Neutral Citation Number: [2022] EWHC 669 (QB)

Case No: QB-2020-003992

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25 March 2022

Before:

MR JUSTICE PICKEN

- -

Between:

VATCHE MANOUKIAN

Claimant

- and -

(1) SOCIETE GENERALE DE BANQUE AU LIBAN SAL
(2) BANK AUDI SAL

Defendants

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- -

Daniel Toledano QC, **Bobby Friedman** and **Caspar Bartscherer** (instructed by **Bryan Cave Leighton Paisner LLP**) for the Claimant.
Ian Wilson QC and **Rebecca Zaman** (instructed by **Dechert LLP**) for the Defendants.

Hearing dates: 7, 8, 9, 10, 11, 15, 16 and 25 February 2022.
Judgment provided in draft: 21 March 2022.

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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Mr Justice Picken:

Introduction

1. The Claimant ('Mr Manoukian') wishes two banks in Lebanon, the Defendants ('SGBL' and 'Bank Audi' respectively, but together 'the Banks'), where he holds accounts, to execute international transfers from those accounts to other accounts nominated by him at another bank, HSBC, in Switzerland. Mr Manoukian has been asking for this to happen since late 2019. The amounts concerned are in the region of US$3.4 million in the case of SGBL and US$1.2 million in the case of Bank Audi.

2. Heading into the trial, no such transfer had been made since the Banks say that they are under no obligation to transfer, whether contractually or as a matter of Lebanese law. The Banks say, in particular, that they were (and are) entitled to refuse to comply with Mr Manoukian's requests given Lebanon's ongoing financial crisis which began in about October 2019.

3. Mr Manoukian's position is that, irrespective of the financial crisis, the Banks are obliged to do as he has asked. He points out in this regard how no capital controls have been introduced at any time since the economic crisis began, with the result that there is no law that prohibits the Banks from making the transfers; indeed, he observes, the Banks have made such transfers to others. Mr Manoukian is concerned, nonetheless, that there is a risk that capital controls might be introduced in the future. As a result, his position is (or was heading into the trial) precarious: any delay in the resolution of the present proceedings could potentially deny Mr Manoukian an effective remedy. It was for this reason, indeed, that the trial which took place before me was expedited: Mr Manoukian issued the proceedings on 19 December 2020; pleadings closed on 6 April 2021, and expedition was ordered at a CMC which took place on 8 June 2021.

4. In further consequence of the need for expedition, I indicated at a short hearing which took place on 25 February 2022 that Mr Manoukian's claim was successful, specifically his primary case that the Banks are contractually obliged to effect the transfers. I made an order, indeed, to that effect. In the circumstances, this judgment does not deal with other aspects either at all or, at least, in any particular detail.

Witnesses

5. It is appropriate that I say something about each of the factual witnesses and record, in particular, that, in my view, each of them did their best in their evidence to assist the Court.

6. Specifically, as for Mr Manoukian himself, his evidence was concerned with his consequential loss claim for lost investments. That is not an issue which I need address given that I have decided that Mr Manoukian succeeds with his primary case. Be that as it may, it was not suggested, either in cross-examination or during the course of closing submissions, that, in giving this evidence, Mr Manoukian was anything other than straightforward.

7. As to SGBL, the first witness to give evidence was Mr Tarek Chehab, SGBL's Deputy General Manager and Deputy Chief Executive Officer. Mr Toledano QC, on behalf of Mr Manoukian, explored with Mr Chehab in cross-examination whether SGBL had

adopted a consistent approach as between its clients (including Mr Manoukian). Mr Toledano QC suggested in closing that some of what Mr Chehab had to say in response to such questioning was not reflected in his witness statement. I consider that Mr Chehab was nonetheless a good witness. I agree with Mr Wilson QC, indeed, that he was knowledgeable, straightforward and clear.

8. The other factual witness called by SGBL was Mr Elie Jeffy, the Head of its Private Banking Unit. Mr Toledano QC took issue in closing with Mr Wilson QC's observation that Mr Jeffy gave his evidence candidly. He submitted, indeed, that Mr Jeffy was prepared to give evidence which was untruthful and contradictory. Although I do not wholly accept that this was the case, the submission is not entirely without merit since it was notable, amongst other things, that he was unable to give a satisfactory explanation as to why he had signed a particular document but not others, suggesting somewhat implausibly that he signed all documents which he received notwithstanding the fact that none of the other transfer requests in the documents are signed. Furthermore, it is unclear why Mr Jeffy only mentioned that he had kept an analysis of all of the transfer requests made by his clients when he was being cross-examined and not in his witness statement; the more so, since no such spreadsheet had been disclosed in the course of these proceedings.

9. Turning to Bank Audi's factual witnesses, Mr Ghazaleh is its Deputy Chief Executive Officer. He was a good witness, who was highly knowledgeable and well able to deal with the questions which Mr Toledano QC put to him concerning Bank Audi's financial and liquidity position in the lead-up to the financial crisis and subsequently. This is, however, another issue which, in the event, I will not be addressing in this judgment.

10. The last of the factual witnesses was Ms Nelly Loutfallah Razzouk, the Assistant Branch Manager at Bank Audi who dealt with Mr Manoukian's transfer requests. She was, at least in my assessment, a little circumspect in the answers which she gave. I do not consider, however, that she was trying other than to assist the Court. Again, her evidence was on matters which I need not resolve.

11. As for the expert evidence, this was given by Mr Nadi Najjar in the case of Mr Manoukian and by Dr Fadi Moghaizel on behalf of the Banks. Their evidence, on Lebanese law, is important given that it is Lebanese law which I have to apply in determining this dispute.

12. Mr Toledano QC and Mr Wilson QC each criticised the expert called by the other. Thus, whilst submitting that Mr Najjar was a reliable and helpful expert who was both knowledgeable and clearly trying to assist the Court, Mr Toledano QC submitted as to Dr Moghaizel that his evidence must be treated with caution since, it was observed, he either showed a lack of understanding of Lebanese law or an unfortunate willingness to blur the boundaries between expert and advocate.

13. A number of matters were raised in this connection. I do not propose to rehearse all of them. It suffices to give a single example. This was the suggestion made by Dr Moghaizel that a particular custom (as will appear, custom is important in this case) was a custom which had come into being since November 2019 (and so, again as will appear, after Mr Manoukian had made his first transfer requests). As Mr Toledano QC rightly submitted, that simply cannot be relevant as a matter of Lebanese law (and, indeed, common sense) since what matters is the custom which existed at the time that

Mr Manoukian first entered into a contractual relationship with the Banks. Notwithstanding this, it was only with a marked reluctance that Dr Moghaizel ultimately accepted that the alleged new custom which he had identified was of no relevance at all.

14. That said, I also agree with Mr Wilson QC when he submitted that there were aspects of Mr Najjar's evidence which were likewise open to criticism. It was notable, for example, that on a few occasions Mr Najjar referred in cross-examination to having spoken to a Lebanese academic, Professor Nammour, (whose writings, as will appear, are relevant in this case) about certain points and obtained his agreement that what he (Mr Najjar) was saying about his writings was right. That evidence is incapable of being tested and hinted at a somewhat partisan approach. However, like Dr Moghaizel, ultimately, at least when asked questions at the level of principle, Mr Najjar for the most part engaged and sought to assist the Court in his answers.

15. In truth, however, my overall assessment is that both Mr Najjar and Dr Moghaizel were doing their best to assist the Court and were in that respect endeavouring to be independent when expressing the views which they did. In matters of foreign law evidence it can sometimes be difficult for an expert to keep to the right side of the line; the boundary is sometimes harder to recognise and can sometimes be innocently disrespected. The more so, given that foreign law experts are often (as is the case with Mr Najjar and Dr Moghaizel) advocates used to putting forward an argument as attractively as possible.

The background

16. The background is essentially uncontroversial, at least as regards the areas which matter for the purposes of this judgment in view of the determination which I have arrived at. What follows, in the circumstances, is largely taken from the description set out in the Defendants' written opening submissions.

Opening of the accounts

17. Mr Manoukian, who is classed as a consumer for the purposes of the Judgments Regulation (Regulation 1215/2012), opened his accounts with SGBL on or around 26 March 2015. His contract with SGBL is governed by the terms of SGBL's Welcome Agreement - General Conditions (the 'SGBL General Conditions'), which Mr Manoukian signed and returned to SGBL. Mr Manoukian was classified as a *"high net worth"* client of SGBL and so the relationship was handled by the Bank's Private Banking Unit. To be eligible for the Private Banking services, an SGBL client needed a net worth of over US$5 million or a deposit with SGBL of at least US$250,000.

18. Mr Manoukian opened his personal account with Bank Audi on, so at least it would appear, 29 March 2018. His contract with Bank Audi is governed by Bank Audi's General Agreement for Opening and Activating Accounts and General Terms and Conditions for Electronic Banking Services (the 'Audi General Conditions'), which Mr Manoukian signed. Mr Manoukian was classified as a *"VIP client"* of Bank Audi because of the size of his deposits, which were in excess of US$500,000.

The onset of the Lebanese banking crisis

19. That there is an ongoing financial crisis in Lebanon is well known and not in dispute. It has been described by the Spring 2021 Lebanon Economic Monitor as in the top ten *"most severe crises episodes globally since the mid-nineteenth century"* and is the cause of liquidity problems which currently pervade the Lebanese banking sector. It appears, indeed, that, were Lebanese banks to accede to all international transfer requests, there would be a run on the banks and a collapse of the banking sector. That said, as Mr Toledano QC highlighted, the Banks do not say that the transfers were impossible. Nor have they alleged *force majeure*. Their case, rather, is that, although they could have made the transfers, they were (and are) under no obligation to do so.

20. The crisis's immediate catalyst was nationwide political unrest in the autumn of 2019, triggered by a proposal by the government to tax calls made by WhatsApp. Due to that unrest, which included protests, street riots and roadblocks, Lebanese banks were closed for two weeks between 18 October 2019 and 31 October 2019. During this time, SGBL issued a blanket directive to refuse all requests for international transfers and Bank Audi directed employees not to process any new cross-border requests until after the Bank reopened and resumed business. When the banks reopened on 1 November 2019, there was a run on all Lebanese banks, with large numbers of clients attempting to withdraw all their foreign currency or transfer it all abroad.

21. Anticipating such a run, SGBL issued a directive to its employees that, from 1 November 2019, no international transfers were to be made for any purpose. Bank Audi similarly imposed severe restrictions on international transfers, directing staff that foreign exchange transactions exceeding US$10,000 must not be accepted unless approved by Bank Audi's central Treasury Unit. Such international transfers were only to be permitted for personal expenses. These initial directives were intended as temporary, stop-gap measures. At the time, the Banks thought that the crisis would be shortlived and that clients' loss of confidence resulting from the protests and the October 2019 bank closures would be restored. Instead, the crisis deepened, due to problems at a macro-economic level in Lebanon.

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

The Lebanese banking sector's response (in general)

23. On 11 November 2019, after 10 days of further unrest, including bank employees being subjected to verbal and physical abuse, the Lebanese Syndicate of Bank Employees called for a general strike over concerns for safety, and the Banks were forced to close once more. Also on 11 November 2019, the Governor of BdL asked the banks to process cross-border transfers for personal necessities only - a signal to clients that the Banks were acting in accordance with a public directive, which began to manage expectations.

24. The Association of Lebanese Banks (the 'ABL') began developing a harmonised policy on international transfers, which was formally released on 17 November 2019 (the 'ABL Circular'). The ABL Circular directed that transfers abroad were to be limited to urgent personal expenses and set out maximum recommended levels of transfers abroad. Whilst the ABL Circular did not have legal force, it was adopted by the banking sector to achieve a fair and consistent approach across the sector and protect the banks' shrinking foreign currency liquidity. The publication of the ABL Circular, and the stationing of police officers near each bank branch to ensure employees' safety, helped calm the immediate situation and bring the Lebanese bank employees' strike to an end.

25. Over the following months, the Banks each began to tighten their policies and transfer limits as it became plain that the crisis was not transient, and in accordance with subsequent BdL Circulars (BdL Circulars 150, 151, 153 and 155). Each of BdL Circulars 150, 151, 153 and 155 stipulates the amounts and specified purposes for which Banks are required to permit clients to transfer overseas, primarily in respect of Lebanese students abroad. The Banks' case was that implicit in these Circulars is the acknowledgement that banks are not obliged to provide international transfer services in amounts or for reasons other than those stipulated.

Mr Manoukian's requests to SGBL

26. After an initial oral transfer request for US$100,000 conveyed on 7 November 2019 by Mr Manoukian's father, Varouj Manoukian, on Mr Manoukian's behalf to Mr Jeffy, Mr Manoukian made a number of written requests, on 8 November 2019, 3 December 2019, and 24 January 2020, that SGBL execute various transfers from his various GBP and USD accounts held with SGBL, to a GBP and USD account, respectively, held by Varouj at HSBC Switzerland.

