transactions. He places an order for 100 tons of cement with S. A week later he contracts to sell five tons to T. Is this in reliance on S's promise to sell the 100 tons? Who is to say that B would not have contracted to sell five tons of cement to T in any event? Again, if I write to the headmaster of my old school and tell him I propose to make a donation of £100, and a week later the school purchases books for its library, has it relied on my promise? Might it not have bought the books anyway?

3.18 The problem of showing reliance becomes even more difficult where the reliance alleged is not positive (performance), but negative (forbearance). A writes to B, promising him a job. B does not reply, but takes no steps to look for employment elsewhere. A few days later he receives a letter from A withdrawing the offer. Is it to be said that B 'acted' in reliance on A's promise? And if so, are we to assume that he has passed up the chance of any one of a dozen different jobs available to him? (And why stop at a dozen? Why not a hundred?)

3.19 The difficulty is not purely a practical one. It is far from clear why an act of reliance not requested by the promisor should entitle the promisee to performance of the promise. Surely his remedy, if any, should be limited to compensation for his wasted outlay. Why should he be given by way of damages the value of an undertaking which he did not purchase and which may be worth a great deal more than the expenditure he incurred in relying on the promise? If there is to be a remedy for detrimental reliance, it should be in tort for reimbursement, not in contract for the performance of a gratuitous promise.

3.20 It can hardly be disputed that in English law the reliance basis of enforcing a promise has been established by reference to principles of equitable estoppel outside the law of contract. This is demonstrated by the fact that it is for the court to decide in its discretion whether the case is a proper one for equitable relief and what form that should take. The same is true of proprietary estoppel. It is because of the absence of a contract that the court gives 'the minimum equity to do justice to the plaintiff',[40] so that while the claimant may obtain his expectation interest in specie (or if this is impracticable, in money equivalent) where this was based on a mutual understanding, yet if that expectation is uncertain or extravagant or out of all proportion to the detriment he suffered, the relief given should be more limited, though not necessarily restricted to the detriment suffered by the claimant.[41]

3.21 The real issue is whether English law should now discard the historically distinct sets of principles giving effect to promises and subsume them all within a unified theory of contract which treats reliance as an alternative to bargain.[42] No common law system has yet gone so far. The American approach,

[40] *Crabb v Arun District Council*, n 36, per Scarman LJ at 880.

[41] *Jennings v Rice* [2002] EWCA Civ 159, [2003] 1 FCR 501; and see S. Gardner, 'The Remedial Discretion in Proprietary Estoppel – Again' (2006) 122 LQR 492. The scope of proprietary estoppel has been curtailed by the decision of the House of Lords in *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55, [2008] 4 All ER 713, [2008] 1 WLR 1752 where it was affirmed that unconscionable conduct will not, of itself, suffice to establish a proprietary estoppel.

[42] See P. S. Atiyah (1978) 94 LQR 193; C. Fried, *Contract as Promise* (revsd edn, 2015); H. Collins, *The Law of Contract* (4th edn, 2003), ch 5.

spearheaded by the American Restatement on Contracts,[43] is to treat reliance as a basis for enforcing a promise, but the rule is carefully qualified both as to the conditions of binding force ('if injustice can be avoided only by enforcement of the promise') and as to the remedy (which 'may be limited as justice requires'), so that it is more akin to, and is often referred to as, a rule of promissory estoppel. More recently, the High Court of Australia has begun to move towards a unified approach to estoppel as grounding a positive claim for recoupment of loss suffered by detrimental reliance,[44] but again the binding force of the promise is attributed to estoppel rather than to contract and it is emphasized that 'there must be a proportionality between the remedy and the detriment which it is its purpose to avoid'.[45] Accordingly, even in these jurisdictions it is only in respect of the bargained-for promise that the promisee is assured the protection of his expectation interest. Where American law and Australian law have moved forward is in recognizing that in certain conditions reliance on a promise is a sufficient ground for making the promise actionable and allowing recovery of the expectation loss.

(iii) Abstract payment undertakings

3.22 Like most propositions of English law, the rule that a contract must be supported by consideration is not absolute. An important exception is the abstract payment undertaking, a promise which the law will enforce as a matter of mercantile usage despite the absence of consideration or even reliance.[46] Prime examples are the documentary credit[47] and the performance bond or demand guarantee.[48] Yet it is clear that these too are bargain-based and are not gift-promises, even though they do not fit the consideration model.[49]

4. CONTRACT AS A REFLECTION OF THE WILL OF THE PARTIES

3.23 Whether viewed in terms of morality or of economic efficiency, the willingness of the law to enforce bargains freely made is rational, for to the extent to which the parties make their own law by the terms of their agreement it is unnecessary to look to outside rules as regulators of their conduct, and they will probably find the results more satisfactory than if such rules were

[43] Restatement, Second, Contracts 90.

[44] *Commonwealth of Australia v Verwayen* (1990) 170 CLR 394; *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387. See A. M. Gleeson, 'Innovation in Contract: An Australian Analysis' in P. Birks (ed), *The Frontiers of Liability* (1994), ch 9, at pp 114 ff. In the more recent decision in *Giumelli v Giumelli* (1999) 106 CLR 101 the High Court of Australia found it unnecessary to reach a view on the question of an overarching principle of estoppel. There is no such principle in English law (*First National Bank plc v Thompson* [1996] Ch 231, per Millett LJ at 236).

[45] *Commonwealth of Australia v Verwayen*, n 44, per Mason CJ at 413. See also Sir Anthony Mason's comments on the Australian developments in 'The Place of Equity and Equitable Remedies in the Contemporary Common Law World' (1994) 110 LQR 238 at 253–256.

[46] See generally R. Goode, 'Abstract Payment Undertakings' in P. Cane and J. Stapleton (eds), *Essays for Patrick Atiyah* (1991), ch 9.

[47] See paras 35.49–35.51.

[48] See para 35.153.

[49] See R. Goode, 'Abstract Payment Undertakings', n 46 at pp 222 ff.

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mentioned next, it includes absolutely anything[181] which would have affected the way in which the language of the document would have been understood by a reasonable man.

(3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.

(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax: see *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749.

(5) The 'rule' that words should be given their 'natural and ordinary meaning' reflects the commonsense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in *Antaios Compania Naviera S.A. v Salen Rederierna A.B.* [1985] AC 191, 201:

> 'if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense.'

3.62 A number of aspects of this summary should be noted. The first is that the test applied by the courts is an objective one. This is consistent with the approach which English contract law generally takes but it is in contrast with the approach adopted in many civilian systems where greater attention is paid to the subjective understandings of the parties. Second, the reference to the 'matrix of fact' has aroused some controversy in so far as it has increased the range of materials to which courts can have regard when seeking to interpret a contract. Fears were expressed that this would increase significantly the cost of litigation.[182] These fears have, however, proved to be largely mis-placed and courts can through their case management powers and their ability to make awards relating to costs regulate the volume of material introduced into evidence.[183] Third, there is some material, such as pre-contractual negotiations, that remains generally inadmissible. Finally, principles 4 and 5 in Lord Hoffmann's summary have given rise to a degree of difficulty in that it is not entirely clear where the line is to be drawn between the adoption of a

[181] By which, as he subsequently explained, Lord Hoffmann meant anything which a reasonable man would have regarded as relevant (*Bank of Credit and Commerce International SA v Ali* [2002] 1 AC 251, [39]).

[182] See, for example, the judgment of Staughton LJ in *Scottish Power plc v Britoil (Exploration) Ltd* (1997) Times, 2 December.

[183] *NLA Group Ltd v Bowers* [1999] 1 Lloyd's Rep 109.

commercially sensible construction of the contract (which is permissible) and judicial re-writing of a contract (which is not).[184] In seeking to give effect to the intention of the parties, objectively ascertained, the courts take account of the natural and ordinary meaning of the words used by the parties and considerations of commercial common sense.[185] The balance between these different considerations seems to be struck by the courts in varying places in different cases.[186] It is probably pointless attempting fully to reconcile the case law because of the heavy factual component which has been introduced into these cases by the modern reliance on a broad 'matrix of fact'.[187] Where the parties have used unambiguous language, the court must apply it[188] and considerations of commercial common sense and the surrounding circumstances 'should not be invoked to undervalue the importance of the language of the provision which is to be construed.'[189] In other words, the clearer the language, the less appropriate it is to construe or confine it so as to avoid a result which could be characterised as unbusinesslike.[190] It is in the case where the contract is badly drafted or the disputed term is capable of more than one meaning that commercial good sense has a stronger role to play.[191] In such cases, although not obliged to do so,[192] the court will generally consider it appropriate to adopt the interpretation which is most consistent with business common sense.[193] Where it is invoked, commercial common sense must not be viewed retrospectively, with the benefit of hindsight[194] , nor should it be used to re-write the contract which the parties have made. The task of the court 'is to identify what the parties have agreed, not what the court thinks they should have agreed.'[195]

[184] See, for example, *Synochem International Oil (London) Co Ltd v Mobil Sales and Supply Corpn* [2000] 1 Lloyd's Rep 339. However, there is no formal limit to the amount of verbal rearrangement or correction which the court is allowed where it is satisfied that something has gone wrong with the contract. What is required is that it should be clear that something has gone wrong with the language and that it should be clear what a reasonable person would have understood the parties to have meant: *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 AC 1101 at [25].

[185] *Wood v Sureterm Direct Ltd & Capita Insurance Services Ltd* [2015] EWCA Civ 839 at [30].

[186] Contrast, for example, the decision of the Supreme Court in *Lloyds TSB Foundation for Scotland v Lloyd's Banking Group plc* [2013] UKSC 3, [2013] 1 WLR 366 at [21] (where the court adopted a 'contextual and purposive' approach to interpretation rather than a 'mechanical' approach) with the decision of the Supreme Court in *Arnold v Britton* [2015] UKSC 36, [2015] AC 1619 at [16]–[23] where rather more emphasis was placed on the importance of the language of the term which is to be construed.

[187] A point which is relevant to the standard of appellate review. While the orthodox approach in English law is to regard the proper interpretation of a contract as a question of law, the modern emphasis on the matrix of fact makes it more appropriate to regard the question as one of mixed fact and law (an approach recently adopted by the Supreme Court of Canada in *Sattva Capital v Creston Moly* [2014] SCC 53, [2014] 2 SCR 633 and which, it is suggested, should be followed in the UK).

[188] *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50, [2011] 1 WLR 2900 at [23].

[189] *Arnold v Britton*, n 186 at [17].

[190] *Wood v Sureterm Direct Ltd & Capita Insurance Services Ltd*, n 185 at [30].

[191] *Rainy Sky SA v Kookmin Bank*, n 188, [23] and *Arnold v Britton*, n 186 at [24].

