



Trade Finance Insight

Welcome to the latest edition of Trade Finance Insight. We are pleased to present a curated selection of articles and resources on all things trade finance, designed to inform and engage our readership.

Our lead article delves into one of the key instruments of international trade finance - the standby letter of credit - and examines whether the prioritisation of inviolability has led to outcomes perceived to be unduly kind to beneficiaries.

We follow with two feature articles that look at important changes to UK law relevant to trade finance; the first is a recent change of law in the field of arbitration and the second is an interesting proposal to bring the near-150-year-old bills of exchange laws into the future.

In our final article, we explore recent changes to the Bankers Association for Finance and Trade Master Trade Loan Agreement.

As always, do not miss our regular Sanctions and Export Controls update page, featuring a selection of intriguing reads, including the latest developments in the US and EU's approaches to Iran and Syria. We are also pleased to connect you with some great resources focussed on sustainability including A Practical Guide to Greenwashing for Financial Institutions, the Sustainability Risk Radar for Financial Institutions and an in-depth article looking at the EU Omnibus Simplification Package.

Lastly, we are proud to share our fantastic news on recent awards won by the Baker Mckenzie team.

We hope that you enjoy this 11th edition of Trade Finance Insight.

Contents The continuing inviolability of standby letters of credit 03 Changes to the UK Arbitration Act -**Governing law of arbitration clauses** 07 A problem with the bill? Law Commission **Consultation Paper on digital assets and** (electronic) trade documents in private **international law** (including Section 72 of the Bills of Exchange Act 1882) 08 **BAFT Master Trade Loan Agreement** moves with the times 12 Sanctions & Export Controls Update 14 Additional Insights and Resources 15 Our Awards 16 **Key Contacts** Europe, Middle East and Africa 17 Asia Pacific, North America, Latin America 18



Editor Highlights

- Standby letters of credit (SBLCs) continue to be one of the key instruments of international finance.
- Their role as the "lifeblood of international commerce" (a term used frequently by the English courts) means that the English courts have taken a hostile view to attempts by Issuing Banks to avoid their obligation to pay out under an SBLC and accordingly the circumstances in which payment can legitimately be avoided are limited.
- However, English court decisions in recent years have dismissed arguments of Issuing Banks based on the fraud exception or illegality of performance. Those decisions have raised some questions as to whether the courts' prioritisation of the inviolability of SBLCs has led to some outcomes that can be perceived to be unduly kind to beneficiaries.

01

The continuing inviolability of standby letters of credit

In this article the authors consider whether the English courts' recent prioritisation of the inviolability of standby letters of credit has led to outcomes that can be perceived to be unduly kind to beneficiaries.

A brief introduction to SBLCs

An SBLC is an instrument typically issued by a bank (Issuing Bank) following a request from (usually) its client (Applicant) in favour of (and often as required by) the commercial counterparty of that client (Beneficiary) to cover the risk to the Beneficiary of the Applicant not fulfilling its obligations under an underlying commercial contract. SBLCs are commonly issued subject to industry standard governing rules, usually those of UCP 600 or ISP 98.

Under English law an SBLC is an on-demand guarantee, meaning that it creates a primary obligation of the Issuing Bank to make a payment to the Beneficiary under the SBLC that is completely independent of the performance or nonperformance of the underlying contractual obligations owed by the Applicant to that Beneficiary. This independence is referred to as the principle of autonomy and it is this principle that is considered to be inviolable. The Issuing Bank must pay out to the Beneficiary upon presentation of documentation in strict compliance with the terms identifying and defining that documentation in the SBLC. In turn the Applicant undertakes to indemnify the Issuing Bank on terms agreed between the Issuing Bank and the Applicant.

Whereas a documentary letter of credit is chiefly designed to be a payment *method* in international commerce (and accordingly the parties to it anticipate and intend that a demand *will* be made under it), an SBLC is a form of credit support under which demands are only made in the event of a default or dispute. Accordingly, the demand mechanism is usually uncomplicated, often simply requiring the Beneficiary to deliver a written demand to the Issuing Bank certifying that a sum is owing to it by the Applicant.

Wriggling off the hook: when can payment under an SBLC be avoided?

English courts have taken a hostile view to attempts by Issuing Banks to avoid their obligation to pay out under an SBLC and accordingly the circumstances in which payment can legitimately be avoided are limited to two circumstances:

- fraud on the part of the Beneficiary; and
- illegality of performance.

The fraud exception

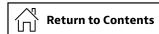
The fraud exception often arises in two contexts:

 an Issuing Bank that has refused to pay out under an SBLC on the basis of fraud on the part of the Beneficiary can rely upon the fraud exception to resist an application for summary judgment by the Beneficiary; and **ii.** an Applicant may seek an injunction to restrain an Issuing Bank from paying out under an SBLC on the grounds of fraud by the Beneficiary.

In each case, the fraud typically relied upon is that the Beneficiary has no honest belief in the validity of the demand that it is making. However, the legal test to be applied in each case is slightly different.

In the first, the Issuing Bank would succeed in defending any application for summary judgment against it where it can establish that it has a "real prospect" of establishing at trial that the Beneficiary did not have the requisite honest belief when making the demand. This reflects the test for summary judgment under CPR r 24.

In the second, where an Applicant applies for an injunction against the Issuing Bank to restrain it from making payment under an SBLC on the basis of the fraud exception, the Applicant must establish that it is "seriously arguable" that the Beneficiary could not have had the requisite honest belief in the validity of the demand and the Issuing Bank was aware of the fraud. As the Privy Council made clear in *Alternative* Power Solution Ltd v Central Electricity Board [2015] 1 WLR 697, the well- known principles on the granting of interim injunctions as set out in *American* Cyanamid Co v Ethicon Ltd [1975] AC 396 do not apply in this context. Instead, in the context of an injunction sought by an Applicant against an Issuing Bank to restrain payment under an SBLC on the basis of the fraud exception, the test that must be met by the Applicant is "an enhanced one": Salam Air SAOC v Latam Airlines Group SA [2021] 1 C.L.C. 795, citing Alternative Power Solution Ltd.