27. Specifically, the requests were these: on 8 November 2019, a written request that SGBL transfer £200,000 from Mr Manoukian's account ending 1826 to Varouj Manoukian's account with HSBC Switzerland; on 3 December 2019, two written requests dated 2 and 12 December 2019, that SGBL transfer £250,000 from Mr Manoukian's account ending 1826, and £200,000 in part from his account ending 1826 and in part from his account ending 2826 to Varouj Manoukian's account at HSBC Switzerland; on 24 January 2020, a written request for the transfer of the entirety of Mr Manoukian's funds held in his GBP accounts ending 2826 and 1826, and his USD accounts ending 4840, 3840, 2840, 7840, 1840 and 5840 (that is, the totality of his funds with SGBL at the time) to a GBP and a USD account held by Varouj Manoukian at HSBC Switzerland; and on 26 October 2020, Mr Manoukian requested that SGBL effect a transfer of £537,000 and four transfers totalling US$2,177,000 (and therefore, a little less than the total of his funds held with SGBL) to accounts held by him at HSBC Switzerland.

28. Mr Jeffy rejected each of the initial SGBL requests without escalating them to Mr Chehab. During this period, Mr Manoukian and his family continued to contact Mr Jeffy and SGBL seeking international transfers, and SGBL considered these requests where they appeared to come within its policies. Mr Manoukian sought (and received) a far more limited payment of £12,000 to the benefit of a company he controls, on the basis of an urgent business need. SGBL made two payments of £6,000 each, on 13 December 2019 and 19 December 2019.

29. Mr Chehab explained how SGBL implemented exceptional measures in respect of international transfers and other foreign currency transactions, and how these evolved over the course of the crisis. From the outset of the crisis, the norm for SGBL was to refuse international transfer requests, and requests were only granted on an exceptional basis for very small sums or percentages of the accounts held with each Bank. SGBL centralised all decisions on foreign transfers through discussions and email communications through four individuals: Mr Sehnaoui, the Chairman (also referred to as the President) of SGBL; Mr Chehab himself; Mr Saghbini, his co-Deputy General Manager; and Mr Ghantous, SGBL's senior manager for the Bank's retail network. The transfer policies developed in this way were then communicated down to regional managers and branch managers as necessary. Throughout, a significant number of requests were considered directly by Mr Chehab, particularly requests for larger sums or involving Bank personnel and so requiring his higher authority. In the first months of the crisis, Mr Jeffy had authority to approve international transfers up to a value of US$5,000 per client group, but this authority was removed by around April 2020. Mr Ghantous initially had authority to approve transfers to a limit of US$5,000 (but this designated authority was removed in July 2020 as the crisis continued).

30. The general approach taken by SGBL, in line with the ABL Circular and subsequent BdL Circulars, was that the requested transfers had to be urgent and for compelling personal needs, such as for health and medical reasons, to pay fees for Lebanese students studying abroad, or to meet tax payment obligations, in circumstances where the client lacked an alternative source of funds to meet the payment demand. Most requests were filtered out as plainly inappropriate and were not escalated up the chain for approval by senior management.

31. On 26 October 2020, Mr Manoukian sought the transfer (as referred to above) of £537,000.00 and US$2,177,000 to Mr Manoukian's accounts in Switzerland. This was rejected by Mr Jeffy without escalating it to senior management.

Mr Manoukian's requests to Bank Audi

32. On 29 November 2019, Mr Manoukian's accounts with Bank Audi were consolidated in three current accounts, which as at around that date held €219,955.69, US$324,703.41 and £404,965.98 respectively. By successive requests dated 6 February 2020, 12 February 2020 and 22 April 2020, Mr Manoukian requested that Bank Audi transfer the sums standing to the credit of three accounts denominated in those currencies held by his father at HSBC Switzerland. Bank Audi did not execute these transfers. Later, on 26 October 2020, Mr Manoukian requested that Bank Audi transfer €218,000.00, US$324,000.00 and £403,000.00 respectively to three accounts denominated in those currencies and held by him at HSBC Switzerland (this was, therefore, a little less than the total of his funds held with Bank Audi). Bank Audi did not execute these transfers.

33. As to Bank Audi's policies at the time that these various requests were made, the evidence was that these had involved eight *"Phases"*, with ever-tightening restrictions on the amount to be transferred, and the permitted reasons and requisite level of urgency of the request. The policies in place from time to time were communicated by senior executives to branch employees. If a transfer request seemed like it might be within the scope of the policies (based on its size and the reason for the transfer), the employee would refer it up to senior management for approval. Requests which were plainly outside the scope of the policies would be declined by the employee without further referral. Specifically, *"Phase 4"* covered the period from 1 February 2020 to 13 March 2020 and so the period within which Mr Manoukian made his first requests to Bank Audi for international transfers, seeking the transfer of his entire account balance to Swiss accounts in his father's name. During this period, caps applied to the amount that would be transferred, and Bank Audi would only carry out transfers for clients whose funds and source of income were exclusively within Lebanon (the rationale being that, if the client had funds abroad or foreign income available, that income could be applied to meet the expense and so the request was not truly urgent). Ms Razzouk explained that Mr Manoukian's initial Bank Audi requests, which were for transfers of his entire account balances, plainly fell outside the scope of these policies. Accordingly, she considered and rejected these at branch level, without escalating them up to the Working Group for approval. Instead, Bank Audi offered Mr Manoukian payment of his balances in the form of banker's cheques drawn on BdL.

34. By *"Phase 7"* (20 August 2020 to 31 December 2020), Bank Audi had tightened the restrictions even further. It was by then mandatory for clients to show a history for all payment requests (i.e., the requests had to be for payments that the client had been making regularly before the crisis); the cap for family expenses was decreased to US$12,000 a year (it had been US$60,000 a year in Phase 4); and tight regulations were imposed on the transfer of payments for students, including tuition and living expenses, in line with BdL Circular 153. During this phase, Mr Manoukian made the further requests to Bank Audi seeking the transfer of £403,000, US$324,000 and €218,000 from his respective foreign currency accounts with Bank Audi to his nominated accounts in Switzerland referred to above. Ms Razzouk explained that Bank Audi's restrictions had only become stricter over time, and she knew there was no prospect of these requests being granted. Accordingly, she refused the requests at branch level and they were not passed up the chain for further consideration.

Article 822: Tender and Deposit

35. On 20 December 2021, the Banks each invoked the tender and deposit procedure in Lebanon. This was done pursuant to Article 822 of the procedural rules which apply in civil actions set out in the Lebanese Code of Civil Procedure ('LCCP'). That provides as follows:

> *"The debtor who wishes to be released vis-à-vis his creditor may offer to the latter through the notary public the thing or amount by which he considers himself indebted and to deposit it at the notary public himself or, if it is a sum of money, to deposit it through and to the name of this latter at an acceptable bank or in the Treasury. … "*.

36. Article 822 is supplemented by Articles 823 to 826 which are in these terms:

> *"Article 823*

The creditor must take a position to accept or reject the tender, whether by a written declaration on his notification document or through a declaration he submits to the notary public within forty-eight hours at most from the date of his notification. Acceptance may not be suspended on a condition or reservation. In the event that the tender is rejected, the notary public must report such rejection to the debtor. If the creditor declares acceptance of the tender, the notary public has the right to deliver to him the thing or amount deposited with him or in his name or located in the place specified in the tender. If he does not demand its receipt, he shall bear the risk of loss and the debtor shall be discharged from the debt. If the creditor refuses the tender and the thing tendered is not in the possession of the notary public and it was possible to move it, the debtor may request the judge of urgent matters, within two days from the date of his notification of the creditor's refusal, to grant permission to deposit it in the place designated by the judge. However, in the event the thing cannot be moved from its place, the debtor may request from the aforementioned judge to place it under custody.

Article 824

The debtor must, under penalty of the lapsing of the effect of the offer and deposit, file within ten days from the date when he is notified [of] the creditor's refusal, a lawsuit to establish the validity of the offer and deposit. The creditor may within ten days of the date of his refusal file a lawsuit to prove the nullity of the offer and deposit. The lawsuit that is filed to prove the validity of the tender and deposit[,] or to nullify it, must be filed in accordance with the rules governing the filing of lawsuits. Such lawsuit may be filed as an additional claim in a main lawsuit in accordance with the rules related to additional claims.

Article 825

The judgment holding that the offer and deposit is valid declares that the debtor is discharged from the date of the offer and deposit. As of the date of the deposit, interest stops running on the amount of the debt, the [debtor] is discharged from liability for late payment, and costs and risks pass to the creditor

Article 826

The debtor may perform the offer before the court without any other measures if the party to whom the offer is made is present. When the offer is refused, the court shall decide to deposit the offered amount at the Treasury against a receipt to its name. The clerk shall draw up minutes establishing the offer and what was mentioned in the hearing's minutes in relation to the offer and its refusal. If the thing offered at the hearing is other than funds, the offeror must ask the court to appoint a receiver for it. The judgment appointing the receiver may not be challenged."

37. Accordingly, the Banks informed Mr Manoukian that they were utilising the process under Article 822 of the LCCP by depositing cheques with notaries public. In the case of Bank Audi, they were in the sum of US$329,738.52, €222,143.27 and £421,987.03; and in the case of SGBL, US$2,170,044.58, £543,840.79, €3,267.92 and LBP11,761,979. It follows that, with the exception of the payment in LBP (which is not material in the context), all payments were purported to be made in foreign currency. The Banks have filed an associated validation claim in Lebanon, which seeks

a declaration that the Banks were entitled to repay the debt by means of the BdL cheques. In response, Mr Manoukian has commenced his own proceedings in Lebanon, effectively seeking the opposite relief. The parties were, however, agreed that the validity of the Article 822 process was to be decided in these proceedings rather than in Lebanon.

38. In taking these steps, the Banks (albeit somewhat belatedly) did what another Lebanese bank represented by the same solicitors (and counsel), Blom Bank SAL, had previously done in relation to a dispute with one of its clients, Mr Bilal Khalifeh. That dispute led to a trial before Foxton J in November last year, in which the issue was whether, under Lebanese law, Blom Bank had effectively discharged its debt to the client through engaging the Article 822 procedure and so by tendering payment in the form of banker's cheques drawn on BdL and then depositing those cheques with a notary public in Lebanon. In his judgment (***Khalifeh v Blom Bank SAL*** [2021] EWHC 3399 (QB)), Foxton J held that Blom Bank had discharged the debt through the tender and deposit process. He, accordingly, dismissed Mr Khalifeh's claim. Although it appeared coming into the trial before me that the Banks would be inviting the Court to reach the same conclusion as Foxton J did in ***Khalifeh***, as I shall come on to explain, ultimately it was accepted by Mr Wilson QC that the Article 822 procedure is no answer to Mr Manoukian's primary (specific performance) case.

The issues

39. At least at the start of the trial, the parties were agreed that the following issues arose: (i) whether an international transfer right exists under the contract with each of the Banks (the 'Contractual Transfer Right Issue') - and, in the case of Bank Audi, whether a particular exclusion clause is applicable; (ii) further or alternatively, whether an international transfer right exists as a matter of Lebanese law (the 'General Transfer Right Issue') - and, again in the case of Bank Audi, whether a particular exclusion clause is applicable; (iii) alternatively, in the event that an international transfer right does not exist, in the case of SGBL, whether it acted in abuse of its rights or in bad faith by exercising its discretion in bad faith or in abuse of rights, by making payments as a result of factors such as nepotism, favouritism or the status of the client; and (iv) the impact of the Article 822 tender and deposit procedure on Mr Manoukian's claim.

40. There were other issues also, specifically an issue concerning the appropriate currency applicable in the Article 822 context, but it was agreed that such issues did not need to be determined. As a result, I say no more about them.

41. Otherwise by way of preliminary, it should be noted that in ***Khalifeh*** the claimant accepted that no international transfer right existed under Lebanese law. Foxton J did not, therefore, address either of the first two issues set out above.

The Contractual Transfer Right Issue

42. This is an issue which turns on Lebanese law since that is the law which the parties were agreed would govern the contracts entered into between Mr Manoukian and SGBL and Mr Manoukian and Bank Audi respectively. Specifically, SGBL's terms and conditions provide, under *"Miscellaneous Provisions"*, at *"F-Applicable law and dispute resolution"*, as follows:

"Any dispute that may arise in connection with the application or interpretation of this SGBL account agreement as well as the products and services appearing therein will be governed by Lebanese laws …".

Bank Audi's terms and conditions provide at *"X- Governing Laws and Competent Jurisdiction"*:

"Without prejudice to the provisions of Paragraph 1 of Article 1 of Chapter Six of this Agreement, this Agreement shall be governed by and construed in accordance with Lebanese laws …".