[192] *Edgworth Capital (Luxembourg) Sarl v Ramblas Investments BV* [2015] EWHC 150 (Comm) at [34].

[193] Rainy *Sky SA v Kookmin Bank*, n 188 at [23].

[194] *Arnold v Britton*, n 186 at [19].

[195] Ibid at [20].

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illegality affect the guilty party's rights in the same way, whether the infringement be major or minor and whether it be plainly culpable wrongdoing on the one hand or a slight infraction of a highly technical statutory instrument on the other? This question has elicited different answers over the years. The particular issue of controversy has been whether the illegality defence is a rule of law which is characterised by fixed (or relatively fixed) rules to be applied by the courts or whether instead this is an area of law where the courts enjoy a broad discretionary power to decline to enforce or otherwise give effect to an illegal contract. This disagreement surfaced in the last decade of the twentieth century when an attempt to introduce a more flexible approach was rejected by the House of Lords in *Tinsley v Milligan*.[532] But the decision of the House of Lords in *Tinsley* was not to be the last word on the matter and it has been re-visited more recently by the Supreme Court in a string of cases. Initially, in *Les Laboratoires Servier v Apotex Inc*[533] the Supreme Court, in a judgment delivered by Lord Sumption, appeared to incline to the view that the illegality defence is a rule of law according to which, rather than seeking to regulate the consequences of an illegal act, the courts withhold judicial remedies, leaving the loss to lie where it falls. But within six months of giving judgment in *Les Laboratoires Servier* the Supreme Court had signalled that the proper approach to the defence of illegality to a private law claim was a matter that required to be addressed by a court of seven or nine Supreme Court justices.[534] That consideration duly followed in *Patel v Mirza*[535] where a court of nine justices held, unanimously on the facts, that the claimant was entitled to recover a payment he had made to the defendant pursuant to an agreement which amounted to a conspiracy to commit an offence of insider trading that had not been carried into effect and, by a majority,[536] that a court considering the application of the defence of illegality should have regard to the policy factors involved and to the nature and circumstances of the illegal conduct in determining whether the public interest in preserving the integrity of the justice system should result in denial of the relief claimed. In short, the majority

[532] [1994] 1 AC 340. The attempt to introduce a greater degree of flexibility had been made by the Court of Appeal where the test which it sought to apply was whether it would be 'an affront to the public conscience' to grant the relief claimed: [1992] 2 All ER 391. Although the House of Lords rejected the 'public conscience' test, it affirmed the decision of the Court of Appeal on other grounds.

[533] [2014] UKSC 55, [2015] AC 430. Lord Toulson dissented and, in doing so, drew attention to the more flexible approach adopted by Lord Wilson giving the judgment of the majority of the Supreme Court in *Hounga v Allen* [2014] UKSC 47, [2014] 1 WLR 2889 at [42]. Given the subsequent development of the law, the judgment of Lord Toulson and his reliance upon *Hounga* was to prove to be influential.

[534] *Bilta (UK) Ltd v Nazir (No 2)* [2015] UKSC 23, [2016] AC 1, [2015] 2 All ER 1083 at [15] and [34] per Lord Neuberger and Lord Mance respectively. But Lord Sumption (at [60]–[63]) broadly adhered to the views which he expressed in *Les Laboratoires Servier*, namely that the illegality defence is based on a rule of law upon which the court is required to act and it is not a discretionary power which depends for its exercise upon a judicial value judgment about the balance of the equities in each case.

[535] [2016] UKSC 42, [2016] 3 WLR 399.

[536] The majority was six to three. For the majority Lord Toulson gave the lead judgment with which Baroness Hale, Lord Kerr, Lord Wilson and Lord Hodge agreed. Lord Neuberger gave his own judgment which did not agree with that of Lord Toulson on all points but he also expressed (at [186]) his agreement with Lord Toulson's 'framework for arriving at an outcome' (and see also [174]). The minority were Lord Clarke, Lord Mance and Lord Sumption. While there are differences between the approaches adopted by the minority, they all rejected the need for a discretionary approach of the type advocated by Lord Toulson.

supported a more discretionary approach than that which had apparently been adopted in *Les Laboratoires Servier*. According to the majority, when deciding whether it is contrary to the public interest to enforce a claim on the ground that to do so would be harmful to the integrity of the legal system, the court should consider: (i) the underlying purpose of the prohibition which has been transgressed and whether that purpose would be enhanced by denial of the claim; (ii) any other relevant public policy on which the denial of the claim would have an impact; and (iii) whether denial of the claim would be a proportionate response to the illegality, bearing in mind that punishment is a matter for the criminal courts.[537] This more flexible approach was heavily criticised by Lord Sumption, in the minority, on the ground that it converted legal principle into an exercise of judicial discretion which would leave lower courts to evaluate individual cases on a case-by-case basis by reference to a potentially unlimited range of factors.[538] While it was not technically necessary for the Supreme Court to engage in this broad-ranging analysis for the purpose of deciding the case before it, it is unlikely that future courts will conclude that the Supreme Court's consideration of the issue was obiter and therefore not binding. Rather, the decision will be regarded as the leading authority on the issue and the Supreme Court has therefore opened a new chapter in the law relating to illegality which at least initially will result in greater uncertainty but over time may yield fairer results if the courts succeed in structuring their discretion in such a way as to render its exercise reasonably predictable.

3.157 But one class of contract must be separated from the rest, namely contracts which are regarded at common law[539] as being in unreasonable restraint of trade. Examples are contracts of employment by which an employee is subjected to unreasonable constraints after his employment ends and contracts which seek to restrict competition to a degree beyond what is necessary for the covenantee's protection.

(ii) Contracts in restraint of trade

3.158 Contracts in restraint of trade differ from other classes of contract affected by illegality in that the mischief lies not in what the contracting party does or refrains from doing but in his *binding* himself to the stipulated act or restraint. Since such restrictive covenants are usually part and parcel of a much wider agreement, the courts are willing to sever the offending covenants and enforce the rest of the contract, provided that the contract is drafted in such a way as readily to permit such severance (the 'blue pencil' test[540]) and the

[537] Ibid at [120].

[538] Ibid at [265]. Lord Sumption's dissent is expressed in particularly strong terms (see [258]–[265] and his conclusion at [265] that 'we would be doing no service to the coherent development of the law if we simply substituted a new mess for the old one'). Only time will tell whether the approach of the majority will lead to a 'new mess' of the type feared by Lord Sumption.

[539] Where a statute regulating restrictive trade practices operates, it is the statute which will govern the consequences of infringement. See below.

[540] So referred to in *Attwood v Lamont* [1920] 2 KB 146 at 149, 155, though the actual decision was reversed on appeal, [1920] 3 KB 571. Severance has been allowed in many cases. See, for example, *Goldsoll v Goldman* [1915] 1 Ch 292, and *T. Lucas & Co Ltd v Mitchell* [1974] Ch 129.

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in futures are regulated as investments for the purpose of the Financial Services and Markets Act 2000,[50] whereas forward transactions in principle are not.[51]

3. *The financial markets*

4.30 These consist of the money market, in which short-term finance is raised against bills, notes, interbank money transfers, and the like, and the securities (or capital) market for issues and sales of stocks, shares, bonds and debentures.

4. *Derivatives and the derivatives market*

4.31 Just as the futures market in commodities fulfils the function of hedging against, and speculation on, price changes without (in most cases) performance of a trading transaction, so the derivatives market provides a similar service for financial products, through futures, swaps, options, and through credit-linked notes and other forms of synthetic transaction. They are called derivatives because their pricing is derived from that of conventional securities but they do not involve actual dealings in currency, money instruments or securities – they merely imitate their financial characteristics and are performed by the payment of differences rather than by delivery of and payment for actual instruments.[52] Derivatives are thus flexible instruments which can be used to package financial products which are not available on the market in direct form or which add features to those which are traded on the market. Not all derivatives are traded, or even available, on a market; many, such as swaps, are arranged by bilateral transactions.

(ii) Characteristics of an organized market

4.32 A fully organized market possesses a number of characteristics which have been described elsewhere.[53] They include a formally established exchange with a defined membership and rules, the provision of a trading floor or other communication facilities, the fixing and regular adjustment of prices by reference to supply and demand, the standardization of contracts and the

[50] Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (SI 2001/544), art 84(1).

[51] SI 2001/544, art 84(2), which excludes contracts for future delivery made for commercial and not for investment purposes, the test being whether delivery is to be made within seven days, unless it can be shown that there existed an understanding that (notwithstanding the express terms of the contract) delivery would not be made within seven days (art 84(4)). All contracts made or traded on a recognized investment exchange are treated as investment contracts (art 84(3)), as are contracts for differences (art 85(1)), but traded forward contracts are made on a commodity exchange, not an investment exchange, and even where constituting contracts for differences will usually be excluded from regulation as investments under art 85(2)(a).

[52] See generally P. R. Wood, *Title Finance, Derivatives, Securitizations, Set-Off and Netting*, ch 15; S. Firth, *Derivatives Law and Practice* (looseleaf); A. Hudson, *The Law on Financial Derivatives* (5th edn, 2012); and J-P. Castagnino, *Derivatives: The Key Principles* (3rd edn, 2009). The turmoil in the financial markets, particularly in the period commencing in 2008, has caused many to re-examine the operation of the derivatives market and to re-consider the risks involved in trading on the market.

[53] See the article referred to in n 41.

fungibility of the commodities offered,[54] together with a clearing and settlement providing for the netting and settlement of claims.

(iii) Functions served by an organized market

4.33 An organized market fulfils six principal functions. First, it provides a mechanism for matching sellers to buyers, and lenders to borrowers. Secondly, it is a convenient tool for raising large amounts of capital through the primary securities market. Thirdly, it ensures through the secondary market that those who buy commodities or financial assets can readily liquidate their positions and offload their risks on the market with an assurance or reasonable expectation of payment. Fourthly, it enables traders and investors to protect themselves against price fluctuations by an offsetting transaction in the futures market. The ability to hedge is dependent on counterparties who are either hedging in the opposite direction or are speculators having no interest in any underlying trade transaction. Fifthly, by providing the mechanism for an ascertainable market price for a commodity or security of a specified description, an organized market sets a yardstick by which compensation or damages for failure to honour a contract can be objectively measured. This market-price rule is examined in detail in chapters 14 and 15. Finally, through its control of membership and its membership rules, an organized market helps to ensure the competence and integrity of its members and the observance of fair and efficient standards of trading.