Two cases that were decided very close together in 2017 illustrate the reluctance of the English courts to modify an Issuing Bank's payment obligations under an SBLC. In both cases arbitration proceedings were already in progress when the Beneficiary made a demand under the SBLC and in both cases the Beneficiary was alleged to have lacked any honest belief that the sum it had demanded was properly owed to it.

Petrosaudi

In Petrosaudi Oil Services (Venezuela) Ltd v Novo Banco S.A. [2017] EWCA Civ 9 an SBLC had been issued in favour of the claimant Beneficiary by the defendant Issuing Bank as security for payments to be made to the Beneficiary by its customer (Applicant) under a contract for supply services under an oil rig drilling contract. A dispute under the underlying contract arose and an arbitration between the Beneficiary and the Applicant was commenced. The underlying contract was governed by Venezuelan law and contained a "pay now, argue later" clause, which, in preliminary arbitral awards, was declared null and void as a matter of Venezuelan law. The Applicant argued that it was not liable to pay invoices issued by the Beneficiary until a final arbitral award was made. The Beneficiary did not accept that and presented the Issuing Bank with the invoices for payment and certified in the demand it made under the SBLC that the Applicant was "obligated to the beneficiary to pay the amount demanded". The Issuing Bank was set to pay out but the Applicant sought an injunction to restrain the Issuing Bank from making payment under the SBLC on the ground that there was no obligation to pay under the underlying contract due to the invalidity of the "pay now, argue later" clause and, therefore, the Beneficiary could not honestly contend that the amount demanded was due and owing and so the presentation and certification of the demand to the Issuing Bank had been made fraudulently.

The first instance decision of the High Court upheld the fraud exception restraining the Issuing Bank from paying out under the SBLC. The Court of Appeal overturned the High Court's decision, focusing on the autonomous nature of the debt obligation under the SBLC and the honest state of mind of the officer of the Beneficiary who signed the demand. It was held that the fact that an invoice was

disputed did not mean that it was not due. Simply, the Court of Appeal found that the invoices had been issued; a period of 15 days (during which an invoice could have been disputed) had elapsed without a challenge being raised and, therefore, the monies were due and payable.

It follows, the Court of Appeal also held, that in certifying the demand, the signatory of the demand was "... not fraudulent in any sense. On the contrary he was entitled to sign it. He was not dishonest".

Nidco

Similarly, in *National Infrastructure Development Company* Ltd v Banco Santander SA [2018] 1 All E.R. (Comm) 156 (NIDCO), arbitration proceedings in respect of a dispute arising out of the underlying contract were in progress when the claimant Beneficiary delivered a demand to the defendant Issuing Bank under the SBLC. In this case, it was the Issuing Bank itself that refused to pay out under the SBLC on the basis that the Beneficiary could not have honestly believed the amounts claimed were due and owing in law, as the Beneficiary had certified, given the underlying dispute in the extant arbitration. The claimant Beneficiary succeeded in both the High Court and the Court of Appeal. However, the Court of Appeal found that the High Court had applied the incorrect test in reaching its decision, namely that it had incorrectly applied the more stringent test that required the Issuing Bank to demonstrate that it was "seriously arguable" on the material available that the Beneficiary could not honestly have believed in the validity of its demand, which is the test that must be met by an applicant seeking interim relief in the form of an injunction to restrain payment under an SBLC. As the Court of Appeal found, the "seriously arguable" test is "not appropriate to describe the burden on a defendant seeking to resist summary judgment who only has to establish a "real prospect" of establishing his defence". However, even applying this more generous test, the Court of Appeal found that the Issuing Bank had no real prospect of establishing that the Beneficiary had not held an honest belief in making the demand.

As in *Petrosaudi*, the Court of Appeal found that "[i]t cannot be fraudulent to make a demand one is entitled to make", and that "[t]he position in law [ie to be determined by the arbitration] is irrelevant because it is the beneficiary's belief in the validity of its demands which is relevant, not whether the demands are correct as a matter of law".

Each decision demonstrates the dauntingly high threshold a claimant must meet in order to successfully argue the fraud exception.

Interestingly, in the latter case, the Issuing Bank raised the proposition that the law should develop to recognise a different approach to letters of credit used to settle performance obligations from the approach to letters of credit used to settle primary payment obligations. It was argued that such a development in the law is especially suited to the construction industry context and where parties to the contract in dispute are already engaged in arbitration, which was the case in both the Petrosaudi and NIDCO cases. The effect would, it was suggested, be to introduce a further exception for unconscionable conduct alongside the existing, recognised, fraud exception. Andrew Ayres KC explores this potential ground for defending a request for payment under an SBLC in his article for the Journal of International Banking & Financial Law (2017) 7 JIBFL 408 and makes the proposition that it might be time for the English courts to recognise that the commercial certainty of SBLCs can be upheld whilst taking a "more flexible, nuanced and rationalist approach". He argues that where parties are already in the process of resolving a dispute through dispute resolution channels, it is difficult to see what commercial purpose is fulfilled in making a claim under an SBLC "other than to fulfil the cashflow expectations of the parties, a dynamic which may be subject to change soon thereafter". A counterargument to this point is that an SBLC is a necessarily Beneficiary-friendly document, providing certainty of payment, that parties choose to enter into in order to facilitate the consummation of commercial contracts that might otherwise not be agreed. In any event, the English courts continue to staunchly stand by the inviolability of SBLCs. to staunchly stand by the inviolability of SBLCs.