Contractual construction as a matter of Lebanese law

43. Turning, then, to Lebanese law, first, there was no issue between the parties (more specifically, Mr Najjar and Dr Moghaizel, the experts instructed by Mr Manoukian and the Banks) that it is for Mr Manoukian to establish the existence of an international transfer right, whether that be contractual or as a matter of the general law. Secondly, as to the principles concerning the construction of contracts, these were also largely (if not entirely) common ground between Mr Najjar and Dr Moghaizel. They are also, it may be noted, in many respects similar to the applicable principles under English law. Accordingly: (i) contracts are to be construed and implemented in good faith, in accordance with the principles of fairness, and consistently with prevailing customary practices: Article 221 of the Lebanese Code of Obligations and Contracts (the 'LCOC'); (ii) Lebanese law requires the ascertaining and giving effect to the parties' joint intention, and not just the words used by the parties in the written contract interpreted literally: Article 366 of the LCOC; (iii) contractual provisions that are ambiguous and require interpretation are to be interpreted in light of other contractual provisions, the general organisation of the document, its coherence and its purpose: Article 367 of the LCOC; (iv) Lebanese law requires the taking into account of the meaning of the contract as a whole and the other provisions in the contract in interpreting each provision: Article 368 of the LCOC; (v) a judge must apply established 'customary provisions' into the contract, even if these are not expressly incorporated into the contract, unless they are contradicted by the terms of the contract: Article 371 of the LCOC; (vi) furthermore, in the case of ambiguity in certain contracts involving consumers, Article 18 of the Lebanese Consumer Protection Law (the "Consumer Law") provides that ambiguous clauses are construed in favour of the consumer.

44. In the present case custom ((v) above) has a particular significance. This is because, in closing, Mr Wilson QC made an important acknowledgment (repeated orally) in his written document at paragraph 41.1, as follows:

"…the Claimant's case is that the contracts should each be construed consistently with custom. The Banks acknowledge that, if there is a Transfer Services Custom, such custom is incorporated into the contracts absent express words to the contrary (and the Banks concede that the contracts do not expressly exclude any such custom). Importantly, however, this is a neutral consideration unless and until the existence, and content, of any Transfer Services Custom is established."

45. Mr Toledano QC, in his closing, made a similar point when he stated as follows at paragraph 204:

"It should be noted that there is not necessarily a bright line between the Contractual Transfer Right and the General Transfer Right. In relation to the Contractual Transfer Right, as explained above, the wording of the contract needs to be construed, not just by reference to the general principles of construction, but also in line with Article 18, and with custom. Given the very strong custom providing for the Transfer Right, this leads to the Contractual Transfer Right – but it is also a factor that strongly supports the General Transfer Right."

He went on at paragraph 205 to say this:

"The point is, therefore, that even in a contract that is silent, that is enough to mean that there is a right for the customer to effect an international transfer."

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

SGBL's terms and conditions

47. In considering SGBL's terms and conditions, I focus on the main provisions relied on by Mr Manoukian, rather than seeking to address every aspect highlighted by Mr Toledano QC during the course of his submissions. It was Mr Toledano QC's submission that the position under the SGBL General Conditions is clear and that they provide for the international transfer right claimed by Mr Manoukian, but that, even if that is not right, they are at best from SGBL's perspective ambiguous so as to mean that they should be construed in Mr Manoukian's favour, as a consumer, pursuant to Article 18 of the Consumer Law and the international transfer right, accordingly, is to be treated as existing.

48. In support of this stance, Mr Toledano QC primarily (if not exclusively) highlighted Clause I/A/b/2. This provides, in translation from the original Arabic under the heading *"Debit operations"* and the sub-heading *"Occasional fund transfers"*, that:

"the account holder has the right to request [or *"ask"*] *SGBL to make any transfer to another account, at the branch, or to another of its branches or another bank, either in favour of the holder or in favour of third parties."*

49. Although Mr Wilson QC submitted that this provision merely entitled Mr Manoukian to ask for a transfer and that SGBL is under no obligation to implement such a request if it had a 'legitimate reason' to refuse, I agree with Mr Toledano QC when he submitted that this is not right on a proper construction of Clause I/A/b/2. I say this for a number of reasons, each as advanced by Mr Toledano QC.

50. First and perhaps most importantly, I agree with him that a right to ask that there be a transfer must entail a right to that transfer being made. If all that it entailed was the right to make the request, then, it is difficult to see what the purpose of Clause I/A/b/2 is since it is always open to a bank's client to ask that the bank do something. As such, it would, as Mr Toledano QC submitted, amount to nothing more than surplusage. The only purpose of the inclusion of the clause must be so as to make clear that there is a right to a transfer.

51. Secondly, again as Mr Toledano QC pointed out, Clause I/A/b/2 does not stand alone. Thus, Clause I/A/b/2 itself further provides (in fact, in the previous sub-clause), under the sub-heading *"direct debit notice"*, that the client has the right to ask that the bank debit his account for certain repetitive payments (electricity, telephone, water, internet bills). It is difficult to conceive how SGBL could refuse such requests since to do so would mean that the client could not pay essential and regular household bills. Similarly, in the next sub-clause, Clause I/A/b/2 provides, under the sub-heading *"permanent automatic transfer"*, that the account holder has the right to instruct SGBL to transfer specified sums on regular dates to another bank account. This is wording which clearly confers a right upon Mr Manoukian to set up a standing order. It would be most odd, in the circumstances, as Mr Toledano QC submitted, if Mr Manoukian were entitled to create a standing order but not entitled to make a single (international) transfer.

52. In this respect, I do not accept that Mr Wilson QC was right when he sought to distinguish between the language used in Clause I/A/b/1, which is concerned with credit transactions, and that used in Clause I/A/b/2, which concerns debit transactions. The former describes the account holder as being able to perform (*"can perform"*) transfers/payments into his account, acts which involve no need for consent on SGBL's part, whereas Clause I/A/b/2 instead uses the language of request. Mr Wilson QC submitted, accordingly, that the latter required SGBL's consent. Although right about this to a degree, this is nonetheless not a distinction which seems to me to assist either way. This is because the fact that, if there is to be a transfer, SGBL will need to do something in response to a request casts no light on whether SGBL is obliged to do that thing, which is the issue presently under consideration.

53. Nor is it only Clause I/A/b/2 which is instructive in this connection since Clause VI(E) also supports the argument that Clause I/A/b/2 establishes the international transfer right for which Mr Manoukian contends. This provides as follows:

> *"Accounts denominated in foreign currencies, and held with SGBL have their counterpart with its correspondents; these assets are therefore subject to existing legal regulations and restrictions or those which would be taken in the countries of these correspondents. They are therefore only available to the extent that SGBL itself has free disposal from the aforementioned correspondents."*

I agree with Mr Toledano QC when he submitted that, if Clause I/A/b/2 merely afforded SGBL a discretion, then, there would have been no need for Clause VI(E) since it would be open to SGBL simply to refuse to comply with a transfer request.

54. Clause VI(E), in truth, however, is significant for a further reason. This is that it demonstrates why Mr Wilson QC must be wrong when he submitted that it is open to SGBL to decline to meet an international transfer request for, as he put it, any

'legitimate reason'. The fact that Clause VI(E) stipulates a scenario where an international request is not to be performed points in the opposite direction to Mr Wilson QC's submission. The absence of a similar provision identifying other scenarios where SGBL would be entitled to refuse to comply with such a request suggests that SGBL's ability to refuse to comply is otherwise limited. Put straightforwardly, the fact that the SGBL Conditions specifically set out the circumstances when foreign transfers need not be made indicates that these are the only circumstances where there is such an exclusion.

55. Thirdly, there are other provisions in SGBL's General Conditions where SGBL has either sought to reserve for itself a discretion or sought to reserve to itself the right to withdraw a service otherwise provided. These include, for example, Clause IV/A/a, in relation to accounts known as *"!Live"* accounts, which provides, in the event of a lack of sufficient or available funds, that:

"It is understood that the aforementioned banking products and/or services may be suspended temporarily or definitively stopped by SGBL, at its sole discretion, at any time and without notice …

…

SGBL expressly reserves the right to temporarily suspend or definitively stop the aforementioned banking products and/or services".

Similarly, Clauses IV/B/a and IV/C/a specify a limitation in essentially the same terms in relation to other accounts called *"!Live+"* and *"GALAXIE"*, whereas Clause IV/D/a provides for the same regarding the *"SELECT"* current account, and there is also Clause IV/E/a, which states that:

"[i]t is understood that the principle and the basis for calculating the loyalty bonus [offered as part of an account called 'SWING+'] (including its percentage) are left to the sole discretion of SGBL, which expressly reserves the right to cancel or suspend it temporarily and/or to modify it, relatively to year (N + 1), at any time, without notice".

56. It was Mr Wilson QC's submission that reliance on these further provisions entails the making of a false comparison since the discretions conferred on SGBL in them relate to services and matters where SGBL has far more scope to decline performance provided that it does not act in bad faith. By contrast, Mr Wilson QC pointed out, the Banks accept that they are generally required to provide transfer services, except where they have a 'legitimate reason' not to do so. That submission does not, however, meet Mr Toledano QC's point, which is that nowhere in SGBL's General Conditions is there a reference to SGBL being entitled, as a matter of discretion, to decline to accede to an international transfer request. This, in circumstances where elsewhere such a discretion is made express. The fact that a discretion is expressly identified in these other respects dealing with different types of service is somewhat beside the point. I am not, therefore, persuaded by the submission which Mr Wilson QC made. I agree, on the contrary, with Mr Toledano QC that, if there were to be any relevant restriction on international transfers, this would have been stated explicitly. The fact that it was not is significant.

57. Fourthly, again in agreement with Mr Toledano QC, the context in which (and expectations against which) the contract between Mr Manoukian and SGBL was

concluded can hardly be overlooked: see Articles 366 and 367 of the LCOC. These likewise support the existence of the international transfer right for which Mr Manoukian contends given that he opened the account from London and so it would, in my view, have always been expected that he would have a right to make international transfers. If the position were otherwise, it would mean that the account could not be operated as a normal bank account. As Mr Toledano QC highlighted in closing, that there were such expectations was explicitly accepted by Mr Chehab in evidence, who described the making of transfers requested, subject only to compliance verification. This is clear from the following exchange:

"Q. Yes. So you are describing here the general situation with how expatriates would bring money, put money into Lebanon, and I'm assuming that those same expatriates would then from time to time ask for their money to be returned or to be paid out of Lebanon to other countries?

A. You have to distinguish between the situation before the crisis –

Q. I was talking before the crisis. I'm just talking before the crisis –

A. Okay.

Q. -- in general terms, that's how it worked?

A. Yes. We had normal banking activities.

Q. Yes. And –

A. Receiving funds in and out.

Q. And that would often involve the customers instructing the bank to transfer the monies back to a foreign account and the bank would ordinarily do that?

A. Yes. Provided that the justification and the invoices and the money laundering procedures were in place, obviously. It was not on internet banking. It has to be properly justified.

Q. You mean you would do your compliance checks?

A. Of course.

Q. And expatriates when they paid that money in the pre-crisis world, they would have expected to be allowed to take that money out and give the bank an instruction to transfer the money out anywhere they wanted it to go, correct?

A. If need be.

Q. If they wanted that. If they asked for it, they would be entitled to expect that's what the bank would do?

A. Yes."

58. Lastly, I agree also with Mr Toledano QC that, in view of Article 18 of the Consumer Law, to the extent that there is ambiguity and in circumstances where nowhere in SGBL's General Conditions is it spelt out that SGBL has a discretion not to comply with an international transfer request, that ambiguity ought to be resolved in Mr Manoukian's favour, so as to mean that there is no such discretion.

59. It follows, for these reasons, that the international transfer right for which Mr Manoukian contends has been made out. That is the case, even without resort having to be had to the existence of any customary such right – a matter to which I will return if only out of completeness.

Bank Audi's terms and conditions

60. Turning to Bank Audi's terms and conditions, my conclusion is the same: that Mr Manoukian has established an international transfer right. I have reached this conclusion for two reasons essentially.

61. The first relates to Mr Toledano QC's reliance on Chapter One/IV/2/b of the Bank Audi General Conditions, which provides (under the heading *"Transfers"*) that Bank Audi is exempted from liability for delay:

> *"in performing a transfer from his/her Account upon his/her request, for reasons related to compliance verification of the transfer"*.
>
> Mr Toledano QC submitted that this provides (again as he put it, *"in terms"*) that Bank Audi may only refuse to comply with a transfer request while it is undertaking such compliance verification, and not otherwise. There can only be a need to excuse liability for delay, he observed, if there is an obligation to make a transfer without delay, except in the one (stated) exempted situation, namely where compliance verification takes place. Chapter One/IV/2/b is, therefore, Mr Toledano QC submitted, *only* consistent with the existence of the international transfer right.

62. Mr Wilson QC submitted that the better interpretation of this clause is that it is deliberately cast narrowly because it is an exclusion of liability, and the exclusion was intended by the parties to apply only to a narrow category of a client's loss and then only in the event of delay rather than non-performance. However, for essentially the same reasons as given in relation to Clause VI(E) of SGBL's General Conditions (see [53]-[54] above), I do not agree with this: specifically, the fact that there is an exception in respect of delayed performance demonstrates that there is an obligation to perform since, if there were not such an obligation, there would be no need for the exception given that the bank could simply say that it is under no obligation to do as the client wishes it to do and make the international transfer.

63. Secondly, as with the SGBL Conditions, the joint intention and expectations of the parties must be taken into account: see [57] above. They apply in the case of Bank Audi also. The expectation of the parties must surely have been that an expatriate such as Mr Manoukian would have the international transfer right which he asserts.