4.34 Closely associated with market operations is the system for settlement of bargains through a clearing house. An important function of a clearing house is to net out transactions between the participants, so that instead of large numbers of bilateral settlements, with money going round in a circle, the clearing house establishes which participants are net creditors and which net debtors at the end of the trading cycle, net debtors making a single net payment to, and net creditors receiving a single net payment from, the clearing house. A distinct and valuable function of a clearing house is to provide a means of novating contracts to the clearing house, so that where S sells goods to B on the market, the contract is registered with the clearing house and upon registration the original contract between S and B is replaced by two new contracts, between S and the clearing house for sale and payment, and between the clearing house and B for purchase and payment. In this way the clearing house is substituted as the counterparty to each of the original parties, a procedure which overcomes possible problems of netting and substitutes the resources of the clearing house for those of the individual trader in the performance of payment and delivery obligations.

(iv) The rules and usages of a particular market

4.35 Each market develops its own customs and usages. Over time many of these are likely to become codified or replaced by formal rules of the market issued by the exchange, so that members are expected to transact business in

[54] So that each unit is treated contractually as the equivalent of any other unit of the same grade, sample or description.

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from those regulating other types of dealing in personal property. The following points of divergence merit particular attention.

(a) The principle of equity by which the agreement of the owner of an asset to transfer it to another is not merely contractual but vests an immediate equitable interest in the intended transferee appears to have no application to contracts of sale of goods.[79]

(b) Conversely, the property passes *at law* when it is intended to pass, by virtue of the contract itself and without the necessity for some new act, even if the seller had no interest in the goods at the time of the contract. This is in contrast to the rule for other types of dealing in personal property, by which an agreement to transfer after-acquired assets takes effect in equity when the assets are acquired but does not operate to transfer the legal title unless some new act is done which is either effective as a legal transfer on its own or else is an act designated by the contract as that which will operate to vest the legal title in the transferee.[80]

(c) The buyer of unidentified goods forming part of a bulk does not acquire equitable co-ownership of the bulk[81] and, prior to the coming into force of the Sale of Goods (Amendment) Act 1995, obtained no property interest, even if paying for the goods in advance, until these had been separated from the bulk and unconditionally appropriated to his contract. However, the Act now has special rules conferring on the prepaying buyer of goods to be supplied from an identified bulk a co-ownership interest in the bulk pending delivery of his contract entitlement to him from the bulk.[82]

3. CLAIMS TO GOODS FORMING PART OF A BULK

8.38 There are two paradigm situations which enable us to examine the problem from opposite ends. Only the second of these is affected by the Sale of Goods Act; the first remains governed by common law rules.

(i) Commingling of goods from different suppliers

8.39 The first case concerns the effect of the commingling of materials contributed by different people to be made up by a third party into a finished product and sold to them in agreed quantities, where the third party becomes bankrupt before delivering the finished product. Here the question is whether they parted with title and the third party acquired title to the materials, the amalgam created by their commingling and the unappropriated finished products.

[79] See para 8.28.
[80] See paras 2.30 and 23.02.
[81] *Re Wait*, n 23; *Re Goldcorp Exchange Ltd*, n 14; and see para 8.08. It would, however, be open to the parties to make a specific agreement outside the contract of sale that would have this effect, eg by a declaration of trust by the seller in favour of himself and the buyer to the extent of their respective interests.
[82] See para 8.52.

EXAMPLE 1:

8.40 A delivers silver to a silver refiner, S, to be made up into ingots, of which a given number are to be sold to A. Similar arrangements with S are entered into by B, C and D. Before any ingots have been delivered S becomes bankrupt, having in his possession a quantity of unprocessed silver in the form in which it was supplied to him, other silver contributed by all four parties which has become commingled but not yet made up into ingots, and a number of ingots yet to be delivered. Can A, B, C or D lay claim to any of the unprocessed silver, the amalgam or the ingots?

8.41 This question cannot be answered without more facts, and it is quite possible that the position of the various claimants will differ. The first matter to be decided is the intention of each of the four parties when they handed over their silver to be processed. Let us suppose that A intended to part with all his interest in his silver and simply to await its return made up into ingots. In that event A has no proprietary claim to anything. By giving up title to his silver, he has lost any chance of asserting a proprietary right to its product, for if the silver is no longer his, what is made from it cannot be either.[83] If ingots had been delivered to him or otherwise unconditionally appropriated to his contract,[84] he would have had title to them. In the absence of any such appropriation he is an unsecured creditor in the bankruptcy, for none of the ingots can be identified as referable to the contract with him; they might equally be referable to the contracts with the other three suppliers or to a decision by S to keep them for himself.

8.42 Suppose now that B, by contrast, stipulated that he was to remain the owner of the silver he supplied and that this was to be kept separate from anyone else's silver and applied exclusively to the making up of ingots for him. So far as B is concerned, S is a bailee of the unprocessed silver and the commingling was unauthorized. Equally, he did not bargain for any interest in silver contributed by other suppliers. Hence B can assert a proprietary claim to the unprocessed silver he supplied, if identifiable, and to co-ownership with S, C and D of the amalgam and any ingots (whether or not appropriated to any of the contracts) to the extent that they contain silver contributed by B, but not otherwise.[85]

8.43 Now take the case of C and D, who are aware that S intends to commingle all the silver for the purpose of making it up into ingots, so that any particular ingots supplied to C or D may come from their own silver, a mixture of their silver and that of other contributors, including S himself, or silver that does not include any part of C's or D's contribution. Suppose further that C and D agree to this on the basis that each retains ownership of his own silver until it has been commingled. In this situation the position of C and D between themselves and *vis-à-vis* S differs from that of B, for whereas B has no claim to any ingots beyond what he contributed to them, C and D each become sole owner of any ingots appropriated to their contracts even if those ingots consist exclusively of materials contributed by the other or by S.[86] This is because C

[83] *South Australian Insurance Co Ltd v Randell* (1869) 6 Moo PCCNS 341.
[84] See para 8.92.
[85] *The Ypatianna* [1988] QB 345; *Lupton v White* (1808) 15 Ves 432.
[86] Of course, to the extent of any contribution made by B, the ingots are co-owned by him, C and/or D.

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do so or the trader has failed to carry out the repair, having been required by the consumer to do so, within a reasonable time and without significant inconvenience to the trader. Like the short-term right to reject, the right is exercised by the consumer indicating to the trader that he is rejecting the goods and treating the contract as at an end.[16] The effect of its exercise is to entitle the consumer to a refund and to impose on the consumer a duty to make the goods available for collection by the trader or (if there is an agreement for the consumer to return rejected goods) to return them as agreed.[17] However, unless the final right to reject is exercised within six months, any refund to the consumer may be reduced by a deduction for use to take account of the use the consumer has had of the goods in the time after their delivery.[18]

12.07 In very broad terms, what the Consumer Rights Act has done is to confer upon the consumer a broad right to reject the goods provided that the right is exercised within the 30-day period, but thereafter to give greater priority to the remedies of repair and replacement, relegating the final right of rejection to cases where it has, for one of the prescribed reasons, not been possible to effect repair or replacement. Having thus dealt in outline with the modifications introduced by the Consumer Rights Act, we now turn back to a consideration of the rights of the buyer both at common law and under the Sale of Goods Act 1979.

12.08 The buyer is not bound to exercise a right to reject for breach of a condition; he can elect to treat the breach of the condition as a breach of warranty,[19] in which case the contract will remain on foot and the buyer's remedy will be damages for breach of warranty. Moreover, there are various cases in which the right to reject will be lost even where the buyer may wish to reject.

2. TIME OF REJECTION

12.09 The buyer may reject the goods either by declining to receive them when delivery is tendered or by giving notice of rejection before a tender of delivery or after receipt of the goods and before acceptance. The distinction between rejection on tender and rejection after receipt appears to have no legal consequences, beyond the fact that a claim by the buyer for expenses to which he has been put as the result of an ineffective tender by the seller[20] is likely to be greater where the buyer has taken the goods into his custody than where he has not. The goods must be rejected within a reasonable time,[21] and in

[16] CRA 2015, s 20(5). The indication may be something the consumer says or does, but it must be clear enough to be understood by the trader: s 20(6).

[17] CRA 2015, s 20(7). The mechanics applicable to the claim for a refund are set out in s 20(9)–(18). In the case where the consumer has a duty to return the rejected goods, the trader must bear any reasonable costs of returning them, other than any costs incurred by the consumer in returning the goods in person to the place where the consumer took physical possession of them: s 20(8).

[18] CRA 2015, s 22(9)–(11).

[19] Sale of Goods Act 1979, s 11(2).

[20] The basis of such a claim is that running parallel with any express delivery obligation of the seller is an implied, collateral undertaking (ie a warranty) not to involve the buyer in expense by making a tender which is not in conformity with the contract.

[21] Sale of Goods Act 1979, s 35(4).

determining what is reasonable it is necessary to consider the interests of the seller as well as those of the buyer.[22]

3. MODE OF REJECTION

12.10 The right to reject must be exercised by an unequivocal notice of rejection to the seller.[23] In exercising a right to reject the goods, the buyer is not, unless the contract so provides, bound to return them to the seller. It suffices that he intimates to the seller that he refuses to accept them.[24] It is the duty of the buyer to hold the goods available for collection by the seller at the contractual place for examination.[25] If the buyer is not in a position to do this at the time he gives notice to reject, the notice will usually be ineffective.[26] The notice of rejection need not be in writing, nor need it specifically identify the goods so long as they are identifiable with certainty as the goods to which the notice relates.[27]

4. EFFECTIVENESS OF NOTICE TO REJECT

12.11 A notice which leaves the seller in reasonable doubt as to whether the buyer is or is not rejecting is not sufficient.[28] Even if the notice of rejection is unequivocal, the buyer cannot rely on it if at the time he gives it he has already lost the right to reject.[29] On the other hand, the seller is entitled to treat the notice of rejection as binding on the buyer, who cannot himself be heard to deny the effectiveness of his own notice.[30] It is for the seller to decide whether to hold the buyer to the notice or to treat it as ineffective by reason of the inconsistent conduct. In the latter case the property in the goods revests in the seller, and the buyer will be guilty of conversion in dealing with the goods[31] unless he was authorized by the seller to do so or acted as an agent of necessity.[32] The only cases where the buyer is entitled to treat his notice to reject as ceasing to be operative is where the seller agrees or where he refuses to accept the notice and the buyer acts in reliance on that refusal.[33]

[22] *Truk (UK) Ltd v Tokmakidis GmbH* [2000] 2 All ER (Comm) 594, 603.

[23] *Graanhandel T Vink BV v European Grain and Shipping Ltd* [1989] 2 Lloyd's Rep 531.

[24] Sale of Goods Act 1979, s 36(1). Section 36 does not apply to a contract of sale concluded between a trader and a consumer (s 36(2)) where the applicable provision is to be found in the Consumer Rights Act 2015, s 20.

[25] See para 13.26.