Illegality of performance

The English courts maintain the same strict approach to cases brought before them by Beneficiaries where an Issuing Bank has refused to pay out under an SBLC on the grounds that performance under the SBLC in the jurisdiction in which performance must occur would be illegal.

The principle that a party need not fulfil an obligation under an agreement where fulfilment would constitute an illegal act in the jurisdiction of performance was established over a hundred years ago in the well-known case of Ralli Brothers v Compania Naviera Sota Y Aznar [1920] 1 KB 614. An English company chartered a Spanish ship from a Spanish company to carry a cargo of jute from Calcutta to Barcelona at a specified rate per ton. Half the cost of the charter was to be paid in London and the other half in Barcelona upon arrival of the ship there. In the period between the contract being concluded and the cargo arriving in Barcelona a Spanish decree was issued limiting the amount that could be paid for jute to an amount per ton that was below that agreed for the contracted cargo. The receivers of the cargo in Barcelona, therefore, would only pay up to the amount permitted by the decree and the Spanish owners sought to make a claim in England for the balance. The English court held that, although the contract in question was governed by English law, as the payment obligation in guestion was to be performed in Spain, and Spanish law set a limit on the amount payable in the respect of the contracted cargo making it illegal in Spain for the receivers to pay more, that part of the contract was "invalid and could not be enforced".

In Kleinwort, Sons and Company v UBIA [1939] 2 K.B. 678, the defendants sought to rely on the principle in Ralli Brothers to avoid paying out under three bills of exchange. The claimant bank was based in London and accepted three bills of exchange drawn on them by a Hungarian company and sent to them by a Hungarian bank together with an undertaking to provide cover for the bills in London. However, cover was not provided upon maturity of the bills as in the meantime Hungarian legislation had made it illegal for Hungarian subjects to pay money outside of Hungary without consent, which had not been obtained. The English courts held, at first instance and on appeal, that the law of

the contract was English law and performance, ie payment, was to take place in England meaning that the contract was enforceable in England even though performance might mean a breach by the defendants of the law of Hungary. The judge in the case characterised the defendants' position as "an ingenious attempt to extend the principle of law stated in [Ralli Brothers] far beyond any set of facts to which it has hitherto been applied or is applicable". Any other decision would have essentially granted the laws of Hungary extra-territorial effect meaning that it would be the Hungarian legislature that determined whether a payment could be made by a Hungarian resident under an English contract to be performed in England.

Fast forward to 2025 and the English courts are still deciding cases where Issuing Banks have adopted arguments based on the *Ralli Brothers* principle. The courts have been unpersuaded though by any attempt to expand the scope of the application of the principle. In *Litasco S.A. v Banque El Amana S.A* [2025] EWHC 312 (Comm), a compliant presentation was made by the Beneficiary to the Issuing Bank, which refused to pay out on the grounds that orders made by Mauritanian courts in underlying legal proceedings prohibited it from doing so, pursuant to the rule in *Ralli Brothers* In its defence, the Issuing Bank relied upon passages from the recent decision (that we will examine in more detail below) in *Celestial Aviation Services Limited* [2025] 1 W.L.R. 196 to support arguments that:

- i. the principle is not "limited to circumstances where performance is unlawful by reason of legislation" but extended to cover situations where "it is unlawful to carry [the act] out"; and
- ii. the principle is not only applicable where it would be unlawful to make payment in the place of the account to which payment is to be made but extends to the situation where the payment into that account involves a corresponding bank, eg in the US in order to effect that payment where such involvement would be unlawful a so-called preparatory step. In *Litasco*, the Issuing Bank submitted that performance of its payment obligations would necessarily involve acts in Mauritania contrary to the orders of the Mauritanian courts.

On point (i) the English court found that to extend the *Ralli Brothers* principle to the performance of acts in breach of an order of a foreign court (in this case unrecognised) as opposed to acts unlawful by reason of legislation or regulation in force in the relevant foreign jurisdiction, "would be not only an extension of the principle but inconsistent with the formulation of the principle in *Kleinwort, Sons & Co,* which has repeatedly been cited as a leading case". Furthermore, such an extension was considered to be inconsistent with well- established rules on the recognition of foreign court decisions.

On point (ii) the English court ultimately concluded that, as decided in Kleinwort Sons & Co, "illegality must be illegality at the contractual place of performance" and in this case that was Switzerland where the Beneficiary had its headquarters and where its bank accounts were located. The judge noted that "the distinction between an act of performance and an act equipping the relevant party to perform includes the distinction between an act illegal at the contractual place of performance and an act illegal in a different jurisdiction", for example the jurisdiction where the person or corporate performing the act is resident or incorporated. The judge distinguished this case from the situation in Celestial Aviation, as in that case the contract specified the method of contractual performance that involved a correspondent bank account in the US before final payment was performed in England, therefore, it was acceptable that the question of whether any part of the "contractually mandated method" of performance was unlawful in a jurisdiction other than the place of final payment performance was taken into consideration.

Recent and current geopolitics have led to a significant increase in sanctions being issued by many jurisdictions across the globe, leading to cases where Issuing Banks have refused to pay out under an SBLC due to the risk of breaching sanctions if they do so. This returns us to the *Celestial Aviation* case. In 2023 the High Court found the Issuing Bank was not justified in refusing to make payment to aircraft lessors under SBLCs issued in connection with aircraft leases to Russian companies that were entered into prior to the introduction of relevant sanctions. One ground of appeal pursued by the Issuing Bank was whether the



question of illegality under the US sanctions regime was engaged under the *Ralli Bros* principle due to the fact that payment was stated to be in US dollars requiring the involvement of a correspondent bank in the US. The appeal was granted on other grounds, so the *Ralli Brothers* principle was of less significance, but the Court of Appeal observed that the contract specified that payment must be a transfer (not cash as the first instance judge had suggested might be an option) and in US dollars (with no allowance for an alternative currency such as euros or sterling), thus distinguishing the circumstances in *Celestial Aviation* from those in *Litasco*.