64. I am not persuaded, however, that the other provisions relied upon by Mr Manoukian assist his case. Thus, as to Chapter Two/II/3/a, which provides that, in respect of a savings account with a savings passbook, the client *"is not entitled to withdraw from*

the Account by virtue of checks [sic], transfers or any other Electronic Banking Service", although Mr Toledano QC submitted that this indicates that a transfer will be permitted unless otherwise excluded, as Mr Wilson QC submitted, this does not follow: all that can be inferred is that it is possible and permissible to draw cheques and make transfers from a deposit or current account, not that Bank Audi must accede to all such transfer requests.

65. As for Chapter Two/I/1, which provides that a client may open a current account with Bank Audi and that it may be activated by any of the following transactions (cash withdrawal or deposit, or by cheque, transfer or debit card, Electronic Banking Services or any other means adopted by the Bank), I do not see how this can properly be said to indicate the existence of an unrestricted international transfer right. As Mr Wilson QC submitted, there is no obvious relationship between the clause and the proposition which Mr Manoukian seeks to extrapolate from it: this clause is concerned only with the mechanism which Bank Audi may adopt to activate the account.

66. Similarly, as to Chapter Two/I/9, which provides that the client is only entitled to make cash withdrawals at the counter of the branch where the account is opened, this really has no bearing on whether there is an international transfer right. Nor does Chapter Six/III/2, which (under the heading "Banking Secrecy") envisages the making of transfers through *"the Bank's local and/or foreign correspondents"*, since, at most, it indicates that Bank Audi had the ability to perform international transfers and that it *might* do so.

67. As for Chapter Six/VII (*"Transactions Value Date"*), which provides that the Bank in its sole discretion may determine the value date of the withdrawal, deposit, transfer or currency conversion transaction, Mr Toledano QC submitted that, because the clause expressly confers this discretion, Bank Audi has no other discretion when it comes to deciding to carry out such a transaction at all. However, again, this does not follow. This clause is only engaged where Bank Audi has accepted and agreed to perform the transaction; it does not address the circumstances in which Bank Audi must agree to such requests or its rights and obligations in doing so.

68. It follows that, again even without having regard to custom, the conclusion which I have reached is that the international transfer right for which Mr Manoukian contends has been established on the basis of Bank Audi's terms and conditions. Lastly, to the extent that there is ambiguity and in circumstances where nowhere in Bank Audi's terms and conditions is it spelt out that Bank Audi has a discretion not to comply with an international transfer request, that ambiguity ought to be resolved in Mr Manoukian's favour, so as to mean that there is no such discretion.

69. Before leaving this issue, I should add something concerning Bank Audi's one-time reliance on the exclusion clause which is to be found at Chapter Six/II/2/c of its terms and conditions and which states that:

"The Bank shall not be liable for: … c - The unavailability of the foreign currency in all or part, for any reason, especially as a result of decisions taken by the competent legislative or administrative authorities or for any other reason."

70. In opening, Mr Wilson QC submitted that Lebanon's foreign currency liquidity crisis meant that there was an unavailability in part, in that Bank Audi lacked (and lacks)

sufficient foreign currency to repay all the clients who have asked for international transfers, let alone all clients who might request such transfers. By the time of closing, however, Mr Wilson QC explained that Bank Audi no longer sought to rely upon this exclusion clause. This was a realistic concession for, as Mr Toledano QC submitted, a number of reasons. The first of these is that the exclusion clause is disapplied in the case of Mr Manoukian since he is classed as a consumer under the Consumer Law and Article 26 of the Consumer Law provides as follows:

"Clauses aiming at, or leading to, creating an imbalance between the rights and obligations of a professional and a consumer, not in favour of the consumer, are considered abusive. The abusive aspect of a clause is assessed on the date of the contract, and by reference to the contract's provisions and annexes except for those related to the price."

Abusive clauses *"shall be deemed completely void, while other clauses shall remain fully applicable"*.

71. Article 26 goes on to state that *"By way of non-limitative example, any of the following clauses shall be deemed abusive"*. These include *"clauses exonerating the professional [from] liability"*. Accordingly, as Mr Toledano QC submitted, the exclusion clause cannot avail Bank Audi, since, insofar as it purports to exonerate Bank Audi from liability for its breach of Mr Manoukian's transfer right, it is null and void.

72. Dr Moghaizel's evidence on this topic was unimpressive since, although he accepted that Article 26 says what it says, he maintained that it is a provision which does not apply to banks. This, despite the fact that he accepted the principle that the Consumer Law *does* apply to Banks as, indeed, it plainly does given that Article 17 of the Consumer Law is in these (wide and bank-specific) terms:

"The provisions of this Law related to contracts concluded between the professional and the consumer shall apply to all matters that do not conflict with the statutory provisions governing liberal professions, banks, and insurance companies".

73. In view of the fact that Mr Wilson QC did not press the point, I do not propose taking up time addressing Dr Moghaizel's reasoning. Suffice to say, however, that I did not find it at all persuasive. Nor, in the circumstances, need I take up time addressing the further reasons advanced by Mr Toledano QC as to why the exclusion clause does not operate in the present case. It should not be assumed, however, that these additional reasons are ones which I would accept make the exclusion clause inapplicable.

74. I should also, lastly, add in the context of the exclusion clause at Chapter Six/II/2/c that nonetheless I do agree with Mr Wilson QC when he submitted that the provision does not assist Mr Manoukian in relation to his case that Bank Audi is under an obligation to effect an international transfer since, in my view, he was right to submit that the exclusion is not obviously concerned (and certainly not necessarily concerned) with transfers as opposed to other obligations on the part of Bank Audi.

Custom

75. I turn next to the issue of custom. As previously explained, it was ultimately accepted, in closing, by Mr Wilson QC that, if there is such a custom, then, Mr Manoukian's case

must succeed whether on the Contractual Transfer Right Issue or the General Transfer Right Issue or, more accurately, on both those Issues. Indeed and conversely, by the time of closing Mr Toledano QC was at least inclined to recognise that, if the international transfer right could not otherwise be established as a matter of construction of the Banks' respective terms and conditions applying the general rules of construction, unless such a custom could be established, then, Mr Manoukian's case would face difficulty.

Foreign law

76. This issue entails consideration of Lebanese law. As such, like Foxton J in ***Khalifeh*** (at [123]), I have sought to follow the guidance given by Simon J (as he then was) in ***Yukos v Rosneft*** [2014] EWHC 2188, [24]-[30]. Mr Wilson QC highlighted, in particular, [29], which states as follows:

"… the Claimant (for reasons which I will come to) submitted that the relevant issue would have to be resolved in the 'Supreme Court' of the foreign jurisdiction; and that therefore the relevant question is: what would the 'Supreme Court' decide if the matter were before it? … I accept that this may be the right approach in some circumstances, but it will not be the right approach in every case. The legal issue may, for example, have been plainly decided by a court which is inferior in jurisdiction to the 'Supreme Court'. I have concluded that the law is correctly stated in Dicey at 9-020.

'Considerable weight is usually given to the decisions of foreign courts as evidence of foreign law ... But the court is not bound to apply a foreign decision if it is satisfied, as a result of all the evidence, that the decision does not accurately represent the foreign law. Where foreign decisions conflict, the court may be asked to decide between them, even though in the foreign country the question still remains to be authoritatively decided.'"

77. Mr Wilson QC also drew the Court's attention to ***Bumper Development Corp v Commissioner of Police of the Metropolis*** [1991] 1 WLR 1362, in which Purchas LJ had this to say at page 1371B-C:

"… we have come to the conclusion that the judge was not entitled to reject the evidence of the experts to the effect that Sadogopan did not have a sufficient continuity of association with the temple to qualify as a 'de facto' trustee. Furthermore, we have also come to the conclusion that Mr Calcutt was correct in submitting that Ian Kennedy J was not entitled to rely upon his own researches based on passages from B.K. Mukherjea on the Hindu Law of Religious and Charitable Trust, 5th ed. (1983) without having the assistance of the expert witnesses and the submissions of counsel. …".

In closing, however, Mr Wilson QC explained that he was not meaning to suggest that this gives rise to an inflexible or absolute rule. His submission, rather, was merely that, where there is a measure of conformity between experts on a particular issue, that should carry substantial weight. It will shortly become apparent why Mr Wilson QC advanced this submission since, as will appear, a central plank of his case concerning custom involved certain of the answers which Mr Najjar gave during the course of his cross-examination.

The expert evidence and doctrinal writings

78. Against this background, I will, in due course, consider the various Lebanese court decisions to which I was referred during the course of the trial. Before doing so, however, I propose, first, to address certain doctrinal writings since both Mr Najjar and Dr Moghaizel were agreed that these are also important.

79. It was Mr Najjar's position, indeed, that such writings make it clear that international transfers are part of the expected services to be received by the clients from their bank on the opening of an account since international transfers are included in the scope of the services that a bank offers with its *"service de caisse"*. He cited in this specific regard *Gavalda* and *Stoufflet*, and two 'Urgent Matters Judge' decisions in support of his view, namely ***Rahman v Lebanese Credit Bank SA, Decision no. 5/2020 dated 13 January 2020*** and ***Tarawi v Bankmed SAL, Decision no. 1/2020 dated 3 January 2020***. In a similar vein, as pointed out by Mr Toledano QC, the French legal database *Jurisclasseur* summarises a range of learning to the effect that banks ensure transfer services as part of their cashier services, whilst *Cabrillac* in 'Le cheque et le virement' (5th Ed.) has this to say:

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

adding later that:

"Each order constitutes a special mandate which the banker must accept. However, because of the tacit commitment he has made by opening the account he cannot, under penalty of incurring liability, refuse or omit to execute an offer without valid reason; it is admitted that he could be forced to do so by legal proceedings."

80. These are French works, rather than Lebanese. As such, according to Dr Moghaizel, they should not be afforded any real weight on the basis that since 1941 there has been a specific legislative provision in France which has differentiated the position from that under Lebanese law. This is something of a non-point, however, since the French law merely codified a pre-existing custom, which confirms that not only that the custom exists (in both France and Lebanon) but that it is longstanding.

81. Indeed, *Encyclopedie Dalloz*, another French work, states that it has *"always"* been the case *"that the banker who has accepted to open an account has therefore undertaken towards the client to effect the transfers that the latter asks him to operate; he cannot therefore refuse to make a transfer"*. As Mr Toledano QC pointed out, not only has this position been confirmed in other French writing but, more pertinently perhaps, this very passage has been applied in recent decisions in Lebanon, including, for example, the 'Enforcement Judge' decision in ***Bank of Beirut SAL v Hasan Makki, Decision no. 54/2021 dated 30 November 2021***.

82. Furthermore, as Mr Najjar explained, with one possible exception (*Nammour*) highlighted by Dr Moghaizel, Lebanese jurists, in any event, say the same on this topic as French jurists. Thus, *Fabia* and *Safa* cite *Encyclopedie Dalloz*, saying this:

"In accordance with the agreement or established practice, the banker in charge of the deposit account shall provide the depositor with a cash service by paying, up to the

amount deposited, the amounts set out in summonses, cheques, requests for transfer or any other acts of disposal."

Additionally, *Nassif* states:

"The depositor shall have the right to have an order for the bank to recover the deposit according to the terms of the contract, in cash, by … transfer, or by way of withdrawal voucher … ."

The Egyptian jurist *Awad* also has this to say:

"It has been an established banking custom that the bank undertakes implicitly to execute all cashier services at the same time upon opening a bank account for a client. These services are made through different operations such as … the execution of the client's transfer orders."

83. As for *Nammour*, cited by Dr Moghaizel, what he has to say does not detract from the custom which Mr Manoukian seeks to establish. As to this, Dr Moghaizel referred (in translation from the original French) to a passage in which *Nammour* stated as follows:

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

However, as Mr Najjar explained, what *Nammour* is here describing is a bank's right to refuse a transfer request if (and only if) it has suspicions in relation to the origin of the funds or as to their criminal nature (and so a compliance concern). After verifying the compliance of the transfer order, Mr Najjar explained, the bank is bound to effect the transfer and this obligation of result falls within the general mandate binding the bank towards its client.

84. That this is, indeed, all that *Nammour* was saying in the passage relied upon by Dr Moghaizel is borne out by a further article of his which Mr Najjar caused to be exhibited to the experts' joint memorandum. In that article, Nammour had this to say:

"Right to the transfer. The right of the person who gave an order of transfer exists once the bank accepts to effect such operation. Nevertheless, the bank is not required to execute a transfer order, even if only with a view to return the funds unduly received by its client, unless at the date of the order, the funds are available, whether because of the credit status of the account, or because of the existence of an authorized overdraft. Likewise, the bank will be exempted from responsibility in the event of an 'absolute impossibility'. This impossibility can be judicial or technical which it has to prove, and it has to notify the person who gave it an order of transfer. Therefore, the bank cannot be validly exempted from liability by relying on changes affecting its internal relationship with the drawee bank.