[26] See para 13.11.

[27] *Atari Corp. (UK) Ltd v Electronics Boutique Stores (UK) Ltd* [1998] QB 539. This was a decision on sale or return but the principle is the same.

[28] *Graanhandel T Vink BV v European Grain and Shipping Ltd*, n 23.

[29] See below.

[30] This is a case of election, not estoppel, so that the seller does not have to show he relied on the notice (see para 3.90).

[31] This will be the case where the buyer resells the goods and delivers them to the sub-purchaser or resells them in circumstances where the sub-purchaser acquires a good title. But a sale unaccompanied by delivery and ineffective to pass an overriding title is not a conversion (*Lancashire Waggon Co v Fitzhugh* (1861) 6 H & N 502).

[32] *Tradax Export S.A. v European Grain & Shipping Ltd* [1983] 2 Lloyd's Rep 100, per Bingham LJ at 107; *Graanhandel T. Vink B.V. v European Grain & Shipping Ltd*, n 23, per Evans J at 533.

[33] There is no authority directly on the point, though it was adverted to in *Graanhandel T. Vink B.V. v European Grain & Shipping Ltd*, n 23, at 533, by Evans J, who did not find it necessary

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the equivalent amount.[129] The receipt by CB from DB and the receipt by C from D through a credit to C's account with CB are legally distinct.[130] Though the payment by DB to CB (directly or indirectly) is what enables CB to recognize C as its creditor for an equivalent sum, it is not that payment which discharges D's debt to C but the resultant decision to credit C's account. It is true that in banking parlance CB is said to receive payment 'for' or 'for the account of' or even 'as agent for' C, but that does not mean that CB's receipt is C's receipt, or that CB's claim on DB or a third bank is held on trust for C. If it has not already given C value by allowing him to draw against the expected receipt, CB collects as agent for C and instantaneously borrows the money back.[131] What C receives from D as the result of CB's decision to credit him is not what CB received but simply an equivalent amount. There are various reasons why CB, despite having received funds for C's account, may be unable or unwilling to credit that account at the time of receipt. The payment order may not adequately identify C, or CB may wish to check whether it still has authority to accept the payment, or else CB may be concerned that the payment is not one which it can lawfully credit, eg because of legal restrictions.[132]

6. COMPLETION OF PAYMENT OF AN IN-HOUSE CREDIT TRANSFER[133]

17.52 So far, we have dealt with completion of payment on the basis of an interbank transfer. What is the position where D and C bank at the same bank, SB.[134] The principle is the same. Payment is complete at the point where SB unconditionally recognizes C as its creditor. The difference arises from the fact that the transfer is purely in-house and does not involve any clearing process, any payment order or any correspondent relationship. All that is involved is that SB accepts C as its creditor in place of D. Payment is thus considered made once SB has performed some act showing its decision to debit D's account and credit C's account, whether or not the decision has been implemented by debit and credit entries to the two accounts.[135] Attempts by banks to reserve to themselves the right to decide this as a matter of subjective intention without reference to their overt acts have not succeeded. In *Momm v Barclays Bank International Ltd*:[136]

> The defendant bank was instructed by telex from Herstatt Bank to credit funds to the claimant's account by a stated value date. The computer processes to effect the transfer from the originator's account to the plaintiff's account were initiated on that date but the computer print-outs were not available until the following morning, when the computer had completed its overnight processing. On the previous day Herstatt had announced its insolvency and the defendants had become aware of the fact that the funds held for Herstatt were insufficient to cover the transfer. Taking the position that all transfer instructions sent through the computer were provisional only, the defendants reversed the transfer in their internal records. No trace of either the original transfer or the retransfer appeared in the plaintiff's own bank statements and came to light only during the course of the litigation. It was held by Kerr J that payment was completed when the bank initiated the computer process and that it was not entitled to reverse the transfer.

There could, of course, be other overt acts having a similar effect, for example, a communication to the beneficiary that he could now regard the funds as his own and was free to draw on them unconditionally.

[129] It is not necessary that it shall have completed the credit entry to the account; its decision to do so is all that is required.

[130] However, for the purpose of a proprietary tracing claim in equity the courts rightly take a robust view and treat CB's unconditional credit to the defendant as derived from the payment to CB.

[131] For the position of a bank collecting a cheque, see para 20.29.

[132] Examples in recent times are the trade embargoes on Argentina and Libya, where regulations prohibited banks from crediting the accounts of nationals of those countries. The bank may also wish to defer a credit where it suspects money laundering or is on notice that C may not be the person who is entitled to the payment.

[133] As to when a cheque is to be considered paid, see para 20.20.

[134] For ease of exposition it will be assumed that they bank at the same branch.

[135] *The Brimnes* [1973] 1 WLR 386, affirmed [1975] QB 929.

[136] [1977] QB 790.

7. CONTRACT NETTING (NETTING BY NOVATION)[137]

17.53 Where parties are continuously engaged in mutual dealings it is both administratively convenient and legally prudent for them to offset or 'net out' their reciprocal obligations, reducing them to a single amount.[138] The term 'netting' is used in two distinct senses. In the first, it denotes the amalgamation of two or more executory contracts into a single new contract to be performed at an agreed future date. This is known as netting by novation, to which we now turn. In its second sense it signifies the netting out of matured obligations for the purpose of computing a payment immediately due. This form of netting is commonly termed payment, or settlement, netting and will be examined in the discussion of settlement.[139]

17.54 Contract (or novation) netting, that is, the netting of contracts to be performed in the future, is very common in foreign exchange and swaps transactions, and typically takes place under a master agreement between the parties by which each new contract is automatically consolidated with existing contracts to produce a new contract (novation) involving a single net indebtedness. This form of netting has two distinct characteristics. It has immediate contractual force and it gives rise to a single new indebtedness which does not fall due for payment until a later date agreed between the parties. The netting therefore takes place as each new contract is made and is not deferred until the time of payment. It follows that when payment falls due, only a single sum is involved on one side or the other, and no question of netting (or set-off) arises. Contract netting has both administrative and legal

[137] See P. Wood, *English and International Set-Off*, paras 5–75 ff; L. Gullifer (ed), *Goode on Legal Problems of Credit and Security* (5th edn, 2013), paras 7-18, 7-29 – 7-31; Giavonoli, in Norton *et al.*, *Cross-Border Electronic Banking;* Bank for International Settlements, *Report of the Committee on Interbank Netting Schemes of the Central Banks of the Group of Ten Countries* (the Lamfalussy Report, 1990); B. Crawford, 'The legal foundations of netting agreements for foreign exchange contracts' [1993] 22 Can Bus L 163.

[138] Netting, embraces both money obligations and, in the commodities, futures and securities markets, delivery obligations. In these markets netting may occur either by bilateral agreement or by novation of contracts to a clearing house (see para 4.34). The latter technique is not used in the case of bank clearings. For the purpose of the present chapter it will be assumed that all obligations are money obligations and that the only relevant clearing will be a bank clearing.

[139] See para 17.56.

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upon a specified period of notice.[167] Sums which the customer requires to be able to withdraw or utilize at will are kept on current account, and the usual method by which the customer conveys to his bank a direction to make payment, whether to himself or to a third party, is by the drawing of a cheque on his account. The bank's duty to observe the customer's mandate in regard to the payment of cheques is subsumed under four broad heads.

1. *Honouring the customer's cheques*

20.73 The paying bank owes a duty to its customer[168] to honour his cheques if properly drawn upon an account in credit or within an agreed overdraft facility and duly presented by the holder. Breach of this duty renders the bank liable in damages to its customer for breach of contract. Such damages may include compensation for injury to the drawer's credit resulting from the wrongful dishonour of his cheque, which are recoverable without the need to prove special damage and in addition to any special damage that may have been suffered. This rule was formerly thought to be confined to traders but has more recently been held by the Court of Appeal to be equally applicable to non-traders.[169] Where the terms on which payment is refused are such as to reflect adversely on the customer's reputation, the customer has an alternative claim for damages for libel. In either case the quantum of damages will, of course, depend on the circumstances, including the claimant's general standing and the size of the cheque.[170]

20.74 Not all statements of reason for non-payment are defamatory. For example, 'confirmation required', 'words and figures differ', 'indorsement irregular' would not be libellous. 'No account' clearly would be and, despite earlier cases to the contrary,[171] it is thought that 'refer to drawer' or 'R. D.' would likewise be defamatory, since almost invariably these words denote either a countermand of payment or an insufficiency of funds.[172]

2. *Observing a countermand of payment*

20.75 Just as the bank must honour its customer's cheque when it has no lawful reason to return it, so also it must refuse payment where the customer has given instructions to stop payment and these reach the bank[173] in sufficient

[167] Varying with the interest rate allowed. In practice, banks allow withdrawal on shorter notice against loss of interest.

[168] But not to the holder, for the bank does not accept the cheque and thus does not engage itself to the holder to pay the cheque on presentment.

[169] *Kpohraror v Woolwich Building Society* [1996] 4 All ER 119. For a critical comment on the case see N. Enonchong, 'Contract Damages for Wrongful Dishonour of a Cheque' (1997) 60 MLR 412.

[170] Prima facie, the smaller the cheque, the greater the libel.

[171] See, for example, *Flach v London and South Western Bank Ltd* (1915) 31 TLR 334.

[172] See *Pyke v Hibernian Bank Ltd* [1950] IR 195; *Jayson v Midland Bank Ltd* [1968] 1 Lloyd's Rep 409.

[173] The bank must actually receive instructions countermanding payment. The mere dispatch of such instructions through the post is not sufficient. There is no doctrine of 'constructive countermand' (*Curtice v London, City and Midland Bank Ltd* [1908] 1 KB 293, per Cozens-Hardy MR at 298). Moreover, the countermand must be given to the branch on which the cheque is drawn (*London, Provincial and South Western Bank Ltd v Buszard* (1918) 35 TLR 142).

time.[174] The bank is, however, entitled to satisfy itself first that the instructions mean what they appear to mean and come from the customer or someone authorized by him. Thus the bank is not as a matter of law obliged to act on a countermand by unconfirmed telegram, though it may be thereby put on inquiry and thus be expected to utilize the period allowed for giving notice of dishonour[175] to make inquiry of its customer, paying the cheque if before the end of that period it has not received satisfactory confirmation of the instructions. The customer cannot countermand payment if the cheque has come into the hands of a holder in due course or is covered by a cheque card.