The thin end of the wedge?

The cases of *Petrosaudi* and *NIDCO* represented the first concerted attack on the inviolability of SBLC in decades, but the approach taken by the English courts maintained the status quo. Similarly, recent attempts to rely upon the doctrine of illegality to avoid payment being made under SBLCs have also largely been rebuffed by the English courts. Some have seen the result of this judicial cautiousness to have produced unjust outcomes.

However, in our view such an argument ignores one of the key facets of an SBLC that is rightly to be preciously preserved: it is by its nature a Beneficiary-friendly instrument and only by its terms being applied with certainty by the courts can this position be maintained. When an Applicant is requested to open an SBLC by its counterparty, it does so knowing that its bank will be required to pay out under any valid demand, and any erosion of the inviolability of the SBLC will compromise its raison d'être and see the "lifeblood of international commerce" trickle into obscurity.



When an Applicant is requested to open an SBLC by its counterparty, it does so knowing that its bank will be required to pay out under any valid demand, and any erosion of the inviolability of the SBLC will compromise its *raison d'être* and see the "lifeblood of international commerce" trickle into obscurity."

James Clarke, Senior Associate

Article Author



James Clarke Senior Associate | London +44 20 7919 5417 james.clarke@bakermckenzie.com **Article Author**



Ben Ko Counsel | London +44 20 7919 1733 ben.ko@bakermckenzie.com

This article first appeared in the Journal of International Banking and Financial Law (2025) 7 JIBFL 269.



Editor Highlights

- The Arbitration Act 2025, which amends the Arbitration Act 1996, received Royal Assent on 24 February 2025 and came into force on 1 August 2025. The changes are intended, according to the UK Government press release, to modernise dispute resolution and cement the UK's position as a world leader in arbitration.
- From a documentation perspective, one key change relates to the determination of the governing law of the arbitration agreement, which, if no express governing law is specified, will now be based on the choice of the seat of the arbitration.

02

Changes to the UK Arbitration Act – **Governing law of arbitration clauses**

Governing law of the arbitration agreement

Under the Arbitration Act 1996, in the absence of an express choice of governing law, and particularly where the governing law of the main contract and the law of the seat of arbitration are different, there is some scope for uncertainty around the governing law of the arbitration agreement, which has given rise to disputes.

The governing law of the arbitration agreement is important as it will determine:

- The validity/enforceability of the arbitration clause;
- The scope of the arbitration agreement, including which disputes fall within its ambit;
- The interpretation of the clause, including intent of the parties and any ambiguities; and
- Certain procedural aspects (although procedural rules are usually determined by the chosen arbitral institution or seat of arbitration).

Post-amendment position

The recent amendments have clarified that the governing law of the arbitration agreement will now be determined by the choice of seat. This means that if the parties choose a particular jurisdiction as the seat of arbitration, the law of that jurisdiction will govern the arbitration agreement unless expressly stated otherwise.

Can an express statement override the choice of seat?

Yes, an express statement of the governing law of the arbitration agreement can override the determination based on the choice of seat. The amendments to the UK Arbitration Act 1996 provide that the law of the chosen seat will apply unless the parties explicitly specify a different governing law for the arbitration agreement. This provision ensures that parties retain the flexibility to choose their preferred governing law, allowing them to tailor the arbitration agreement to best suit their needs.

Conclusion

By aligning the governing law of the arbitration agreement with the choice of seat, the amendments under the Arbitration Act 2025 provide greater certainty for contracting parties. Parties should pay attention to the choice of seat and consider whether an express statement is needed to specify a different governing law for the arbitration agreement from the one that will apply under the Arbitration Act 2025. For clarity, parties may still wish to state expressly the intended governing law of the arbitration agreement, particularly where the governing law of the main agreement and the law of the chosen seat are not the same.



From a documentation perspective, one key change relates to the determination of the governing law of the arbitration agreement, which, if no express governing law is specified, will now be based on the choice of the seat of the arbitration."

Victoria Long, Partner

Article Author



Victoria Long Of Counsel | Bahrain +973 17102006 victoria.long@bakermckenzie.com

Article Author



Sally Kotb Partner | Dubai DIFC +971 4 542 1973 sally.kotb2@bakermckenzie.com



Return to Contents

A problem with the bill? Law Commission Consultation Paper on digital assets and (electronic) trade documents in private

international law (including Section 72 of the Bills of Exchange Act 1882)

Introduction

On 5 June 2025, the Law Commission of England and Wales published a consultation paper entitled "Digital Assets and Electronic Trade Documents in Private International Law" (the "Consultation Paper"). The Consultaxtion Paper explores how emerging technologies, particularly distributed ledger technologies ("DLTs") and electronic trade documents ("ETDs"), challenge traditional private international law principles.

Private international law governs which jurisdiction's laws apply to cross-border disputes, where claims can be brought, and how judgments are enforced. Historically, these rules assumed legal relationships and property were tied to a physical location. However, this premise is increasingly at odds with the nature of digital assets, DLTs and ETDs, such as electronic bills of exchange.

Executive summary

The Consultation Paper's closing section succinctly summarises the law as currently provided under the Bills of Exchange Act 1882 (the "BoEA") and the difficulties in applying this nearly 150-year-old legislation to today's commercial transactions. The paper recommends specific amendments to Section 72 of the BoEA, the clause that sets out specific private international law rules for bills of exchange, to: (i) bring it in line with modern private international law principles, such as party autonomy

(i.e. the ability for contractual parties to choose the governing law of their contract); and (ii) move away from the physical location of the bill of exchange determining governing law, which is no longer appropriate in the digital world.