The question that arises is whether the bank can refuse to execute such an order addressed to him by his client? The transfer order is part of a general mandate related to the collection to which the bank committed to and for which it is liable, as a result,

towards any client except in the events of considering the illicit origin of the funds or the criminal nature of the operation. In this last case, the bank must refrain from executing the order under penalty of invoking its liability and inflicting disciplinary sanctions."

As Mr Toledano QC put to Dr Moghaizel in cross-examination, in this article *Nammour* refers in the first paragraph to insufficiency of funds and absolute impossibility as reasons for refusing to transfer before going on in the second paragraph to the bank having suspicions in relation to the origin of funds or their criminal nature and then making the point that, after verifying, the bank is bound to give effect to a transfer request. Dr Moghaizel sought in response to make the point that the position under French law is different (based on the fact that *Nammour* has footnotes referring to French law). That, however, is a point which, for reasons previously addressed, I do not find compelling. No more compelling was his insistence that, despite *Nammour* only mentioning narrow circumstances in which a bank could refuse to transfer, he should nonetheless be taken as describing a wider right of refusal.

85. I agree with Mr Toledano QC, in the circumstances, that Dr Moghaizel's evidence on this was somewhat unconvincing. As Mr Toledano QC submitted, Dr Moghaizel's evidence ultimately involved his assertion that he disagreed with one distinguished author after another, without setting out any cogent basis for doing so. I am in no doubt, in the circumstances, that Mr Najjar's evidence is to be preferred. International transfers are, as Mr Toledano QC submitted, part and parcel of the services that are provided by a bank, and have been for many years, so as to mean that clients are entitled to expect that transfers will be made subject only to their requests being valid and to compliance verification. That, indeed, was the effect of Mr Chehab's own evidence, as previously set out at [57] above.

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

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

years, even decades. The custom is, therefore, inherently flexible, allowing a bank to refuse to effect a transfer when, taking account of the circumstances at the time of the request, it is legitimate to do so.

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

89. In this last respect, Mr Wilson QC referred to Mr Najjar as having accepted that in such a scenario *"the bank has a legitimate right not to make transfer to preserve its situation and to address the financial situation"*. I am quite clear, however, that Mr Najjar did no such thing. On the contrary, despite Mr Wilson QC's repeated (and understandable) attempts to coax Mr Najjar into a position where he accepted that there is some wider 'legitimate reasons' concept which would entitle a bank to refuse to comply with an international transfer request, Mr Najjar was resolute in his evidence that the reasons which would justify refusal are, as he put it, *"limited"*. By this, he meant, as he explained when first asked by Mr Wilson QC, *"insufficiency of funds, suspicion of money-laundering and the origin of the fund"*; otherwise, *"the bank is bound through its general mandate, constituted from the inception of the bank account, to perform those operations at the discretion of the client"*. He was adamant that it is not a matter of consensualism, with the bank being free, pursuant to Article 181 of the LCOC, to decide whether to transfer or not. As he (again) put it:

"No, I totally disagree. The offer -- when, you know, when the contract -- when the account is opened with the bank, the contact is already established. The obligation of the agent to perform the transaction comes from those common banking services that stem from this relationship that has already been created between the client and the bank opening the bank account. You cannot consider that an offer will come after this. The offer has already been executed. It is the relationship that has happened initially between the bank and the client; it has created a binding relationship. And, as such, you won't be anymore in an offer situation. And, second, you cannot single out transfer operation for the rest of the common bank operation that the bank is giving. So you cannot consider, on the one hand, that the bank is effecting all those operation and then, on the other hand, consider the transfer requests or offer that the bank can refuse or accept at any time, because this will put -- first, it has total – it's totally groundless; and, second, it's not based on the current interpretation of 181."

90. When further pressed, he went on to say this:

"A. The legitimate reason as -- are limited, because the bank is compelled to execute the transfer as an obligation of results. So as an obligation of result, the bank has no discretion to refuse. It has only legitimate reason in relation to the very specific conditions I told you.

Q. Well, on that, there's no -- as far as I'm aware, there's nothing which -- we've talked about some examples of cases where a bank may refuse. There's nothing, as it were, enshrined in code, in law, which identifies those specific exceptions, right?

A. Right.

Q. So there's nothing that says 'these are the only possible circumstances in which a transfer request can be refused'; do you agree with that?

A. That's the interpretation of the obligation of result. If you have an obligation of result -- you don't have any discretion anymore to execute it or not. You are bound to execute it."

91. It was immediately after this that Mr Najjar gave the answer on which Mr Wilson QC placed such heavy reliance. However, in context, it is perfectly clear that Mr Najjar was not intending to suggest that there is some sort of wider 'legitimate reason' concept beyond the reasons (described by him as *"valid"* rather than *"legitimate"*) which he had earlier identified. Indeed, it is instructive in this respect to note that a little later this exchange ensued:

"A. If they are closed, yes, of course.

Q. Okay. And then what happened next was that although the banks opened, they experienced what we've been describing as a 'run'; all the banks had experience of their depositors, in general, seeking to get their monies out. And if that had happened, that would have led to a collapse of the Lebanese banking system, resulting in huge losses to depositors and bank shareholders; do you agree?

A. Yes.

Q. And in those circumstances, that, I will suggest to you, was also a valid, legitimate reason not to honour those transfer requests at that time?

A. You see, here we come to the principle of impossibility or frustration as a force majeure. So we consider that there is a contractual obligation, and you have an event that happened that prevent the debtor to execute the obligation. As defined, the force majeure tells you that you have to have the unpredictability or the unforeseen nature of the event, and that the event was not caused directly or indirectly by the debtor. So here we come to the very effect of the binding force of the relationship and the exception which is the impossibility due to a force majeure situation, by pursuant to Article 341 and following of the LCOC.

So, yes, they could claim that there was an impossibility to execute the transaction, provided that the condition I told you about, like the unforeseen and the not -- impossibility to the banks are met."

Mr Najjar was plainly here envisaging a different legal route which would enable a bank to refuse to comply with an international transfer request. This underlines his non-acceptance of Mr Wilson QC's suggestion that there is a wider 'legitimate reason' justification for refusal.

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

93. It follows, applying the construction principle identified at [43(v)] above and anyway as conceded by Mr Wilson QC, that the conclusions which I have reached concerning the construction to be afforded to SGBL and Bank Audi' respective terms and conditions are further underlined by the custom which I have found exists.

The Lebanese court decisions

94. So far, I have focused only on what the Lebanese law experts had to say on the matter of custom and on the doctrinal writings on this topic. I have not yet also had regard to Lebanese court decisions, other than indirectly given that, in expressing their views, Mr Najjar and Dr Moghaizel also had regard to (albeit, as will appear, to rather differing extents) Lebanese court decisions.

95. In this respect, it is worthwhile bearing in mind what Foxton J had to say in ***Khalifeh*** at [125]:

> *"Lebanon has no doctrine of precedent as such, but the jurisprudence of the Lebanese courts is capable of establishing (as well as evidencing) legal principles, particularly when a particular principle is endorsed by a number of cases, so as to give rise to a jurisprudence constante. The civil courts operate in a triarchy of courts of first instance, the Court of Appeal and the Cassation Court. In addition to what might be termed the ordinary courts, Lebanon also has courts of summary jurisdiction in which a single judge (sometimes referred to as the 'Urgent Matters Judge' but who I shall refer to as 'the Summary Procedure Judge') presides. The jurisdiction of these courts is concerned with granting urgent relief in cases in which this can be done without determining the merits of the rights and obligations of the parties (Articles 579 to 588 of the LCCP). When an issue that is seriously disputed is submitted to the Summary Procedure Judge, the Judge is required to rule that they have no jurisdiction."*

96. Foxton J went on to address the status of 'Urgent Matters Judge' decisions (or, as he described them, 'Summary Procedure Judge' decisions). Before considering what he had to say on this topic, I should say something about what constitutes 'jurisprudence' in Lebanese law since it was Dr Moghaizel's evidence that the Lebanese court decisions to which I will come on to refer are not capable of constituting 'jurisprudence' not only because of the status point (his position being that, because these are decisions within a summary jurisdiction, they are not referred to or given any weight by the 'ordinary' courts) but also because for 'jurisprudence' to be established requires, as he put it, *"a stable and repeated trend of higher courts decisions over a longer period of time"*.

Specifically, Dr Moghaizel's position was that, even if there were, say, twenty decisions all decided in the same way, still no weight should be placed on them since they do not amount to 'jurisprudence'.

97. I do not accept that Dr Moghaizel can have been right about this. It seems to me that, at a minimum and as Mr Toledano QC submitted, the fact that there is a body of decisions pointing in the same direction must serve as some sort of indication as to what Lebanese law should be taken to be. This was also the view taken by Mr Najjar, who stated in his report as follows:

"In practice, however, a number of constant rulings will be awarded substantial weight by judges deciding the same issue thereafter, particularly in cases where the written law is unclear, ambiguous, uncertain or silent".

98. Mr Najjar explained the position further during the course of his cross-examination in answer to a question from me:

"MR JUSTICE PICKEN: -- what you are really saying, as I understand it, is that if there is a body of consistent cases, more than one, but a whole body of them, then you are saying that whilst not formally binding they would be, I think you say very powerful?

A. Absolutely. Yes. Absolutely."

He added that:

"They are not bound to rely on those judgments, but they will definitely look at them, especially as I said when you have such a consistent and almost unanimity of decisions ruled by the judges of urgent matters."

99. This makes obvious sense, whereas Dr Moghaizel's approach does not, particularly his insistence that:

"There must be jurisprudence. To be able to reflect the position of Lebanese law on a specific issue, there must be jurisprudence. Jurisprudence is never represented by decisions of urgent matters judges."

The more so, as Mr Toledano QC pointed out in closing, given that Dr Moghaizel himself prayed in aid an 'Urgent Matters Judge' decision (***Daykat v Blom Bank, Decision no. 58/2020 dated 6 February 2020***) when giving his evidence in relation to the Article 822 tender and deposit process. This was raised with Dr Moghaizel in the following exchange:

"MR JUSTICE PICKEN: But isn't this you relying on an urgent matters judge to deal with a substantive point?

A. Yes. I mentioned it because it related to the issue at hand, but it's worth what urgent matters judges are worth, I agree.

MR JUSTICE PICKEN: But you're relying on a substantive point when you say in another context you shouldn't be relying on urgent matters judges' decisions for substantive points.

A. Yes, you should not, yes.

MR JUSTICE PICKEN: But here you are.

A. Yes. Yes, I did."

This was Dr Moghaizel describing 'jurisprudence' which cannot sensibly be described, as Dr Moghaizel put it, as falling into the category of *"a stable and repeated trend of higher courts decisions over a longer period of time"*. On the contrary, it was a single decision of a single 'Urgent Matters Judge'. Mr Toledano QC was right, in the circumstances, to characterise this as entailing Dr Moghaizel's mask slipping: when it came to analysing the law on the Article 822 tender and deposit issue, he was content to place significance on an 'Urgent Matters Judge' decision, whilst nonetheless maintaining in the international transfer context that such decisions cannot constitute 'jurisprudence'.

100. As to the status of 'Urgent Matters Judge' decisions more specifically, Foxton J set out certain relevant provisions of the LCCP at [126] to [128]. Thus, Article 579 provides:

"The Sole Judge may look, in his capacity as an urgent matters judge, into applications to take urgent measures in civil and commercial matters without addressing the basis of the right, and without prejudice to the special jurisdiction of the President of the Enforcement Court. He may, in the same capacity, take measures aiming at removing manifest assaults on rights or on lawful situations. In situations where the debt's existence cannot be the subject of a serious dispute, the Urgent Matters Judge may grant the creditor a provisional advance on account of his right."

Article 583, then, provides:

"The Urgent Matters Judge gives his decision in the lawsuit submitted to him without delay."

Article 584 provides:

"The decision of the Urgent Matters Judge does not have the force of res judicata in relation to the basis of the right. However, he may not amend or cancel it except if new circumstances arise that justify it."

101. Foxton J continued at [129], as follows:

"Decisions of Summary Procedure Judges can be appealed. I accept Dr Moghaizel's evidence that when such appeals are brought, it is very rare for a stay of the decision of the Summary Procedure Judge to be ordered (not least because that would be inconsistent with the urgent and essentially interim nature of the jurisdiction). A stay is only to be granted when it appears clear to the relevant court (the Court of Appeal, or if that court has refused a stay and a further appeal is brought, the Cassation Court) that the consequences resulting from enforcement would be unreasonable or if there is a likelihood that the appealed decision will be overturned."

102. Later, when setting out his conclusions in relation to the issue of Lebanese law which he had to determine (whether a client is obliged to accept a cheque tendered by a bank pursuant to Article 822), Foxton J had this to say at [207]:

"This is clearly a difficult issue of Lebanese law on which no definitive ruling has as yet emerged from the Lebanese courts. While the various Summary Procedure decisions provide some support for Professor Obeid [the Lebanese law expert instructed by Mr Khalifeh], the weight to be accorded to them is limited by (i) the particular nature of the summary jurisdiction …; (ii) the fact that they all proceed from the conclusion that the customer had a contractual right to transfer funds abroad, which it is accepted does not arise in this case; (iii) the fact that many of them involved challenges to the validity of the closure of an account, on the basis that allowing the closure to take effect would deprive the customer of its rights, whereas there is (now) no challenge to the closure of the account here; and (iv) most importantly, the Cassation Court has taken what I accept is the very rare course of staying a number of the decisions on the basis that it is seriously arguable that they are wrong. Further, while the clear majority of these decisions are consistent with Mr Khalifeh's case, the decisions are not all to one effect."