20.76 A bank which pays a cheque after payment has been countermanded acts in breach of its mandate and is prima facie precluded from debiting its customer's account.[176] But where the payment is effective to discharge an indebtedness of the customer to the payee, then in principle the bank should be entitled to claim subrogation to the payee's rights against the customer and thus to maintain the debit to the customer's account despite the breach of mandate.[177]

3. *Paying only against a genuine and authorized signature*

20.77 In principle, the paying banker's duty to honour his mandate is, like any other contractual duty, a strict one, and where the terms of the mandate are broken, the exercise of reasonable care is no defence. Thus at common law a banker paying out on a forged signature is not entitled to debit his customer's account, however skilful the forgery.[178] As we shall see, such a rule has been modified by statute in the case of forged indorsements.[179]

20.78 Similarly, if the customer is other than a single individual (eg a company, a partnership or other unincorporated body or two or more individuals opening a joint account), the bank must honour cheques drawn only by an authorized signatory, and where the mandate requires two or more signatures, both or all of the signatures so required must appear. However, the customer will in certain conditions be estopped from disputing the genuineness of the signature or the authority of the signatory.[180]

[174] Ie before the bank has either paid the cheque or committed itself to pay in a manner consistent with its mandate. See para 20.20.

[175] See para 19.84.

[176] *Reade v Royal Bank of Ireland* [1922] 2 IR 22. Section 75 of the Bills of Exchange Act 1882 expressly provides that the bank's duty and authority to pay are determined by countermand of payment.

[177] See para 20.104.

[178] *London and River Plate Bank v Bank of Liverpool* [1896] 1 QB 7; *London Joint Stock Bank Ltd v Macmillan and Arthur* [1918] AC 777. This is not because of any supposed rule that a banker is expected to know his customer's signature but because a document on which the customer's signature as drawer is forged does not constitute his mandate (*National Westminster Bank Ltd v Barclays Bank International Ltd*, n 110, per Kerr J at 666). See also *Jackson v White and Midland Bank Ltd* [1967] 2 Lloyd's Rep 68, where the general principle was accepted but the bank was held entitled to maintain the debit to its customer's account as regards those payments which had effectively discharged the customer's legal liability to the payee.

[179] See para 20.80. For a comparative treatment, see B. Geva, 'Allocation of Forged Cheque Losses – Comparative Aspects, Policies and a Model for Reform' (1998) 114 LQR 250.

[180] See below.

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2. *The transfer*

23.11 Where, on the other hand, the agreement between the parties has crystallized into a mortgage or pledge,[30] questions of consideration and formalities of contract do not arise, for the real rights of the creditor now rest not on the original agreement but on the transfer of ownership or possession.[31] However, if the security is a written mortgage of goods by an individual, it must conform to the requirements of the Bills of Sale Acts unless falling within one of the exemptions from the Acts,[32] while if the security is a mortgage of land or an interest in land, it is void for the purpose of creating or conveying a legal estate unless it is by deed,[33] and even to take effect as an equitable mortgage it must be in writing and signed by or on behalf of the parties.[34] Moreover, even a valid mortgage or pledge will not give the creditor an attached security interest unless and until money is advanced.[35]

(ii) Identifiability

23.12 English law, in contrast to that of a number of other jurisdictions,[36] does not require specificity of assets for the purpose of security except where the Bills of Sale Acts apply.[37] Accordingly, in the case of transactions outside those Acts, the security agreement may be expressed to cover a specific asset, a class of assets, or, indeed, all the debtor's assets, present and future, without description. The absence of any requirement of particularity greatly facilitates charges on after-acquired property in general and floating charges in particular.[38]

[30] A mere equitable charge (hypothecation), as opposed to a charge which includes an agreement for a mortgage, does not involve a transfer either of ownership or of possession. It may be created by contract or as a term of a settlement or other transfer or of a declaration of trust, as where A transfers property to B, or declares himself a trustee for B, but stipulates that the property is to stand charged with payment of a given sum or periodic payment to C. A mere voluntary undertaking to charge property does not suffice, even if by deed (see n 25).

[31] As to what constitutes delivery of possession for this purpose, see para 24.05.

[32] See generally *Halsbury's Laws of England* (5th edn, 2015), vol 49, *Financial Instruments and Transactions*, Part 3: Bills of Sale. By a curious legislative anomaly, registration of a bill of sale is made obligatory not only to perfect it against third parties but even to preserve its validity as against the grantor in relation to the chattels comprised in the bill (Bills of Sale Act (1878) Amendment Act 1882, s 8). See further, para 24.10. A security bill of sale cannot in general be taken over after-acquired property (Bills of Sale Act (1878) Amendment Act 1882, s 5).

[33] Law of Property Act 1925, s 52(1).

[34] Under s 2(1) of the Law of Property (Miscellaneous Provisions) Act 1989 if it is an agreement for a mortgage or an attempted legal mortgage which is imperfect, or s 53(1)(c) of the Law of Property Act 1925 where it is a mortgage of an equitable interest. The effect of the 1989 Act is that an equitable mortgage can no longer be created solely by deposit of the title deeds; it is necessary to have an agreement in writing signed by or on behalf of both borrower and lender (*United Bank of Kuwait plc v Sahib* [1995] 2 All ER 973). It seems pointless to require the signature of the lender when the agreement is purely unilateral and the lender is neither making promises nor giving undertakings – particularly since the purpose of the Act was to facilitate transactions, not make them more complicated!

[35] See para 23.15.

[36] Eg, France, Germany, Italy.

[37] See Bills of Sale Act (1878) Amendment Act 1882, s 4.

[38] See further paras 2.60, 8.02 ff, as to identifiability.

(iii) The debtor's power to give the asset in security

23.13 This requirement has two facets. Firstly, the asset must be one which is capable of being given in security. We have already seen that a pledge cannot be taken over pure intangibles because it involves the delivery of possession.[39] Subject to this, security can be given over any kind of property, tangible or intangible, except where the asset is of a kind which, because of its personal nature, considerations of public policy or a contractual prohibition against assignment, is incapable of transfer.[40] Secondly, the debtor must have an interest in the asset or a legal power to dispose of it. A security interest cannot attach to an asset in which the debtor has no current interest[41] except where he is authorized by the holder of such an interest to enter into the security agreement or transfer, or has power to do so by virtue of some exception to the *nemo dat* rule.[42] A security agreement expressed to cover future property creates merely an inchoate security interest, but upon the debtor acquiring an asset within the after-acquired property clause, the security interest attaches to that asset with effect from the date of the agreement[43] unless the agreement itself evinces a contrary intention.[44]

23.14 The distinction between an existing and a future asset is not quite as clear-cut as one might suppose. This is because present property is considered to include what is commonly termed *potential* property, that is, property not yet in existence but growing out of that which is in existence and is owned by the debtor. The concept of potential property applies both to tangibles and to intangibles. Examples of potential tangibles are progeny of livestock, milk from cows, wool growing on sheep, and growing crops. Provided that the security agreement identifies the asset (ie the particular livestock, cows, sheep, land) from which the potential property is to grow[45] and that the debtor has an interest in that asset at the time of making the security agreement, the grant of security over the potential property will be treated as a present assignment of existing property, not an agreement to assign after-acquired property,[46] though the security interest cannot, of course, be asserted until the potential property actually comes into existence. The same rule applies to rights growing out of existing contracts. So an assignment of the right to receive sums payable in the future under an existing hire-purchase agreement or building contract constitutes a present assignment of an existing chose in action, not an assignment of future property, even though (as in the case of the building contract) the assignor has to carry out work to earn the sums payable under

[39] See para 22.19. See also para 24.05.

[40] See L. Gullifer (ed), *Goode on Legal Problems of Credit and Security* (5th edn, 2013), para 1-59.

[41] For this purpose the debtor's possession of a tangible or documentary intangible constitutes a sufficient interest even if unlawful vis-à-vis the absolute owner. See paras 2.20–2.21.

[42] See paras 2.74, 16.09 ff.

[43] See *Tailby v Official Receiver*, n 6; *Re Lind* [1915] 2 Ch 345; and paras 23.21–23.22.

[44] As in the case of a floating charge. See ch 25. A charge on an agreement for a lease also constitutes a charge on any lease created pursuant to the agreement, even without an express undertaking to execute a charge on the lease when this comes into existence (*Property Discount Corpn Ltd v Lyon* [1980] 1 All ER 334, affirmed [1981] 1 All ER 379).

[45] See para 8.74.

[46] See para 8.74.

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25.02 This provided effectively for security over machinery and other equipment. The creditor could get his security; the debtor could not dispose of it except as permitted by the mortgage or with the creditor's subsequent consent. That, however, left the problem of security over shifting classes of asset – stock and receivables – which did not lend themselves so readily to such treatment. It was quite impracticable to expect a trading company to ask permission of its mortgagee every time it wanted to sell an item of stock; and while there was not quite the same difficulty with receivables, the debtor company would want, in the normal course of things, to pay the proceeds of sale into its own bank account and treat the moneys as its own, without the need to segregate the receivables and the proceeds for the benefit of the mortgagee. How was the security required by the creditor to be reconciled with the need of the debtor to deal with its circulating assets freely in the ordinary course of business?

25.03 The answer was the floating charge, a further manifestation of the English genius for harnessing the most abstract conceptions to the service of commerce.[5] The creditor would take security over the debtor's present and future property but would contract to allow the debtor liberty to manage the assets and dispose of them in the ordinary course of business, free from the charge, until such time as the company ceased to carry on the business as a going concern or some other event occurred which, by the terms of the security agreement, entitled the creditor to enforce his security and put an end to the company's powers of disposition. The first case in which the floating security device was tested and upheld came eight years after *Holroyd v Marshall* with the decision of the Court of Appeal in Chancery in *Re Panama, New Zealand and Australian Royal Mail Co*.[6] In that case the debtor company charged its 'undertaking and all sums of money arising therefrom' with repayment of the amount payable under its debenture. It was held that the word 'undertaking' signified not merely the income from the business but also present and future property of the company, and that while by the terms of the charge the debenture holder could not interfere in the running of the company and its dealing with its assets until the winding up of the company, the occurrence of that event entitled the debenture holder to realize its security over the assets, and to assert its charge in priority to the general creditors.

2. THE NATURE OF THE CHARGE[7]

25.04 Since *Re Panama*, the nature of the floating charge has been described in some detail in a number of cases, though the judges have been careful to avoid offering exhaustive definitions. The 'classic and frequently cited'[8] definition of a floating charge was provided by Romer LJ in the following terms:

[5] Compare the doctrine of estates in real property law, para 2.25.

[6] (1870) 5 Ch App 318.

[7] The term 'floating charge' is used generally to cover any floating security, whether it takes the form of an assignment of future property or a charge upon it. The wide powers usually given to the creditor by the present-day security instrument mean that he will normally have all the powers of an equitable mortgagee, including the power to get in the legal estate or title, even if the security takes the form of a charge. Whether a floating security is in fact a charge or a mortgage depends on the terms of the security agreement. See H. Beale, M.Bridge, L. Gullifer and E. Lomnicka, n 1, paras 6.54–6.67.