Electronic Trade Documents Act 2023

The Electronic Trade Documents Act 2023 (the "ETDA") was a landmark reform that modernised English law by granting ETDs the same legal status as their paper counterparts. Before this, English law did not permit the negotiation (transfer by indorsement) of an electronic document, which materially impacted the practicality of using bills of exchange as a method of financing. The ETDA established criteria for electronic documents to be treated identically to paper bills under English law, opening the door to significantly streamlined international financing while allowing financiers to retain the rights and privileges of the holder of a bill under English law. "Overdue Bill! Legislation towards digitalising trade finance a welcome response" in <u>Issue 7</u> of Trade Finance Insight discusses the ETDA in more detail.

Although many of the shortcomings identified in the Consultation Paper apply equally to paper bills of exchange as well as electronic bills of exchange, the ETDA and anticipation in the international market of greater use of electronic bills of exchange has accelerated the perception that current UK private international law rules no longer meet the commercial expectations of the businesses that use them.

Section 72 of the BoEA

What is a bill of exchange?

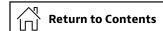
A bill of exchange is a financial instrument that contains an unconditional order in writing, addressed by one party (the "drawer") to another (the "drawee"), requiring the drawee to pay a specified sum of money to a third party (the "payee"), either on demand or at a fixed or determinable future date.

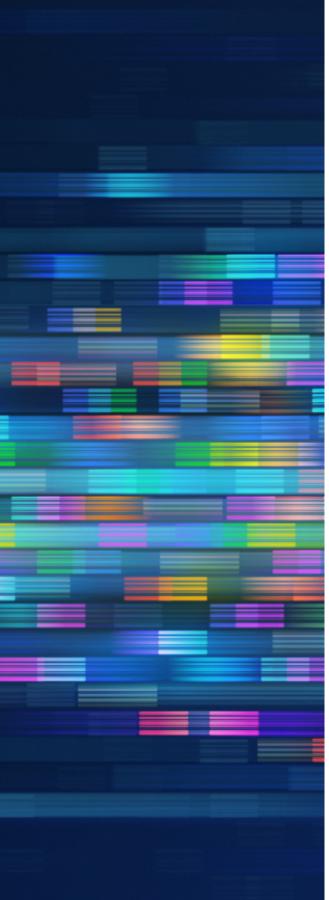
Once accepted by the drawee, the bill becomes a binding promise to pay, and it can be transferred by indorsement, making it a flexible and tradable instrument (in this context it is referred to as a "negotiable instrument"). Bills of exchange are a useful instrument for a financier to hold because, in most circumstances, the holder of a bill of exchange holds it free from equities and is able to seek recourse from the drawer and each previous indorser of the bill if the acceptor (being a drawee who has accepted the drawer's order to pay) dishonours the bill.

In modern commerce, especially with the advent of ETDs, the legal recognition and treatment of bills of exchange in digital form is a key area of reform.

Legal Framework

Obligations arising from negotiable instruments are contractual in nature. However, in most systems of private international law, obligations arising from negotiable instruments are typically treated differently from other types of contracts For





example the EU Rome I Regulation on the law applicable to contractual obligations excludes contractual obligations arising under negotiable instruments "to the extent that the obligations...arise out of their negotiable character".

We consider two legal frameworks for determining the applicable governing law for a dispute in relation to bills of exchange in this article: (i) the BoEA (which is applied by courts in the UK); and (ii) the Geneva Convention for the Settlement of Certain Conflicts of Laws in connection with Bills of Exchange and Promissory Notes 1930 (the "Geneva **Conflicts Law**") and the Geneva Convention providing a Uniform Law for Bills of Exchange and Promissory Notes 1930 (the "Geneva Uniform Law" and, together with the Geneva Conflicts Law, the "Geneva Conventions") (which have been ratified by a number of countries, including many EU Member States, Brazil and Japan). Both frameworks adopt a "several laws" principle, meaning they hold that a bill of exchange is made up of a number of "supervening" contracts and a new contract is created on each occasion another person obtains rights on the bill, i.e. there is no such thing as "the governing law of a bill of exchange", with the principle rights and obligations being (i) the primary obligation of the acceptor to pay the holder, and the primary right of the holder to receive payment from the acceptor, upon presentment for payment, (ii) the secondary liabilities of the drawer and each indorser to pay the holder if the bill is dishonoured.

A court in England will apply Section 72 of the BoEA to determine which substantive law to apply to the issue in dispute in relation to a bill of exchange. Conversely, a court in a country which has ratified the Geneva Conflicts Law, such as France, will apply those rules to determine the same issue.

Wolff interpreted Section 72(1) of the BoEA as follows:

"If the drawer signs the bill in France and dates it correctly from Calais but posts it to his creditor after having crossed to Dover, the formal validity of the bill depends on English law, though only the stamp on the envelope shows whence the letter came." 1

Section 72(1) of the BoEA provides that validity is determined by the law of the place of issue (with issue defined in the BoEA as being the first delivery of the bill to the holder by transfer of possession (actual or constructive)). However, if the issue of formal validity was heard before a French court, the application of the Geneva Conflicts Law would result in the place of signing, i.e. France, being applied. This can lead to inconsistent results. If we take the example of a bill of exchange that does not have the words "bill of exchange" included on its face, which is a requirement for a bill of exchange to be formally valid under the Geneva Uniform Law but is not required under the BoEA, then in the case of Wolff's example above, an English court would consider the relevant legal regime to be applied to be BoEA, meaning that the bill of exchange would be valid notwithstanding the omission of the words "bill of exchange" on its face. A French court, however, would instead apply the Geneva Uniform Law and would determine that the bill of exchange is invalid for not including those words.

When this approach is applied to an electronic bill, the outcome is even more challenging in a world where electronic communications are so frequently sent and received on the move and away from the office and through various networks and VPNs. Accordingly, the Law Commission has proposed a number of updates to the BoEA in respect of private international law to reflect the realities of digital commerce and to align it with modern private international law principles (while leaving the substantive "trade documents law" of the UK unchanged, e.g. there is no proposal to require the words "bill of exchange" to be included for formal validity under English law).