103. In the present case, as previously explained, Dr Moghaizel maintained (as apparently he had also done in ***Khalifeh***), notwithstanding his own reliance on ***Daykat*** when giving his evidence in relation to the Article 822 tender and deposit process, that 'Urgent Matters Judge' decisions have no significance. In closing, however, Mr Wilson QC made it clear that the Banks no longer adopted so absolute a stance since, as he put it in his written closing submissions at paragraph 79:

"The Banks accept that, notwithstanding that they are in the summary jurisdiction, decisions of Urgent Matters Judges and appeals from these decisions could in theory shed light on how the Lebanese Court of Cassation would determine the issues of law in these proceedings, because such decisions are suggestive of the views of the judges that have decided these cases."

It is important to appreciate that what Mr Wilson QC had to say in paragraph 79 represents a shift in the Banks' position from what it had been in opening. Dr Moghaizel's position was, in contrast, not realistic. Indeed, as I shall explain, not only did he insist (at least until late in the day) that no weight could be given to 'Urgent Matters Judge' decisions (and Enforcement Court judgments) but he even suggested that this is the position not only with 'Urgent Matters Judge' decisions but with Court of Appeal judgments also. Dr Moghaizel cannot be right about this, however. As can be seen, under Article 579 of the LCCP, an 'Urgent Matters Judge' has the power to take measures to prevent manifest infringements of rights, where there is no serious dispute as to the underlying rights. This is usually done, both experts agreed, having heard argument from both parties. According to Dr Moghaizel, nonetheless, in a case involving a seriously disputed issue (such as, he would suggest, whether there is an international transfer right), an 'Urgent Matters Judge' ought to decline jurisdiction. That this has not been done in the cases (or most of the cases) to which Mr Najjar has referred means, Dr Moghaizel considered, that the 'Urgent Matters Judge' decisions in those cases where it has (at least on the face of it) been decided that there is an international transfer right are cases which ought not to be afforded weight.

104. I do not accept that Dr Moghaizel can have been right about this for a number of reasons. First, in my view, there is considerable force in Mr Toledano QC's submission that Dr Moghaizel's position amounts to an assertion that because an 'Urgent Matters Judge' would need to find the existence of an international transfer right to a higher standard (in other words, that there is no serious dispute as to its existence), so any finding by such a judge that that standard is met is less persuasive than would be the

case if there were a lesser standard which needed to be met. If right, then, it seems somewhat counter-intuitive. Nor do I agree with Dr Moghaizel (and Mr Wilson QC) that an 'Urgent Matters Judge' does not engage with the merits at all in determining that there is a manifest infringement. This was put to Mr Najjar by Mr Wilson QC, as follows:

"Q. If an infringement is manifest and the right itself is obvious, one shouldn't need to go into any detail on the merits?

A. Yes, I understand the logic. But to assess whether it is manifest, the judge needs to understand the merits and address the merits. How can he consider that –

Q. To a limited extent?

A. No, no. Without limitation. And this is exactly what is happening in all court decision now, they are going in depth and giving full analysis."

I consider that Mr Najjar was right when he explained that an 'Urgent Matters Judge' does necessarily have to consider the merits in order to be satisfied that it is appropriate to grant the relief sought under the jurisdiction which is vested in that judge.

105. Secondly, although Dr Moghaizel made the point that banks have always contested jurisdiction under Article 579 of the LCCP, as indeed seems to have been the case based on the decisions to which reference was made at trial, it is significant that in all except one instance such challenges have failed. Although Dr Moghaizel was also able to point to certain other stay cases in which the court has considered there to be a likelihood that the threshold would not be met (albeit without deciding the point since that is not required for the purposes of a stay application), as Mr Toledano QC submitted, the fact remains that the overwhelming weight of the Lebanese court decisions have entailed an acceptance that the threshold has been met. Furthermore, again as Mr Toledano QC submitted, in the one case in which it was not decided that there is an international transfer right (and in the case of the stay decisions) the reason why this was decided was because of a procedural objection that the 'no serious dispute' threshold had not been met and so that the court would need to consider the merits in detail: the courts did not decide that there is no international transfer right.

106. For these reasons, as well as further reasons which I give later when addressing certain specific Lebanese court decisions, therefore, I reject Dr Moghaizel's evidence that the various cases relied upon by Mr Najjar are of no (or little) assistance to the Court in deciding what Lebanese law is; it is clear, on the contrary, that such cases are helpful in this respect. That said, it is unnecessary, for present purposes, to refer to every case cited by Mr Najjar or, indeed, to engage in a detailed exploration of the rationale which lay behind each of the decisions made. This is because the sole focus at this stage is to see what (if anything) the cases have to say concerning the question of custom. This is, therefore, a somewhat limited inquiry, as to which the position is clear.

107. Thus, in ***Decision no. 17/2020 dated 17 January 2020***, the 'Urgent Matters Judge', Judge Rola Chamoun, had this to say (as with each of the decisions to which I refer, in English translated from the original Arabic, hence the occasional slightly unusual wording):

"Whereas the internal and external bank transfers are operations in banking dealings and considered as a bank custom, as they are a daily bank routine that the local and foreign banks do for their customers, in line with the globalization and the cross-border commercial dealing that lead to the creation of modern techniques in order to facilitate import and export process including but not limited to: the bank transfer technique that the United Nations Commission on International Trade Law considered as a model law on 15/05/1992.

…

Whereas the bank, in the light of the above, does not have the power to refuse carrying out a bank transfer meeting the custom banking conditions without a reasonable excuse, as amid the development witnessed by the bank transfer concept in many legislations, it became a legal formal act not considered anymore as a consensual process or contract, but an execution modality of two existing contracts, and are the deposit on the one hand, and the agreement between the commander and beneficiary on the other hand. …".

The judge, then, went on to say this:

"Whereas it is to mention in this regard, as a confirmation to the aforesaid, that protecting the banking sector and prohibiting its collapse should not lead to the collapse of other sectors or harm the rights of the depositors and banks agents …

Whereas the crisis isn't considered as a 'force majeure' that may exempt the banks from carrying out their obligations, knowing that the 'force majeure' is an unexpected event that can't be avoided and out of the hands of the one that uses it as an excuse not to be held responsible, all said factors do not exist in our case as shown before[.]"

In this case, therefore, the judge was acknowledging the existence of a custom of the type put forward by Mr Manoukian. There is no suggestion that the relevant constraint on the custom is more widely couched since I am clear, contrary to Mr Wilson QC's submission, that the reference to *"without a reasonable excuse"* is, in context, a reference to what might be described as the usual exceptions to the obligation to transfer and not something wider. That this must be the case is, indeed, borne out by the fact that the judge went on to address a *force majeure* argument which appears to have been the basis (and the only basis) on which the bank was seeking to excuse itself from the obligation to effect the transfer: that compliance with the transfer request would lead to a run on the banks. No such *force majeure* argument is advanced in the present case.

108. In similar vein, although no reference was made to there being a custom as such, in ***Rahman***, the case previously mentioned, the 'Urgent Matters Judge', Judge Rita Herro, said this:

"Whereas the bank transfer (virement bancaire), either inside or abroad, and despite its definition and legal infrastructure, is among the routine and daily operations that Lebanese and foreign banks traditionally perform in the interest of their clients, in line with the globalization and cross-border trade, the reason of emergence of modern techniques to facilitate the movements of import and export from and to different countries, including the bank transfer technique that the United Nations Commission

on International Trade Law UNCITRAL (CNUDCI) included with regard to it a model law on May 15, 1992; The model law of UNCITRAL on international transfers.

…

Whereas this latter hasn't the authority to refuse carrying out the bank transfer if it receives a transfer order which observes the customary banking conditions, without a reasonable excuse, in particular in light of the development that the concept of bank transfer has witnessed in different legislations so that the bank transfer becomes a formal legal act which effects are produced as a result of restrictions in writing, it is no longer perceived as a consensual process or contract, it is rather seen as a means to execute two existing contracts preceding its performance, they are the deposit or the credit opening existing between the bank and the commander from one hand and the agreement between the commander and the beneficiary from the other hand; therefore, when the commander orders the bank to carry out the transfer, the bank doesn't accept the transfer offered to it, it rather executes an obligation it has before its creditor, as such, when the bank executes the same, it doesn't accept to conclude a contract with the commander, it, however, executes a commitment it has and which is imposed under the contract existing between it and its client; while the beneficiary shall be bound to declare accepting the occurred transfer as being a means to settle the transactions between him and the commander.

… ."

The judge, then, went on to address a *force majeure* argument, as follows:

"Whereas, furthermore and thirdly, the respondent highlights the country's exceptional circumstances, namely the economic and bank crises which prevent it from making bank transfers so as to safeguard the bank sector's stability and the customers' interests equally, insisting on deciding on the existence or not of a force majeure that interferes with the basis of the dispute.

…

Whereas the exceptional circumstances, that the country is facing and which the respondent bank is invoking, do not rise to the level of force majeure, i.e. an event that is unpredictable, irresistible and beyond the control of the part invoking it, for the liquidity crises, in both the nation foreign currencies equally, was predictable by the financial experts and could have been avoided if the banks, in cooperation with the Central Bank of Lebanon (Banque du Liban), had taken the necessary measures to improve the situation of the bank sector and prevent the erosion of the depositors' trust, which requires to refute the statements of respondent that are contrary thereto in this regard[.]"

Mr Wilson QC noted, correctly, that the judge, accordingly, analysed this question solely through the legal framework of the separate concept of *force majeure*, rather than by analysing the scope of the custom. He suggested that this represented a failure to follow her own finding as to the extent of the custom and to consider whether the financial crisis constituted a *"reasonable excuse"*. However, this does not assist the Banks in the present case since, as previously pointed out, it necessarily means that the judge was not meaning to say that a run on the banks would justify the bank in that case

refusing to comply with an international transfer request. Indeed, it is clear that the bank in that case did not consider that it did either since, to repeat, the argument which was advanced before the Judge was not that the custom permitted the bank not to execute the transfer but that the financial situation in Lebanon supported a *force majeure* defence. The fact that the bank in that case (and other banks in other cases) only advanced a *force majeure* defence strongly suggests that the custom put forward by Mr Wilson QC and the Banks in the present case is not as they suggest. Mr Toledano QC in closing described *force majeure* as *"an escape valve"* which the Banks have chosen in the present case not to deploy. I agree with him about this and, in particular, that it is not open to the Banks to seek to advance a *force majeure* type case in support of a case that the relevant custom is subject to a loosely framed 'legitimate reason' exception.

109. Similarly, in ***Makhlouf, Decision no. 240/2020 dated 30 July 2020***, the 'Urgent Matters Judge', Judge Carla Shwah, stated as follows:

"And since the commercial custom applicable to banks does not give the bank a discretionary authority in deciding to make the required transfer from the customer outside the country, it cannot refuse the transfer request that it receives from its customer when this request meets the generally accepted banking conditions, especially after the development it witnessed globally. The concept of bank transfer so that is has become a legal and formal act of research and is no longer seen as a consensual process or a contract that requires the approval of its two parties or any specific formalities for its conduct, but as an implementation of two previous existing contracts, the first is the account opening contract between the customer and the bank, and the second is the current agreement between the customer requesting the transfer and the beneficiary of it. On the other hand, for this reason, the bank does not refuse or accept the transfer request submitted to it, but rather it is subject to the Implementation of an obligation imposed on it by the comprehensive contract between it and its client.

Whereas it is established that the plaintiff's account with the respondent bank is full and that the request submitted by him satisfies the legal requirements represented in the fact that the country to which the transfer is requested is not among the countries to which transfers are prohibited, and that the identity of the beneficiary is clear and unobtrusive in terms of his person or account data,

And in view of the foregoing, it becomes clear and undisputed that the plaintiff has a legitimate right to make the required bank transfer and to oblige the defendant to do so, and this right is derived from the services provided to him by the bank in context of enforcing the account opening contract signed with him, which did not prove the express and clear agreement between the two parties to the contract, reversible, as described above,

And since the defendant's refusal in the case of current dispute to make the required transfer is not justified because he did not exclude this service from the framework of his contract with the plaintiff in the manner described above and did not dispute the solvency of the latter's account or the fact the country in which the transfer is prohibited or the identity of the beneficiary is[.]"

The custom here described is not widely framed but, instead, closely defined. Furthermore, again, the judge, then, went on to address a *force majeure* argument advanced by the bank by reference to *"the exceptional circumstances that the country*

is going through … arising from the unpredictable and dire financial conditions prevailing in the country, to consider it as a solution to any legal or contractual obligation it has towards the plaintiff or from any supposed obligation". As before, this was only raised as a *force majeure* argument, not as a 'legitimate reason' applicable to the custom concerning international transfers. The judge rejected the contention.