[8] *Re Spectrum Plus Ltd* [2005] UKHL 41, [2005] 2 AC 680, at [99].

> I certainly do not intend to attempt to give an exact definition of the term 'floating charge', nor am I prepared to say that there will not be a floating charge within the meaning of the Act which does not contain all the three characteristics that I am about to mention, but I certainly think that if a charge has the three characteristics that I am about to mention it is a floating charge. (1) If it is a charge on a class of assets of a company present and future; (2) if that class is one which, in the ordinary course of the business of the company, would be changing from time to time; and (3) if you find that by the charge it is contemplated that, until some future step is taken by or on behalf of those interested in the charge, the company may carry on its business in the ordinary way as far as concerns the particular class of assets I am dealing with.[9]

This language was echoed by Lord Macnaghten on appeal:

> I should have thought there was not much difficulty in defining what a floating charge is in contrast to what is called a specific charge. A specific charge, I think, is one that without more fastens on ascertained and definite property or property capable of being ascertained and defined; a floating charge, on the other hand, is ambulatory and shifting in its nature, hovering over and so to speak floating with the property which it is intended to affect until some event occurs or some act is done which causes it to settle and fasten on the subject of the charge within its reach and grasp.[10]

The reference to there not being 'much difficulty' in defining a floating charge in such a way as to differentiate it from a fixed charge has proved to be somewhat optimistic. The courts have in fact experienced considerable difficulty in distinguishing between the two, particularly in the context of a charge over book debts.

25.05 The leading case is now the decision of the House of Lords in *Re Spectrum Plus Ltd*,[11] in which it was held that it is the third of Romer LJ's characteristics of a floating charge that is 'the hallmark of a floating charge and distinguishe[s] it from a fixed charge.'[12] In other words, the critical question to be asked relates to the control that is exercised over the assets that fall within the scope of the charge. While the courts were once willing to recognise that a charge could be fixed notwithstanding the fact that the chargor retained an ability to remove the asset from the scope of the charge,[13] it is now clear from *Spectrum* that the test to be applied is a more restrictive one and that the ability to remove an asset from the scope of the charge will result in the conclusion that the charge is floating and not fixed.[14] While it may be an overstatement to conclude that any control by the chargor over the asset subject to the charge is inconsistent with the fixed nature of a charge, it would be accurate to state that the degree of control that can be exercised by the chargor consistently with the charge being fixed is now

[9] *Re Yorkshire Woolcombers Association Ltd* [1903] 2 Ch 284, at 295.

[10] *Illingworth v Houldsworth* [1904] AC 355, at 358.

[11] See n 8. For critical analysis of the case see J. Getzler and J. Payne (eds), *Company Charges: Spectrum and Beyond*.

[12] *Re Spectrum Plus Ltd*, n 8, at [106]. See to similar effect the judgment of Lord Millett in *Agnew v Commissioner of Inland Revenue* [2001] UKPC 28, [2001] 2 AC 710, at [32].

[13] See, for example, *Siebe Gorman & Co Ltd v Barclays Bank Ltd* [1979] 2 Lloyd's Rep 142, a case which was overruled by the House of Lords in *Re Spectrum Plus Ltd*.

[14] *Re Spectrum Plus Ltd*, n 8, at [107] and [139].

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the interposition of a guarantor provides encourages lenders to extend credit in situations where they might not otherwise be willing to advance money to the debtor.

30.04 The law has always adopted a protective attitude towards guarantors, taking the view that any act of the creditor which increases the guarantor's risk without his consent entitles him to be discharged from liability, wholly or in part. So for those advising banks and finance houses who intend to provide funds on the security of a guarantee, a knowledge of the legal principles involved is of first importance.

1. THE LEGAL NATURE OF A GUARANTEE

(i) Characteristics of a suretyship guarantee

30.05 In the sense used in this chapter[5] a guarantee is an undertaking to answer for another's default.[6] It is thus both a secondary and an accessory engagement. It is secondary in that the guarantor can be sued only after default by the principal debtor; and it is accessory in that, in principle, the guarantor's obligation is coterminous with the obligation of the principal debtor and is enforceable only where and to the extent that the principal contract is enforceable.[7] Just as a loan contract may limit the lender's rights to a specific fund or security, imposing no personal repayment obligation on the borrower, so also a guarantee may take the form of real security furnished by the guarantor without personal commitment on his part. For example, in consideration of B lending money to C, C's friend A may deposit the deeds of his house with B by way of equitable mortgage without personal obligation for repayment of the loan in the event of C's default.[8] In such a case the rights conferred by the guarantee are restricted to the enforcement of the security, and if this proves inadequate, that is B's misfortune; he cannot look to A for the deficiency.

30.06 The typical guarantee is an undertaking to meet the money liability of the principal debtor arising from his default, whether the default itself relates to the payment of money or the performance of some other obligation, for example, to execute building works. But there is nothing to prevent a guarantor from assuming a secondary liability for performance of the principal debtor's non-money obligations, and it is not uncommon for suretyship bonds given in connection with construction contracts to empower the issuer of the bond to take over the contract upon default by the contractor, as an alternative

[5] Demand guarantees, performance bonds and standby credits are not suretyship guarantees but undertakings which are primary in form, though secondary in intent. See para 35.154.

[6] It does not refer to a 'guarantee' in the sense that the term is used in s 30 of the Consumer Rights Act 2015 to denote an undertaking to a consumer given without extra charge by a person acting in the course of that person's business that, if the goods do not meet the specifications set out in the guarantee statement or any associated advertising the consumer will be reimbursed for the price paid for the goods or the goods will be repaired, replaced or handled in any way.

[7] See para 30.25, and J. Steyn, 'Guarantees: The Co-Extensiveness Principle' (1974) 90 LQR 246.

[8] *Re Conley* [1938] 2 All ER 127. As to non-recourse loans, see para 22.37.

to payment of damages.[9] There has been much case law as to the circumstances in which a woman who gives a bank a guarantee for her husband's debts can have the guarantee set aside on the ground of misrepresentation or undue influence.[10] This is not discussed in the present chapter, which focuses on guarantees by commercial parties.

(ii) Suretyship guarantee distinguished from primary undertaking

30.07 A guarantee is to be distinguished from a contract involving a primary obligation to the creditor, eg an indemnity. The distinction is relatively easy to state but has proved to be extremely difficult to apply in practice.[11] The classic exposition of the difference is the example given in *Birkmyr v Darnell*.[12] A says to B: 'Supply goods to C and, if he does not pay you, I will.' That is a contract of guarantee. But if A says to B: 'Supply goods to C and I will see that you are paid', that is a contract of indemnity. The illustration is neat, but the usual explanation of it tends to obscure rather than to illumine the principle. It is said that in the first case A's liability is dependent on C's default, while in the second it is not. This by itself tells us little in a situation where the obligations of the indemnifier have the same content as those of the principal debtor and both fall due at the same time, for the indemnifier will then be called upon to pay only where payment has not already been made by the principal debtor. The essential point of an indemnity, or other primary undertaking, is that it is a distinct, autonomous undertaking which is in no way dependent for its content or enforceability on the terms or validity of the undertaking given by the debtor.[13] Into this category fall undertakings by A:

(a) to be answerable for any loss suffered by B as a result of contracting with C;
(b) as issuer of a letter of credit;[14]
(c) as acceptor of a bill of exchange where the acceptance is given for C's accommodation;[15]
(d) as issuer of a demand guarantee or performance bond for the performance of C's obligations.[16]

30.08 In each of these four cases A's payment undertaking is a primary obligation that exists independently of the contract between B and C, which is governed by its own terms and which B can in principle enforce against A

[9] See generally *Rowlatt on Principal and Surety*, n 1, ch 15.

[10] The leading case being the decision of the House of Lords in *Royal Bank of Scotland plc v Etridge (No 2)* [2001] UKHL 44, [2002] 2 AC 773. The decision has itself spawned a considerable case law in which the courts have had to consider the limits of the decision in *Etridge* but that case law is beyond the scope of this work.

[11] See, for example, *Yeoman Credit Ltd v Latter* [1961] 2 All ER 294, [1961] 1 WLR 828, at 835; *Pitts v Jones* [2007] EWCA Civ 1301, [2008] QB 706; *Associated British Ports v Ferryways NV* [2009] EWCA Civ 189, [2009] 1 Lloyd's Rep 595, at [1]; *ABM AMRO Commercial Finance plc v McGinn* [2014] EWHC 1674 (Comm), [2014] 2 Lloyd's Rep 333.

[12] (1704) 1 Salk 27.

[13] *Yeoman Credit Ltd v Latter*, n 11; *Argo Caribbean Group Ltd v Lewis* [1976] 2 Lloyd's Rep 289.

[14] See paras 35.49–35.51 ff.

[15] See para 19.48.

[16] See para 35.154.

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as shipper but may perform the contract by buying goods afloat.[29] The distinctive feature common to c.i.f. and extended f.o.b. contracts in which S ships as principal is that the price includes the cost of carriage beyond the agreed delivery point, so that the delivery and price obligations are not coterminous.

4. *Delivery at place (DAP)*[30]

32.25 S may undertake not merely to dispatch the goods, as in the previous two cases, but to deliver them, say, ex ship New York, in which case the contract is a destination or 'arrival' contract, that is, it is S's responsibility to ensure that the goods arrive safely and in proper condition in New York, ready for collection by B from the ship, all expenses up to this point being paid by S.[31] If the goods are lost or damaged in transit, then subject to rules of risk and frustration the loss falls on S, for the contractual delivery point is from the ship in New York.

7. A TYPICAL EXPORT TRANSACTION[32]

(i) Procedural steps

32.26 Export procedure takes a variety of forms, but there are certain basic stages in a typical transaction, which will briefly be described. In the illustration that follows it will be assumed that under the contract of sale it is the exporter's responsibility to arrange for shipment of the goods. This, of course, will not necessarily be so in all cases.

1. *The purchase order*

32.27 The first step is for the foreign buyer to place the order. The contract of sale is the core of the operation, and all subsequent ancillary contracts must be in conformity with it, a point to which we shall return when considering the documents for which the buyer can call and which the seller is entitled to tender. Usually the contract will be a standard-term contract, on the buyer's terms, the seller's or a combination of the two. Whose terms are made to prevail will, in large measure, depend on the respective bargaining positions of the parties, a matter influenced as much by supply and demand for the goods

[29] This is not to say that the port of departure is irrelevant in a c.i.f. contract (on the contrary, it is frequently made a contractual term), merely that the shipment need not be by or on behalf of S but is effective if made by a predecessor.