The Consultation Paper findings

Opportunities to update

The Law Commission raises the following as opportunities for reform:

 Outdated assumptions: Section 72 of the BoEA assumes a paper-based system and relies on concepts like the "place of contract" and "place of delivery", which are ambiguous or of less relevance for electronic and decentralised instruments.

- Limited party autonomy: The law currently does not allow parties to choose the applicable law, which is inconsistent with modern commercial expectations.
- "Several laws" principle: Since a bill of exchange comprises multiple contracts, each may be governed by a different law. The Law Commission has acknowledged that a considerable number of stakeholders have expressed a strong preference for a "single law" approach, allowing the drawer to designate one governing law when drawing a bill of exchange for all future obligations arising out of that bill of exchange. However, the Law Commission has stopped short of recommending the "single law" approach replace the "supervening contracts" approach on the basis that to do so would be a material departure from the centuries-old approach to which most legal systems across the globe are accustomed.

Proposed reforms to Section 72 of the BoEA

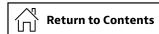
The Law Commission is proposing the following reforms to Section 72 of the BoEA:

Section 72(1): validity as regards requisite form

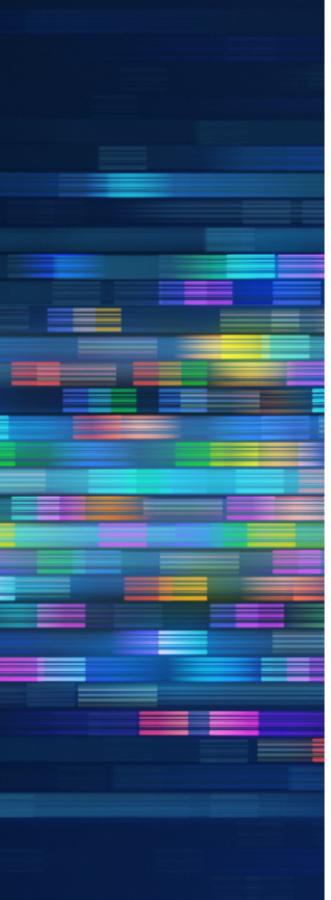
Section 72(1) concerns the formal requirements for the conclusion of contracts of the bill – i.e. what formalities must be satisfied to give legal effect to the bill of exchange. The general rule is that the validity of a bill as regards requisite form is determined by the law of the place of issue. The validity of subsequent contracts related to the bill is governed by the law of the place where each contract is made.

The Law Commission have provisionally proposed adopting a "menu" approach to mitigate the complexities arising from the application of the "several laws" theory to the formal validity of the contracts on a bill of exchange. The proposal sets out that any contract on a bill of exchange should be considered to be valid as a matter of English law if it complies with any one of:

1. the law governing the substance of the relevant contract (as to which see the proposed changes to Section 72(2) of the BoEA below);



¹ Wolff Private International Law 2nd Edition, s.464.



- **2.** the law governing the substance of the drawer's contract;
- **3.** the law governing the substance of the acceptor's contract; or
- **4.** the law of the place where the instrument is payable.

This means that each contract on a bill of exchange would only need to comply with the formal requirements of one of these options in order for it to be valid as a matter of English law. This approach is similar to the used in the EU Rome I Regulation, allowing a broader range of "validating" rules to apply and addressing some of the complexities that arise when considering the formal validity of a subsequent contract on a bill of exchange if the initial (or earlier) contract on the bill of exchange is not formally valid. However, outside the UK, jurisdictions which apply the Geneva Conflicts Law or their own rules of private international law, will not be affected by any change to the UK regime. In practice, therefore compliance with other formal validity requirements may still be required if there is a risk that a dispute may be litigated in a court outside the UK.

Section 72(2): the interpretation of the contracts on a bill

Section 72(2) addresses which law should govern how certain contracts on a bill of exchange and their terms should be interpreted when multiple jurisdictions are involved. The general rule is that the interpretation of the drawing, indorsement, acceptance, or acceptance supra protest of a bill, is determined by the law of the place where such contract is made. The Law Commission has put forward two positions on amendments to this sub-section.

First, it is provisionally proposed that this sub-section should be amended to make it clearer that "it applies to all the issues that fall under the "wide" view of what section 72(2) currently encompasses". On this reading, the amended sub-section would cover not only the construction and interpretation of the words used in the contract, but also the substantive matters or the "legal effects" of the words.

Secondly, the Law Commission has proposed to revise the private international law regime for the interpretation of bills of exchange more generally: a multi-limb structure that would use party autonomy as the principal determining factor. Parties would be able to indicate their choice of law alongside their signature in a way that clearly identifies the choice of law to be applied to that party's obligations. In the absence of a valid choice the default rules would be by:

- **1.** For the obligations of the acceptor, the law of the place where the instrument is payable, as interpreted consistently with the place of "proper presentment" under Section 45 of the BoEA.
- **2.** For the obligations of the drawer, an indorsee and other secondary parties: the law of the relevant secondary party's habitual residence.

Again, this is a similar approach to that taken for ordinary contractual obligations in the EU Rome I Regulation, emphasizing party autonomy. When combined with the proposed changes to Section 72(1) it essentially allows parties to choose English law to govern all contracts on a bill of exchange and only comply with English law formal validity requirements (which, for example, also encompass the equal treatment of electronic bills of exchange under the ETDA). However, as previously noted, courts in other jurisdictions will not be obliged under their private international law rules to recognise an express choice of law clause in a bill of exchange and will instead apply their own rules.

Section 72(3): the duties of the holder

This section relates to the duties of the holder with respect to presentment for acceptance or payment and the necessity for or sufficiency of a protest or notice of dishonour. The general rule is that the governing law of the duties are determined by the law of the place where the act is done or the bill is dishonoured.

