inc., 677 N.E. 2d 30 (Ill. App. 1997).

1. Under Section 3 of this Act, this Act only applies to foreign-country judgments that are conclusive, and if the judgment grants recovery of a sum of money, enforceable where rendered. Thus, if the period of effectiveness of the foreign-country judgment has expired in the foreign country where the judgment was rendered, the foreign-country judgment would not be subject to this Act. This means that the period of time during which a foreign-country judgment may be recognized under this Act normally is measured by the period of time during which that judgment is effective (that is, conclusive and, if applicable, enforceable) in the foreign country that rendered the judgment. If, however, the foreign-country judgment remains effective for more than fifteen years after the date on which it became effective in the foreign country, Section 9 places an additional time limit on recognition of a foreign-country judgment. It provides that, if the foreign-country judgment remains effective between the parties for more than fifteen years, then an action to recognize the foreign-country judgment under this Act must be commenced within that fifteen year period.

2. Section 9 does not address the issue of whether a foreign-country judgment that can no longer be the basis of a recognition action under this Act because of the application of the fifteen-year limitations period in Section 9 may be used for other purposes. For example, a common rule with regard to judgments barred by a statute of limitations is that they still may be used defensively for purposes of offset and for their preclusive effect. The extent to which a foreign-country judgment with regard to which a recognition action is barred by Section 9 may be used for these or other purposes is left to the other law of the forum state.

SECTION 10. UNIFORMITY OF INTERPRETATION. In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

COMMENT

Source: This Section is substantively the same as Section 8 of the 1962 Act. The section has been rewritten to reflect current NCCUSL practice.

SECTION 11. SAVING CLAUSE. This [act] does not prevent the recognition under principles of comity or otherwise of a foreign-country judgment not within the scope of this [act].

COMMENT

Source: This section is based on Section 7 of the 1962 Act.

1. Section 3 of this Act provides that this Act applies only to certain foreign-country judgments that grant or deny recovery of a sum of money. The purpose of this Act is to establish the minimum standards for recognition of those judgments. Section 11 makes clear that no negative implication should be read from the fact that this Act does not provide for recognition of other foreign-country judgments. Rather, this Act simply does not address the issue of whether foreign-country judgments not within its scope under Section 3 should be recognized. Courts are free to recognize those foreign-country judgments not within the scope of this Act under common law principles of comity or other applicable law.

SECTION 12. EFFECTIVE DATE.

[(a) This [act] takes effect _____.]

[(b) This [act] applies to all actions commenced on or after the effective date of this [act] in which the issue of recognition of a foreign-country judgment is raised.]

COMMENT

Source: Subsection 12(a) is the same as Section 11 of the 1962 Act. Subsection 12(b) is new.

1. Subsection 12(b) provides that this Act will apply to all actions in which the issue of recognition of a foreign-country judgment is raised that are commenced on or after the effective date of this Act. Thus, the application of this Act is measured not from the time the original action leading to the foreign-country judgment was commenced in the foreign country, but rather from the time the action in which the issue of recognition is raised is commenced in the forum court. Subsection 12(b) does not distinguish between whether the purpose of the action commenced in the forum court was to seek recognition as an original matter under Subsection 6(a) or was an action that was already pending when the issue of recognition was raised under Subsection 6(b).

SECTION 13. REPEAL. The following [acts] are repealed:

(a) Uniform Foreign Money–Judgments Recognition Act,

(b)

.]

COMMENT

Source: This Section is an updated version of Section 10 of the 1962 Act.