[30] DAP is a new term introduced for the first time in Incoterms 2010. It amalgamates three terms which are no longer included in Incoterms, namely Delivered at frontier (DAF), Delivered ex ship (DES) and Delivered duty unpaid (DDU). So, for example, the arrival vehicle under DAP could be a ship, as in the example given in this paragraph, but it would also encompass another mode of transport.

[31] However, not all 'arrival' contracts are ex ship in this sense. The words 'arrival' or 'to arrive' may mean that the seller's obligation to deliver ex ship and the buyer's obligation to pay are dependent on the safe arrival of the ship and/or the goods at the stated destination, and that if this does not occur, the contract is discharged, neither party having any claim against the other. See *Benjamin's Sale of Goods* (9th edn, 2014), paras 21-023 ff.

[32] See generally *Schmitthoff: The Law and Practice of International Trade* (12th edn, 2012); Branch, *Export Practice and Management*.

as by the relative size and substance of the parties themselves.[33] A well-drawn contract will stipulate by which law it is to be governed (in practice, it will usually be that of the seller), and in most cases the choice-of-law clause will be upheld and applied in the courts of both seller and buyer. In the absence of an express choice of law by the parties, or the application of the Vienna Convention on Contracts for the International Sale of Goods (the 'CISG') to the contract, an English court will have to apply the law determined by English conflict of laws rules.[34]

2. *Assurance of payment*

32.28 Where the contract provides for payment in advance, or for some advance assurance of payment such as an irrevocable letter of credit,[35] the seller will wish to have this in his hands before proceeding further.

3. *Procurement of the goods*

32.29 Unless he is able to supply the goods from stock, the exporter must proceed to manufacture or acquire them. The goods must, of course, conform to the requirements of the contract of sale and, assuming that the sale transaction is governed by English law, the normal rules contained in the Sale of Goods Act will apply.

4. *Export licence*

32.30 Where an export licence is required, it is usually for the seller to obtain this.[36] Most exports do not require a licence, but for those categories listed in the Export Control Act 2002, and regulations made thereunder,[37] as from time to time amended, a licence from the Export Control Organisation in the Department for International Trade is necessary except so far as the order otherwise provides. Exports of specified classes of controlled goods are covered by an Open General Export Licence which may be utilized without application, provided that the exporter registers its intention to use the licence. In other cases the exporter must apply for a Standard Individual Licence to export specified goods to a specified consignee or an Open Individual Export Licence covering multiple shipments.

[33] As to the battle of the forms, see para 3.51.

[34] See paras 37.70 ff.

[35] See paras 35.26 ff.

[36] See paras 34.10–34.11.

[37] See in particular the Export Control Order 2008 (SI 2008/3231), which, as amended, consolidates various orders made under the Export Control Act 2002. An EU general export authorization for dual-use items (ie those that can be used for both civil and military purposes) may also be obtained pursuant to Council Regulation (EC) 428/2009 of 5 May 2009, as amended, on setting up an EU regime for control of exports, transfer, brokering and transit of dual-use items and technology. Further helpful information can be found on the website of the Department for International Trade (www.gov.uk/guidance/beginners-guide-to-export-controls).

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is much controversy about some aspects.[24] On the assumption that in each case the parties carry on business in different states,[25] the following questions arise:

(a) Where proceedings are brought in a non-reserving contracting state whose rules of private international law lead to the application of the law of a reserving contracting state, should the court apply CISG? The view of the government of the Federal Republic of Germany is that a state which makes such a declaration is not a contracting state for the purpose of art 1(1)(a), so that where the rules of private international law lead to the application of the law of such a state, there is no obligation on Germany to apply the Convention, and German legislation commits German courts to this approach, which is also shared by a number of scholars.[26] But whereas art 92 expressly provides that a contracting state making a declaration under that article is not to be considered a contracting state within art 1(1), there is no such provision in art 95, and the better view[27] is that only the courts of the reserving state are bound by that state's declaration, and that the courts of non-reserving contracting states should treat CISG as applicable if their rules of private international law apply to the law of the reserving state, regardless of the latter's reservation.

(b) Where the rules of private international law of the forum state lead to the application of the law of a non-reserving contracting state but the forum state has made a declaration under art 95, should its courts apply CISG? The answer is yes, but they will do so not by virtue of art 1(1)(b) but in pursuance of their own conflict rules, and it is for the court concerned to determine the application of these. However, the position is otherwise if the forum state's conflict rules lead to the application of the *lex fori* itself, for by making its declaration under art 95 the forum state has manifested its policy decision not to apply CISG via a conflict rule.

(c) Where proceedings are brought in a non-contracting state whose rules of private international law lead to the application of the law of a contracting state, should CISG be applied? Where the law referred to is that of a non-reserving state, the court will apply CISG, but, again, under its own conflict rules, not under art 1(1)(b). Where the law referred to is that of a reserving state, a court is more likely to apply the domestic law of that state than the CISG.[28]

(iii) Other bases of application

33.12 The provisions of CISG as to the sphere of its application are exhaustive only so far as the Convention rules are relied on as treaty provisions. There are at least three other ways in which courts and arbitral tribunals have succeeded

[24] The matter is now the subject of a CISG Advisory Council Opinion: see CISG Advisory Council Opinion No 15 'Reservations under Articles 95 and 96': www.cisgac.com. It may be that this Opinion will go some way towards reducing the uncertainty surrounding this issue.
[25] A condition which has to be satisfied whether art 1(1)(a) or art 1(1)(b) applies.
[26] See, for example, J. Honnold, *Uniform Law for International Sales*, para 47.5.
[27] And the view which is taken in the CISG Advisory Council Opinion, n 24, paras 3.12–3.16.
[28] This is the view taken in the CISG Advisory Council Opinion, n 24, para 3.18.

in holding the Convention rules applicable despite the absence of the necessary link with a contracting state.[29]

1. Contractual incorporation

33.13 It is open to the parties to incorporate CISG provisions by reference in their contract. In the United Kingdom the sole effect of such incorporation is that the Convention rules are applied as if they had been set out as terms of the contract. Accordingly, an English court would have no duty to apply the Convention as such, but would do so only to the extent that it would apply any other terms of the contract.

2. Trade usage

33.14 In an arbitration under the Rules of Conciliation and Arbitration of the International Chamber of Commerce the arbitral tribunal, relying on what is now art 21(2) of the ICC Rules, which requires account to be taken of any relevant trade usages, held that there was no better source for determining those usages than CISG.[30] That is itself a large assumption, but even if it were justified, it is harder to support the application of CISG in a case where neither the country of the seller nor that of the buyer was a contracting state, the contract had been made before CISG had even been concluded and the tribunal applied its provisions in the teeth of the law which it had determined was applicable but considered unreasonable. A potentially more fruitful source for identifying trade usage is the ICC's Incoterms 2000, which could be resorted to as evidence of usage even where, under national law, they would not have been considered incorporated into the contract.

3. Lex mercatoria

33.15 There is a body of opinion which holds that there exists a corpus of uncodified international trade law and usage, the *lex mercatoria*, which subsists independently of any national legal system. In line with this view the Iran-United States Claims Tribunal applied CISG rules as part of the *lex mercatoria*.[31] English law does not, it is thought, subscribe to this concept of *lex mercatoria*, but would, of course, be free to apply any trade usage by reference to which the parties expressly or impliedly contracted and to look to the Convention for best evidence of such usage where appropriate.

[29] See further L. F. Del Duca and P. Del Duca, 'Practice under the Convention on International Sale of Goods (CISG): A Primer for Attorneys and International Traders' 27 UCC LJ 331, 343–344 (1995).
[30] ICC Case No 5713/1989, summarized in (1990) XV Yearbook of Commercial Arbitration 70 and [1989] Unilex D 89–1, and discussed by R. Goode, 'Usage and its Reception in Transnational Commercial Law' (1997) 46 ICLQ 1 at pp 20 ff, 29.
[31] *Watkins-Johnson Co and Watkins-Johnson Ltd v Islamic Republic of Iran* (1990) XV *Yearbook of Commercial Arbitration* 220.

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that document, any other stipulated document or the credit.[204] This requires that the terms of each document should be consistent with those of the others and that all documents should appear on their face to relate to the same transaction. This, in turn, entails that they should be linked to each other either by direct reference or by the fact that they appear on their face to relate to the same goods.[205] However, the following points should be noted.

(a) While the description of the goods, services or performance in the commercial invoice must correspond with the description in the credit, in all other documents the goods, services or performance may be described in general terms not conflicting with the description of the goods, services or performance in the credit.[206]

(b) UCP 500 introduced substantial changes in the requirements for transport documents. These were designed to cater in particular for the steadily growing use of non-negotiable sea waybills and multimodal transport documents. In each case it was for the credit to specify the type of transport document to be furnished by S. The UCP (both in their previous and current form) set out in detail for each such type the information that it has to indicate in order for it to be accepted by banks.[207] Article 26 also deals specifically with deck cargo, stating that banks will accept a transport document which contains a provision that the goods may be loaded on deck provided that it does not specifically state that they are or will be loaded on deck.

(c) Banks and importers have become much more relaxed about transhipment since containerization and the introduction of multimodal transport operations, because goods can safely be left at the intermediate port in sealed containers and thus protected from the elements. Accordingly, banks will accept a bill of lading indicating that the goods will or may be transhipped, provided that the entire ocean carriage is covered by one and the same bill of lading; even if the credit prohibits transhipment, banks will in certain conditions accept a bill of lading which indicates that the goods will or may be transhipped.[208]

(d) The documents must be presented not only before the expiry date specified in the credit but also (where particular transport documents are involved) not later than 21 days after the date of shipment.[209]

[204] UCP, art 14(d).

[205] See *Banque de l'Indochine et de Suez SA v J H. Rayner (Mincing Lane) Ltd* [1983] 1 Lloyd's Rep 228; Jack: Documentary Credits, n 11, paras 8.42–8.51.

[206] UCP, arts 14(e) and 18(c).

[207] See UCP 500, Part D, arts 20–38; and UCP 600, arts 19–28.

[208] UCP, art 20(c). Article 20(d) provides that clauses in a bill of lading stating that the carrier reserves the right to tranship will be disregarded.

[209] Article 14(c). In the case of a negotiation credit the presentation that has to be made prior to expiry of the credit is presentation to the negotiating bank. The time when that bank, in turn, presents the documents to IB or AB as confirming bank (if AB is not itself the negotiating bank) is irrelevant to S's rights as beneficiary. However, art 14(c) can be displaced if the credit establishes a different temporal restriction. Thus, a provision that presentation is to be 'within 21 days from B/L date' clearly requires presentation within 21 days of the date of issue of the bill of lading irrespective of the date of shipment: *Fortis Bank SA/NV v Indian Overseas Bank (Nos 1 & 2)*, n 93, at [71]–[77].