The Law Commission's provisional proposal for Section 72(3) reflects the underlying approaches taken in relation to Sections 71(1) and 72(2):

- 1. The duties of the holder with respect to presentment for acceptance should be governed by the law of the place where the drawee has their habitual residence.
- 2. The necessity for or sufficiency of a protest or notice upon dishonour by non-acceptance should be governed by the law of the place where the drawee has their habitual residence.
- **3.** The duties of the holder with respect to presentment for payment should be governed by the law of the place where the bill is payable.
- **4.** The necessity for or sufficiency of a protest or notice upon dishonour by non-payment should be governed by the law of the place where the bill is payable.

The approach to protest and notice upon dishonour is different in the substantive law of the UK and many countries that are party to the Geneva Uniform Law in that the UK does not require a formal "authentic act" but those other jurisdictions do. An "authentic act" involves a formal procedure performed by a public official, typically a notary, at the place where the bill has been dishonoured. These proposed changes to Section 72(3) aim to make the identification of the relevant governing law for the various duties of the holder more concrete and modern by relying on the "connecting factors" of the place of payment and/or habitual residence. Habitual residence is a widely used concept in private international law more generally and, for example, for a corporation would typically be construed as its place of central administration. Parties can then have more confidence as to whether they should be complying with, for example, the substantive requirements of the BoEA and/or the Geneva Uniform Law.

Consultation questions

The consultation period ended on 8 September 2025 and we await further announcements on next steps. The full details of all consultation questions on which the Law Commission requested feedback can be found HERE.



Conclusion

The Law Commission's proposed reforms to Section 72 of the BoEA would, if enacted, bring about much-needed clarity and flexibility to 150-year-old legislation based on the medieval "law merchant" that became internationally established law in an environment we would hardly recognise today. The proposed changes would ensure the rules apply equally to both paper and electronic instruments, helping the law stay relevant in the digital age.

The changes aim to eliminate reliance on outdated "connecting factors", such as the place of issue or delivery, and instead focus on ensuring legal certainty for all parties involved. They would also help to future-proof English private international law and bolster the UK's competitiveness as a legal hub for digital assets and international trade.

Some have considered take up of electronic bills following the ETDA becoming law in 2023 to be disappointing. In part this can be attributed to unease amongst market participants as to the efficacy of electronic documents under the laws of all applicable jurisdictions. Greater certainty under English law of its applicability to bills of exchange is certainly welcome, but we anticipate doubts will remain in those seeking to use bills in cross-border financings.



The Law Commission's proposed reforms to Section 72 of the Bills of Exchange Act 1882 would, if enacted, bring about much-needed clarity and flexibility to 150-year-old legislation based on the medieval "law merchant" that became internationally established law in an environment we would hardly recognise today. The proposed changes would ensure the rules apply equally to both paper and electronic instruments, helping the law stay relevant in the digital age."

James Clarke, Associate

Article Author



James Clarke Senior Associate | London +44 20 7919 5417 james.clarke@bakermckenzie.com **Article Author**

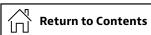


Lucy Frames
Associate | London
+44 20 7919 1266
lucy.frames@bakermckenzie.com

Article Author



Gabby White Senior Knowledge Lawyer | London+44 20 7919 1891
gabby.white@bakermckenzie.com



BAFT Master Trade Loan Agreement 04 moves with the times

The Bankers Association for Finance and Trade (**BAFT**) recently updated its English law template master trade loan agreement (the MTLA). Originally created in 2014 to be an industry-standard document for lending between financial institutions to finance or refinance on a bilateral, uncommitted and unsecured basis trade transactions of the borrowing financial institution's customers, market uptake has been limited and a number of legal developments, including the demise of LIBOR, in the intervening years prompted an overhaul.

Sustainable Trade Finance

The environmental, social, and governance (ESG) landscape continues to rapidly evolve and so it is no surprise to see the revised MTLA address sustainable trade finance for the first time. Parties can include optional sustainability provisions which allow the borrower to represent to the lender that a particular Trade Loan will finance (or refinance) a "Sustainable Trade Transaction" (defined by reference to internationally acceptable standards). If the lender agrees with the analysis, for which purpose it may obtain a report from an independent sustainability consultant, then that Trade Loan will be designated and treated as a Sustainable Trade Loan unless and until it is declassified due to, for example, non-compliance with the applicable sustainability standards.

While additional sustainability resources are regularly coming online, for example the International Chamber of Commerce's recent expansion of its Principles for Sustainable Trade Finance to extend

the scope of sustainable trade financing beyond environmental criteria to encompass social impact and sustainability-linked supply-chain finance structures, it remains to be seen whether the new MTLA provisions will be widely adopted given the additional evaluation, information and monitoring they entail.

Structural changes

The 2025 MTLA more clearly identifies that the lender is providing an uncommitted facility with the commitment to lend in any particular instance now evidenced by the execution and deliver of a Trade Loan Acceptance. The 2025 MTLA adopts a more market standard approach to the order and content of clauses which will be more familiar to those used to dealing with, for example, facility agreements based on the Loan Market Association template documents.