110. In ***Tarawi v Bankmed SAL***, another case previously mentioned, the same 'Urgent Matters Judge', Judge Carla Shwah noted as follows, when again deciding that the bank was obliged to effect the international transfer:

"Whereas the commercial custom applied at banks does not give the bank discretionary authority to determine the transfer procedure requested from the customer abroad, bearing in mind that the latter's account is full, that the application he submitted meets the legal requirements represented in the fact that the request submitted by the customer is signed by him, and that the country for which the transfer is requested is not one of the countries for which the transfer is prohibited, and that the beneficiary's identity is clear and not considered suspicious.

Whereas the Defendant's abstention in the current dispute from making the required transfer is not justifiable as it did not exclude this service from the framework of his contract with the Plaintiff as aforementioned, nor did he dispute the solvency of the latter's account or the fact that the country to conduct the transfer has been documented or that the beneficiary's identity is the subject of the transfer, or that the does not have the value of the amounts subject of the transfer as evidence to his offer to pay them by a bank account drawn on the Bank of Lebanon, and it does not show the same as if the transfer prohibited.

…

Whereas the defendant bank, for all the reasons stated above, has fall outside the scope of its legitimate rights to reject the requested transfer, because this rejection is not legitimate right as described above, and it clearly violates the claimants clear, non-explicit, non-explicit, non-explicit contractual rights. This violation is based on its right to freely dispose of its funds and transfer the same internally and externally.

… ."

111. Judge Carla Shwah later had this to say in ***Radi v Fransabank SAL, Decision no. 1022/2020 dated 23 December 2020***:

"In accordance with the provisions of the Lebanese constitution, the economic system is free to guarantee individual initiative and private ownership, and that private ownership is one of the basic rights guaranteed by Constitution[.]

Whereas the Lebanese laws include the movement of capital from and to Lebanon, which is based on free exchange, and there are no official restrictions on that in any of the applicable laws, and this constitutes one of the pillars of Lebanese economy[.]

Based on foregoing, any restriction on the individual's right to his/her personal property that would constitute a violation of a constitutional rule set forth in the constitutional document, Any restriction in the movement of the capital constitutes a

violation of the applicable laws, From here, Any restriction on the right of the plaintiff to move its account freely is absolute, as well as the procedures of financial transfers therefrom, whether internal or external, is a violation of the above constitutional and legal principles; In addition to the fact that the banking transfer service falls within the established professional custom of banks, locally and globally, for its clients, it is one of the obvious contractual obligations the banks are bound by without the need to mention them in their contracts, As long as it has not excluded the surface from the framework of its contract; The bank, on whose face the plaintiff subsequently refused to make the required transfer from the account of the plaintiff, as long as it did not exclude this service from the framework of its contractual therewith and did not claim this was in the first place."

Although Mr Wilson QC sought to suggest that the judge was here basing her decision on paragraph F of the Preamble to the Constitution, which the parties' experts agree is wrong in principle, it is clear, on analysis, that the judge also was describing (hence the words *"In addition"*) an *"established professional custom of banks"*.

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

"Whereas the appellant's allegations that it is not permissible to oblige it to provide any banking service to its customers without its consent are not legally established, because the bank's acceptance of opening the account for its customer implies its obligation to perform the service of the customer's service fund (service de ca[is]se), including acceptance of checks and transfer orders[.]

Whereas it is known that the banking services provided by the banks to their customers include, for example, without limitation, withdrawals and deposits of funds and collection of checks in addition to the bank transfer[.]

The banker is the cashier of his client; he receives his funds in deposit, makes payments, makes collections; he can also make remote transfers of funds.

For a bank, cash transactions include transactions carried out by its customers, in physical or automatic counters. This includes cheque remittances, cheque book or bank card withdrawals, cash payments and withdrawals, transfers, and currency exchange transactions."

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

"Whereas the banks acceptance of opening the account for the benefit of his customer does not substitute for its satisfaction with respect to each individual transaction, including the transfer transaction, However, the consent required in this case is limited to the mechanism of conducting the required transaction and not to the principle of its completion, The bank's consent to contract with its customer and accept its deposit

gives the latter the right to benefit from the banking services provided by the bank in general, and the latter is right to refuse to perform the requested service is limited to the absence of the objective conditions of this service, which were excluded from the terms of the contract, or its value was inconsistent with the condition of the customer's account or any other reasons not arising from the arbitrary will of the bank[.]

Whereas in this respect, it is noted that the bank may not ask about the reason for the customer's desire to request a transfer, as he may not originally interfere in the affairs of his customer or inquiry [sic] about the reasons for his actions, especially when he is not asked about the safety of these actions or their results[.]

Whereas, on the other hand, it is evident that the Appellant – the Plaintiff at the beginning – has clearly identified the number of the account to which the transfer is requested, and there is no legal obstacle that prevents the transfer of the funds to the mentioned account. The account of the transfer applicant is full, and the Appellant does not deny the legitimacy of this account and does not express any doubt about the source of the funds deposited therein.

Whereas the Lebanese law does not, on its side, include any provision prohibiting the required transfer or giving the Appellant Bank the right to participate in fulfilling or not meeting the request of its client to this entity[.]

Based on the foregoing, it follows that the right of the Appellee to request a bank transfer exists and exists and that the Appellant's statements of the violation are refutable."

Mr Wilson QC submitted, in the circumstances, that the Court of Appeal should be taken here as merely identifying certain examples of the permitted exceptions (such as the legitimacy of the account or the source of the funds), and not as limiting the scope of a bank's ability to refuse to transfer providing that its reasons do not arise from its *"arbitrary will"*. However, there is no suggestion in what the Court of Appeal had to say that they either did consider or (had they been asked to consider) would have considered that the exceptional circumstances of the financial crisis in Lebanon went to the content of the customary obligation itself. In fact and on the contrary, the Court of Appeal went on to say this:

"Whereas the Appellant Bank refused to make the required transfer from the Appellee based on the exceptional circumstances the country is going through and its need to maintain a reserve of foreign currency, not to lose liquidity, and the duty to ensure equality between all depositors, in addition to securing the interest of the appellate and third parties[.]

In view of the exceptional circumstances, the circumstances do not constitute a justification for the Contractor's abstention from the enforcement of the contractual obligations, unless the evidence is submitted that it collects force majeure requirements as expressly indicated in the provisions of article 342.

Whereas it has been agreed that the situation of force majeure assumed for the contractual obligations arises from an unexpected external event that cannot be paid or avoided, provided that it has a foreign nature, meaning that its source is not linked to the contractor's person or conditions[.]

Whereas there is no evidence in the present file of an emergency event that prevented the Appellant from making the transfer for reasons beyond its scope.

In fact, the statements made by the latter in relation to the value of his deposits of foreign currency and his desire to preserve them indicate that the factors invoked or not of a foreign nature but are linked to the person of the Appellant and to his personal conditions, which negates the realization of the force majeure as a reason for dropping the contractual obligations and failing to comply with them.

Whereas the Appellant's argument about the economic crisis and the exceptional circumstances accompanying it does not, therefore, constitute a justification for his refusal to complete the required transfer, especially since no legislative provision was issued to that date to prevent the transfer of funds abroad or limit the possibility of transfer.

Whereas the conclusion reached in the appealed decision to oblige the Appellant Bank to complete the required transfer in favour of the Appellee is legally valid and proper[.]"

Again, therefore, the only argument put forward by the bank concerning the financial crisis was a *force majeure* argument which failed. Nobody sought to suggest that the custom somehow did not apply or, more accurately, that the custom permitted the bank to refuse to transfer. It should, indeed, be borne in mind that even in the present case it was only in closing that the Banks sought, through Mr Wilson QC, to advance a case premised on the custom being subject to a 'legitimate reasons' exception.

113. In ***Nakad v Blom Bank SAL***, a decision of the Court of Appeal in the Mount of Lebanon dated 26 April 2021, in which an appeal by the bank against the decision of an 'Urgent Matters Judge' ordering it to execute the claimant's transfer request was rejected, an argument that *"the money transfer service provided by banks to the clients is discretionary and is not of any binding nature"* was held to be *"not legally valid"*. Specifically, the first instance judge had decided that:

"It is only the plaintiff who, in his capacity as an account holder, has the power to determine the operation he wishes to make, and thus give specific instruction to Defendant Bank. The latter must comply with such instructions as long as the account is solvent and there is no legal or contractual provision that justifies its refusal to respond to the request of its client. Therefore, the Defendant Bank's refusal to make the requested transfer is not based on legal justification or legitimate reason, which is deemed to constitute a manifest infringement of the plaintiff's rights."

The Court of Appeal had this to say:

"In order to determine the existence of the conditions for the intervention of the summary judge so that he can take the required measure, it is imperative to address all questions raised from a purely legal point of view and through the established provisions in the field of banking transactions.

They include those related to the essence and nature of the work of banks and the contracts that bind banks to depositors, in the light of the apparent facts and documents mentioned above[.]

In the light of the development, professionalism, and innovation that the banking activity has witnessed, one of the functions of banks such as opening bank accounts and offering methods of payment including the transfer of foreign currency abroad and implementation of payment orders including checks, remittances, etc., is related – even by the customary practice – to an evident function which cannot be included e in the field of an ambiguous question that raises questions about whether the banks refusal to perform these functions constitutes a manifest violation of the rights, which calls for the intervention of the Court of First Instance to define the custom and determine its essence and nature, and to examine the legal consequences of its violation. Indeed the banks, by the nature of the work, except the deposit, which fall at the heart of their daily activities and transactions, Bank transfers are among its banking works;

'When the bank receives a transfer order, it must implement it without delay, as long as the account balance has sufficient balance for the execution of the operation …'

'The bank's consent to carry out the order is necessary … That the bank is generally not free because when the bank accept to open an account, it is implicitly committed to providing service to the client, which includes the acceptance of the implementation of checks and transfer orders sent to the bank, as long as the transfer order has a counterparty and that the other conditions of execution are met… and if the bank refuses to execute the transfer order, the judge can order its execution and impose threatening fines.

However, he cannot render his judgement subject to effective implementation, because the bank's commitment is to carry out operations.'

'The bank cannot refuse the execution of a transfer order provided by the account holder if there is sufficient balance in the account. This is based on the fact that the bank – when opening the account – implicitly undertakes to execute the transfer orders issued in relation to this account which meet the legal conditions required by customary banking practice. In addition, the bank does not have to investigate the reason why the transfer order was issued to it. In addition, the bank must immediately execute the transfer order which has been issued to it … In the event of a delay in execution causing damage, the bank will be required to compensate him for such damage …'.

Refer to Ali Jamal El–Din Awad: Banking Operations from a Legal Perspective.

Thus, we conclude that the opening of an account with the bank allows the holder to have all the methods to payment, including the financial transfer. The money transfer is a basic banking service and an essential element of financial transactions. To this effect, the Plaintiff has the right to dispose of its deposit in multiple ways, including the bank transfer. The bank has no right to refuse the execution of the transfer order issued by him."

The Court of Appeal went on to say this:

"Whereas it is proved that the Appellees deposited the sums of money in US dollars with the Appellant Bank, there is no dispute on the right to recover the sums and the obligation to be borne by the letter to return them. Therefore, the bank has no right to refuse to respond to the plaintiff's request to return the funds or transfer them to his

will, citing the absence or the insufficiency of the money or the decrease in the amount of the balance.

In addition, the bank may not invoke the economic circumstances in order to release itself from its obligations.

The Lebanese legislator has not issued any law prohibiting by virtue of this agreement to transfer funds abroad or limiting the amount of funds to be transferred. The Lebanese laws and regulations in particular Article 156 of the Code of Money and Credit oblige banks to take into account when using the funds they receive from the public, the rules which ensure the maintenance of the rights, and reconcile in particular between the duration of their employment and the nature of their resources, and assume at their expense the obligation to ensure liquidity and solvency. The banks are to safeguard the rights of depositors. The bank shall have no right to invoke the maintenance of foreign reserve currencies or the state of its accounts in correspondent banks.

The bank may not invoke the burden of insufficient liquidity - assuming that there are insufficient amounts - upon the Depositor.

The Bank shall have an obligation to provide regular banking services in accordance with standards of honesty, credibility and confidence granted to it by the Depositor, which constitute the main pillars of his existence and activity.

It should be taken into taken the obligation to guarantee deposits required by law No.28 of 09/05/1967.

The Appellant Bank invokes its concern to ensure equality between all clients by stopping the provision of the transfer service abroad.

This contradicts with the legal, regulatory and contractual provisions which govern its relationship with the Depositor, and emphasizes at first sight that the firmness of the manifest infringement of his rights and causes damage to him; The allegations of the Appellant about the relationship of banks with their clients regarding their deposits are invalid on the grounds that they are deemed to be a loan.

… ."