35.90 If IB determines that a presentation does not comply, it has various options open to it.[210] First, it may refuse to honour the credit.[211] Alternatively, it may, in its sole discretion, consult its customer, B,[212] to see whether he is willing to waive the discrepancy, which in most cases he will, as the commercial objective is to obtain the goods, not to take technical points on the documents.[213] If IB decides to refuse to honour on the basis that the presentation does not comply, it must give a single notice[214] to that effect to the presenter.[215] The notice must state that the bank is refusing to honour and indicate each discrepancy in respect of which the bank refuses to honour.[216] The notice must then state that the bank is (a) holding the documents pending further instructions from the presenter, or (b) holding the documents until it receives a waiver from B and agrees to accept it, or receives further instructions from the presenter prior to agreeing to accept a waiver; or (c) that the bank is returning the documents; or (d) that it is acting in accordance with instructions previously received from the presenter.[217] The notice must be given[218] no later than the close of the fifth banking day following the day of presentation.[219] Once a bank has issued a rejection notice stating what it has elected to do with the documents, it comes under an obligation to act in accordance with the notice and with its chosen option.[220] Such an obligation arises as a matter of

[210] For an analysis of UCP 600, art 16, see M. Hwaidi and B. Harris, 'The Mechanics of Refusal in Documentary Letter of Credits: An Analysis of the Procedures Introduced by Article 16 UCP 600' [2013] JIBLR 146.

[211] Article 16(a).

[212] Where the documents are presented to AB as confirming bank, AB's consultation (if any) will be with IB, who, in turn, may consult B.

[213] Article 16(b). However, this will not extend the prescribed period that is stated in art 14(b).

[214] Although 'a single notice' is required, where the bank specifies discrepancies in the tendered documents, but fails to state that the bank is refusing to honour or negotiate as required by art 16(c)(i), and later serves another notice correcting the defect, it may be able to rely on the second notice as long as it serves that notice in time and adopts the same substantive reasons: *Bulgrains & Co Ltd v Shinhan Bank*, n 146, at [32]–[34].

[215] Articles 16(c).

[216] Article 16(c)(i) and (ii). An express statement of refusal to honour or negotiate is not necessary. A statement that clearly indicates the intention of the bank to refuse is sufficient: *Bulgrains & Co Ltd v Shinhan Bank*, n 146, at [35]–[41]. Prior to the UCP 500 English law did not consider that a bank which rejected documents on one ground precluded it from rejecting a fresh tender containing some other discrepancy featuring in the original documents (*The Lena* [1981] 1 Lloyd's Rep 68); but in Hong Kong Kaplan J took a different view in *Hing Yip Hing Fat Co Ltd v Daiwa Bank Ltd*, n 153, which art 16(c)(ii) adopts.

[217] Article 16(c)(iii). In *Bulgrains & Co Ltd v Shinhan Bank*, n 146, it was held that, in a communication between banks, it is enough that the rejection notice merely identifies the applicable provision (at [50]–[51]) (in that case 'notify, as per UCP 600 article 16(c)(iii)(b)', without expressly stating what the nominated, confirming or issuing bank is proposing to do with the documents). Article 16 applies equally to a nominated bank acting on its nomination or a confirming bank (if any), with the exception of arts 16(b) and 16(c)(iii)(b), which only relate to IB. A nominated bank, confirming bank or issuing bank may, after providing notice under art 16(c)(iii)(a) or (b) (as applicable), return the documents to the presenter at any time (art 16(e)).

[218] On the meaning of 'given' in art 16(d), and whether it requires receipt of the notice of refusal, see *Bulgrains & Co Ltd v Shinhan Bank*, n 146, at [29]–[31].

[219] Article 16(d).

[220] *Fortis Bank SA/NV v Indian Overseas Bank (Nos 1 & 2)*, n 93; cf E. P. Ellinger, 'Rejection of Documents Tendered Under a Letter of Credit' [2013] LMCLQ 1, 4–5. This is, however, without prejudice to the liberty expressly conferred by art 16(e) to return documents to the presenter at any time.

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tion in maritime law.[15] As for the special position of suits which have sovereign states as a defendant, in general, matters from which a state would enjoy immunity from civil suit[16] fall outside of the scope of 'civil and commercial matters'.[17]

37.05 Those instances aside, it is unlikely that any of the issues discussed hitherto in this work will be outside of the scope of the Brussels Ir Regulation. As such, it will be necessary to determine the domicile of the defendant so that the applicable rules can be identified and applied. Domicile is to be determined at the date when the proceedings are initiated by the issue of the claim form.[18] In the case of natural persons, the Regulation leaves the definition of the domicile of individuals to national law.[19] In ascertaining whether the defendant has his or her domicile in England,[20] the court will apply the rules in Schedule 1 to the Civil Jurisdiction and Judgments Order 2001.[21] A defendant will be so domiciled[22] if he or she is resident in England and the nature and circumstances of that residence indicate a substantial English connection,[23] which will be presumed where the defendant has been resident there for three months prior to the raising of the action.[24] In the case of legal persons, the Regulation provides an autonomous definition of domicile.[25] An entity will be domiciled in England if it has its 'statutory seat'[26] there, or if England is its place of central administration[27] or its principal place of business.

[15] Article 71. See also *Owners of cargo lately laden on board Tatry v Owners of Maciej Ratai, The Tatry*: Case C-406/92, [1994] ECR I–5439. Although note that, if the mechanisms of a convention conflict with the objectives of the Brussels Regime, the latter takes precedence: *TNT Express Nederlands BV v AXA Versicherung AG*: Case C-533/08, [2010] ILPr 35; cf *British American Tobacco Switzerland SA v Exel Europe Ltd* [2015] UKSC 65, [2016] AC 262.

[16] For the law in England, see the State Immunity Act 1978, discussed in H. Fox and P. Webb, *Law of State Immunity* (3rd edn, 2013).

[17] *Mahmadia v People's Democratic Republic of Algeria*: Case C-154/11, [2013] ICR 1.

[18] *Canada Trust Co v Stolzenberg (No 2)* [2000] UKHL 51, [2002] 1 AC 1, [2000] 4 All ER 481.

[19] Brussels Ir, art 62.

[20] When determining whether an individual is domiciled in another Member State, the law of that Member State should be applied: Brussels Ir, art 62(2).

[21] SI 2001/3929, as amended by the Civil Jurisdiction and Judgments (Amendment) Regulations 2014 (SI 2014/2947).

[22] Although there is, in effect, a presumption that, where the defendant is an EU national, they will be held to be domiciled in the state of nationality unless 'firm evidence' is advanced to the contrary: *G v de Visser*: Case C-292/10, [2013] QB 168.

[23] Sch 1, para 9(2) (UK domicile); para 9(3) (attribution of domicile to individual law unit, ie England).

[24] Sch 1, para 9(6).

[25] Article 63(1).

[26] Article 63(2) translates this for the purpose of the laws of UK and Ireland: a company will have its statutory seat in England if it has its registered office there, or, in the absence of any registered office, if it was incorporated there, or, if there has been no incorporation, if it was formed under English law.

[27] See *Young v Anglo American South Africa Ltd* [2014] EWCA Civ 1130, [2014] ILPr 40.

(ii) Jurisdiction regardless of domicile

37.06 Some jurisdictional rules of the Brussels Ir Regulation apply even where the defendant is not domiciled within the EU.[28] First, where the proceedings have as their principal object rights in immoveable property, certain corporate matters,[29] or stated forms of intellectual property rights, art 24 provides that specific courts will have exclusive jurisdiction based on their paramount territorial connection to such matters: for instance, matters concerning rights in real property may only be brought before courts of the *situs* of that property. Secondly, outside of the cases covered by art 24, any defendant may submit to being sued before an EU court by failing to contest the jurisdiction of the court seised.[30] Thirdly, if the consumer contract provisions are engaged,[31] then the counterparty can be sued in the courts of the consumer's domicile, even if that counterparty has its place of business or is otherwise established outside of the EU.[32]

37.07 Of most practical importance, however, is art 25, relating to jurisdiction agreements. If the parties have designated the English court under a jurisdiction agreement,[33] then, provided that the clause meets certain formal requirements,[34] and the clause is not otherwise invalid by the law of the chosen court,[35] then the English courts have exclusive jurisdiction[36] in all disputes falling within the scope of the agreement. The determination of the scope of the clause is a matter for the law of the forum.[37] English courts will apply the law which governs the main contract to questions of its interpretation and scope,[38] and, if this law is English law, the approach taken is a commonsense one, preferring commercial sensibilities over a technical focus on the precise

[28] The contrary interpretation of 'regardless of domicile' in *Choudhary v Bhatter* [2009] EWCA Civ 1176, [2010] ILPr 8 has been recognised as being incorrect and *per incuriam* (*Dar Al Arkan Real Estate v Al Refai* [2014] EWCA Civ 715, [2015] 1 WLR 135), but is yet to be formally overruled.

[29] That is, the validity of the constitution, the nullity or the dissolution of companies. As is true for all of art 24, this must form the principal matter of the proceedings, and not where the issue arises as a collateral question eg an allegation that a public authority had no authority to enter into a rate swap transaction is a collateral question and does not compel that entire dispute to be heard in the court indicated by art 24: *BVG v JP Morgan Chase Bank NA*: Case C-144/10, [2011] 1 WLR 2087.

[30] Article 26. Such submission will give jurisdiction even if inconsistent with a jurisdiction clause covered by art 25: *Elefanten Schuh v Jacqmain*: Case 150/80, [1981] ECR 1671.

[31] That is, if a consumer (one acting outside of a trade or profession, in furtherance of their own private needs and consumption: *Benincasa v Dentalkit Srl*: Case C-269/95, [1997] ILPr 559) buys goods on credit terms, finances them through credit, or if the counterparty makes his services available in the consumer's domicile or directs his activities there: art 17.

[32] Article 18(1).

[33] On jurisdiction agreements generally see T. C. Hartley, *Choice of Court Agreements under the European and International Instruments* (2013); A. Briggs, *Agreements on Jurisdiction and Choice of Law* (2008).

[34] Generally, that the clause is in writing, or accords with a form previously used by the party or which coincides with the usage of the trade or area of commerce in which the parties are engaged.

[35] Including its choice of law rules: Recital (20).

[36] Unless the parties specifically agree that the jurisdiction clause is simply non-exclusive. Note that special rules apply in insurance, consumer, and employment cases: art 25(4).

[37] Again, including its choice of law rules.

[38] *Sulamerica Cia Nacional de Seguros SA v Enesa Engenharia SA* [2012] EWCA Civ 368, [2013] 1 WLR 102.

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