114. Mr Wilson QC complained that the Court of Appeal in ***Nakad*** did not engage with the question of the range of circumstances in which a refusal of a transfer order may be justified. The text quoted, he suggested, itself merely gave limited examples (insufficiency of funds, identification of counterparty and that *"the other conditions of execution are met"*), which do not include anti-money laundering regulations. As such, he submitted, it could not sensibly have been relied on for that purpose by the Court of Appeal. In any event, he submitted that the Court of Appeal failed to engage with the question of whether the financial crisis was such a reason. Again, however, I reject this criticism, noting that the Court of Appeal went on to address the only basis on which the financial crisis was relied upon by way of defence (*force majeure*) and to reject that case. The Court of Appeal said this:

"The ongoing economic crisis could not constitute force majeure, since it was not an unanticipated event external to the bank."

115. I might add concerning the Court of Appeal decisions in ***Rizk*** and ***Nakad***, in which decisions of an 'Urgent Matters Judge' were upheld, that I was not persuaded that Dr Moghaizel could be right when he maintained that these involved the Court of Appeal acting in excess of its jurisdiction because it had gone far too far by investigating both the merits and the basis of the right. Specifically, Dr Moghaizel had this to say concerning the Court of Appeal decision in ***Rizk***:

"This is wrong. This is wrong. They look into the merits, the basis of the right. Again, the infringements -- the manifest infringement is made for simple, quick things, like, again, squatters, electricity being stopped, a passage right obstructed. It was not made and intended for this."

Asked about this, Dr Moghaizel's evidence became increasingly difficult to follow, as this exchange serves to demonstrate:

"MR JUSTICE PICKEN: Can I just ask: you say that they got this wrong because they exceeded the jurisdiction available to them, given the matter came to them from the urgent matters court; is that your position?

A. No, I'm saying that the urgent matter judge should not look into the merits and the underlying basis of the right.

MR JUSTICE PICKEN: I've got that point. But therefore –

A. Yes.

MR JUSTICE PICKEN: -- to the extent that the Court of Appeal appeared to have gone into the underlying merits on this appeal –

A. Yes.

MR JUSTICE PICKEN: -- you say that they exceeded the appropriate jurisdiction.

A. It is the same, because the same rules apply.

MR JUSTICE PICKEN: Right. So we just ignore it, do we?

A. No, I mean, once the Court of Appeal goes into its analysis, normally it should have decided that there is a serious dispute and that the lower judge has no jurisdiction.

MR JUSTICE PICKEN: I've got that, they didn't, you say they were wrong, so do we just ignore what they say about the underlying merits?

A. We don't ignore it, we read it, but it's not jurisprudence. No, we cannot ignore it.

MR JUSTICE PICKEN: So it has no status?

A. It is no weight. It has no weight. Because we're still in the urgent matters judge's sphere. But we read it, we understand it.

MR JUSTICE PICKEN: That's what I'm asking you. So we just ignore it.

A. It has not weight.

MR JUSTICE PICKEN: Okay, it has no weight.

A. It has no weight on the future jurisprudence.

MR JUSTICE PICKEN: Right, okay. Thank you."

Dr Moghaizel subsequently modified his position by explaining that, rather than being afforded *"no weight"*, the Court of Appeal decisions should be afforded *"less weight"*. Either way, however, it seems to me that such decisions (including 'Urgent Matters Judge' decisions) are appropriately taken into account when seeking to derive assistance as to what Lebanese law is.

116. Furthermore, as to the decisions where stays have been ordered pending appeal and, more specifically, a decision of the Court of Cassation which allowed appeals from two decisions of the Court of Appeal refusing to stay decisions of 'Urgent Matters Judges' (***Abdulrahman v Credit Libanais SAL, Decision no. 13/20 dated 17 February 2020***, as cited by Dr Moghaizel in the joint memorandum), matters were expressed in those cases with a degree of caution on the basis that, as it was put in ***Abdulrahman***, whether there was an international transfer right *"may give rise to a serious dispute"* and *"could give rise to a serious dispute"*. The same applies to the Court of Cassation decision staying the Court of Appeal's decision in ***Nakad (Decision no. 38/2020 dated 24 August 2020)***. These are cases which did not entail it positively being decided that no international transfer right existed, but merely that it is appropriate that there be a stay. On the contrary, the cases where a stay has been ordered have involved a procedural decision based on a determination that there *might* be a serious dispute about the existence of an international transfer right: in essence, that the claims should not have been brought before an 'Urgent Matters Judge' because that involved the usage of a wrong procedure. As such and as Dr Moghaizel agreed in cross-examination, even if appeals were ultimately to be successful in those cases, there would still only be a jurisdictional point involved. He agreed, in particular, with the proposition put to him by Mr Toledano QC that a successful appeal *"wouldn't tell you that the appellate court disagreed with any of the underlying substantive legal analysis, it would tell you that the appellate court did not think the judge had jurisdiction at all"*. In short, as Mr Toledano QC put it in closing, in each of the stayed cases, if the appeals are ultimately upheld, that only means that the existence of an international transfer right is not so beyond doubt as not even to give rise to a serious dispute.

117. It should also be borne in mind in this context that there are rather more cases where a stay has been refused. These include ***Rizk*** in the Court of Appeal, and five recent Court of Cassation decisions cited by Mr Najjar in the joint memorandum (***Decision no. 2/22 dated 11 January 2022, Decision no. 3/22 dated 11 January 2022, Decision no. 4/22 dated 11 January 2022, Decision no. 5/22 dated 11 January 2022*** and ***Decision no. 6/22 dated 11 January 2022***) each refusing a stay in similar cases.

118. It follows, for this and the other reasons which I have given, that I am strengthened in my conclusion that, as a matter of Lebanese banking custom, a bank's obligation to effect a transfer pursuant to a client's request is not subject to a loose concept of 'legitimate reason' which would entitle a bank to refuse to comply with a transfer request which would risk a run on that bank and other banks. I am clear, on the contrary,

that the custom is as asserted by Mr Toledano QC on Mr Manoukian's behalf. Accordingly, in line with the construction principle described at [43(v)] above and the concession made by Mr Wilson QC, even had I decided that the Banks' respective terms and conditions do not give Mr Manoukian an entitlement to have international transfers effected by the Banks without taking account of custom, nonetheless that is how the terms and conditions should be understood given my conclusion that there is such a custom (and not the custom for which Mr Wilson QC and the Banks have contended).

The General Transfer Right Issue

119. Given this conclusion, I prefer not to say anything further concerning the Lebanese law authorities or doctrinal writings beyond what I have already had to say. I prefer, therefore, not to determine the General Transfer Right Issue. It is appropriate nonetheless that I say something briefly concerning the various provisions of the Lebanese constitution or codified provisions of law on which Mr Manoukian has placed reliance. This is because I am wholly unpersuaded that this reliance was warranted. Indeed, Mr Najjar himself accepted during the course of cross-examination that it is not possible to derive support for the existence of an international transfer right from the provisions relied upon.

120. Specifically, paragraph F of the Preamble to Lebanon's Constitution provides that *"the economic system is free and ensures private initiative and the right to private property"*. As such, it has nothing whatever to do with international banking transfers, even tangentially or by implication, as Mr Najjar agreed when the point was put to him by Mr Wilson QC:

"I'm not saying that the constitution, which is of course a general rule that doesn't really address specific situations, is giving you the rights for transfer. The constitution is telling you that once you have a right of transfer, you cannot be restricted from using this right of transfer in light of, or because of, for instance, de facto capital control … the constitution itself doesn't give you the first right of transfer."

Mr Najjar, it should be noted, acknowledged this point also when it was put to him that in three of the cases which he had cited in his report 'Urgent Matters Judge' Carla Shwah had relied on paragraph F in support of her decision, in, for example, ***Hanna Radi v Fransabank SAL (Decision no. 1022/2020 dated 23 December 2020)***, that *"Any restriction on the right of the Plaintiff to move its account freely … is a violation of … constitutional and legal principles"*. Mr Najjar's answer was as follows:

"It all depends from what ground you're starting. If you start by saying that the customer has no right or no contractual or customary right for a transfer, then, yes, you're absolutely right, she's wrong. But if the principle, as is, in my view, established that there is a customary or contractual right for a transfer, then what the judge is referring to is accurate; because here she's only addressing the capital control law; and she's implying or confirming that there is a customary right for a transfer. So it all depends from what is the starting point."

Indeed, in ***Hanna Radi*** the judge went on to state that *"In addition to the fact that the banking transfer service falls within the established professional custom of banks, locally and globally, for its clients, It is one of the obvious contractual obligations that banks are bound by without the need to mention them in their contracts …"*. As Mr

Najjar was, in effect, saying, the judge was, therefore, plainly having regard to custom and not confining herself to paragraph F. However, it is equally plain that paragraph F itself, and simpliciter, does not give rise to an international transfer right.

121. Secondly, Article 123 of the Lebanese Code of Commerce ('CMC') and Article 307 of LCOC, also relied upon by Mr Manoukian, do not assist. Article 307, in particular, applies to bank deposits. As Dr Moghaizel put it, it is a provision which *"lays down the banker's obligation, and it is an obligation of restitution of equivalent funds"*. That restitution can be made by transfer but transfer is not the only way in which the obligation of restitution can be fulfilled. Mr Najjar, indeed, agreed that Article 307 does not confer the transfer right for which Mr Manoukian contends.

122. Thirdly, as for Article 249 of LCOC, which provides that obligations must be performed in kind, Mr Najjar accepted that this is not a provision which is a source of an international transfer right; rather, it only applies if a transfer right already exists.

123. Fourthly, Mr Najjar accepted also that Articles 785 and 786 of the LCOC, relied upon by Mr Manoukian (at least in the pleadings) in support of an argument that a bank acts as the client's agent in acting on the client's instructions, that these provisions do not say anything about when an agency relationship would arise and, as such, do not give rise to an international transfer right.

124. Fifthly, Mr Najjar accepted that Article 221 of the LCOC (the terms of which I do not set out) does not in and of itself provide for an international transfer right.

125. Sixthly, despite originally contending that the existence of a transfer right could be derived from Articles 41, 44 and 50 of Law 81/2018, Mr Najjar similarly accepted that these provisions, which concern the regulation of electronic transfers and payments, do not give rise to any more general international transfer right.

126. Seventhly, as for Article 169 of the CMC, this provides that, in the case of savings accounts:

"Payments and withdrawals can be [e]ffected only by presentation of the book to the cash office. Withdrawals by cheques or transfers are not authorised".

In the joint memorandum Mr Najjar expressed the view that this:

"states that transfers are not allowed in saving accounts. A contrario, this shows that they are allowed in all other accounts".

In cross-examination, however, he agreed that this is not the effect of the provision. I agree with Mr Wilson QC when he submitted that all that can be inferred from the fact that it is not possible to draw cheques or make transfers from a savings account is that it is possible and permissible to draw cheques and make transfers from a deposit or current account. Mr Najjar, indeed, was himself constrained to accept that *"You can't infer that the bank must accede to all transfer requests on a deposit account"* from this provision.

127. I have, lastly, previously addressed Bank Audi's reliance on the exclusion clause at Chapter Six/II/2/c of its terms and conditions. For reasons explained, this is not an exclusion clause which assists Bank Audi.

The Bad Faith Issue

128. It will be recalled that this issue concerns only SGBL and not also Bank Audi. It is not, however, an issue which it is necessary to determine, given my conclusions thus far. Therefore, I say no more about it, whilst making it clear that I am not, as a result, making any finding of bad faith against SGBL.

The Article 822 (Tender and Deposit) Issue

129. In his written closing submissions, Mr Wilson QC had maintained an argument that, even if there were a transfer right (whether contractual or under the general law), this would nonetheless still permit the Banks to meet Mr Manoukian's claim by invoking Article 822. However, when addressing the Court orally, Mr Wilson QC explained that the Banks no longer took that position. He accepted, indeed, that the Article 822 (Tender and Deposit) Issue would not fall to be considered if the Court were to decide either the Contractual Transfer Right Issue or the General Transfer Right Issue in Mr Manoukian's favour. Mr Wilson QC went on to explain that, in the circumstances, the Banks' reliance on Article 822 was limited to Mr Manoukian's alternative claim in debt, in the event, that the Court were to decide that there was no transfer right and so that specific performance should not be ordered.

130. I am clear that Mr Wilson QC was right to adopt this modified position since, in tendering and depositing the monies in accordance with Article 822, the Banks quite clearly have not complied with Mr Manoukian's requests that those monies be transferred out of Lebanon. That was, indeed, ultimately accepted by Dr Moghaizel, although only after he had insisted that the remedy for a party in Mr Manoukian's position would be to claim damages rather than that Article 822 is inapplicable, as this exchange demonstrates:

> *"MR JUSTICE PICKEN: But if the obligation requires performance of the money going out of … Lebanon -- and this is the premise which Mr Toledano is asking you to adopt -- then how is it that you pay the money to a notary in … Lebanon, can that meet the obligation?*
>
> *A. Yes, then Article 822 does not come into play."*

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

Conclusion

131. It follows that, as ordered on 25 February 2022, Mr Manoukian is entitled to specific performance as regards the international transfer right which he has asserted and which

I have found does, indeed, exist. The Banks are, accordingly, required to execute the international transfers which he has been requesting.