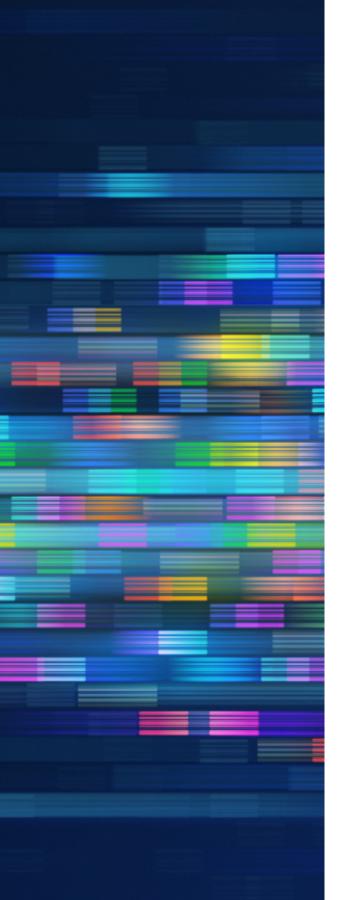
In contrast to the 2014 MTLA, the 2025 MTLA takes a split approach to drawdown conditions, with a set of general conditions to be satisfied before any utilisation request can be submitted and further conditions to be satisfied for each particular drawdown and funding date. There is further flexibility to add further transaction-specific conditions into the relevant drawdown request. The 2025 MTLA introduces the concept of "Booking Office" to allow parties to sign up an MTLA between "head offices" but then select an overseas office or branch in the relevant Trade Loan Request and/or Acceptance for a particular Trade Loan.

Repayments and Interest

There is more flexibility around payment terms with the optional to allow for voluntary prepayments and interim repayments on a case-by-case basis. The 2014 MTLA provided only for full payment at maturity. There is no restriction on duration of any particular Trade Loan or for the maturity to match that of the underlying Trade Transaction, although in practice, for risk and regulatory reasons, it is envisaged that in most cases these would fully align.

The 2025 MTLA allows for multiple interest periods, whereas the 2014 MTLA only envisaged full payment of accrued interest on maturity of the trade loan.

BAFT have also included drafting for the post-LIBOR world. This largely takes the same approach as the BAFT Master Risk Participation Agreement with the suggested Reference Rates for non-euro currencies being the applicable central bank rate and EURIBOR for euro loans. This reflects the typically short-term nature of most Trade Loans and reduces drafting complexities if, for example, compounded near-risk free rates, such as SOFR, are used. The parties are free to specify different applicable rates for any particular transaction in a Request but should bear in mind that the drafting of the MTLA 2025 may need further revision to adequately accommodate those.



Legal developments

Finally, optional drafting to reflect the potential application of the US Foreign Account Tax Compliance Act, EU and UK bank "Bail-In" legislation and data protection laws are also included for the first time.

Article Author



Gabby White Senior Knowledge Lawyer | London

+44 20 7919 1891 gabby.white@bakermckenzie.com



The environmental, social, and governance (ESG) landscape continues to rapidly evolve and so it is no surprise to see the revised MTLA address sustainable trade finance for the first time."

Gabby White, Senior Knowledge Lawyer



Sanctions & Export Controls Update



Sanctions & Export Controls Update



SAVE THE DATE: Global Year-End Review of Import/Export & Trade Compliance Developments Conference - Global Sanctions and Export Controls Blog



EU Commission issues new guidance on "best efforts" obligations -**Global Sanctions and Export Controls Blog**



European Responses to Iran: snapping back? -**Global Sanctions and Export Controls Blog**



EU and US Announce Framework Trade Agreement -**Global Sanctions and Export Controls Blog**



OFAC and BIS Issue Final Rules Removing Syria Sanctions Regulations and Relaxing Export Controls for Syria - Global Sanctions and Export Controls Blog



EU Commission clarifies relationship between Incoterms and sanctions compliance in new factsheet - Global Sanctions and Export Controls Blog



Additional Insights and Resources



Omnibus - A Last Chance Saloon for the EU Taxonomy?

In this article, we look at the proposed changes to the Taxonomy, the associated Green Asset Ratio (GAR) and the EU Green Bond Standard (EuGBS) and whether they will be enough to secure its future.



A Practical Guide to Greenwashing for Financial Institutions

This guide considers what is greenwashing, the developing legal landscape and how financial institutions may mitigate the risk of reputational damage.



Sustainability Risk Radar for **Financial Institutions**

Our updated Sustainability Risk Radar analyzes the most pressing sustainability risks that the bank sector needs to consider in 2025. In this year's edition, we examine recent trends and developments, the associated risks, and explore the solutions available to stay on top of these challenges.



Looking Ahead: Cross-Border **Strategies Amid US Policy Shifts**

Explore insights from Baker McKenzie practitioners on major developments and the potential business implications – from tax policy to trade and tariffs, from dealmaking to enforcement, and beyond.



Our Awards



Pan-African Law Firm of the Year

EMEA Finance African Banking Awards 2024, 2023, 2022 and 2021

Banking & Finance Legal Adviser of the Year

Global Banking & Markets Africa Awards 2025, 2024, 2023 and 2021

Infrastructure Finance Deal of the Year

Nigerian ACME Financing.

Global Banking & Markets Africa Awards 2025

Infrastructure Deal of the Year

African Banker Awards 2025

North Africa Deal of the Year

Global Banking & Markets Africa Awards 2025

ECA, DFI and IFI Deal of the Year

Advised MUFG on the successful completion of a USD 500 million accordion facility to increase the size of a USD 234 million Samurai loan for the Afreximbank.

Bonds, Loans & ESG Capital Markets Africa Awards 2024

Infrastructure Finance **Deal of the Year**

USD 1.76 billion loan to the Republic of Tanzania to fund the construction of a standard gauge railway.

Bonds, Loans & ESG Capital Markets Africa Awards 2024

Local Currency Loan Deal of the Year

KES 20 billion loan to Safaricom.

Bonds, Loans & ESG Capital Markets Africa Awards 2024

Advised on 3 Deals of the Year (Debt, Equity and Infrastructure)

African Banker Awards 2024

Africa Export Finance Deal of the Year

TXF Perfect 10 Deals 2024



Key Contacts Europe, Middle East and Africa



James Clarke Senior Associate | London +44 20 7919 5417 james.clarke@bakermckenzie.com



Michael Foundethakis
Partner | Paris
+33 1 44 17 53 40
michael.foundethakis@bakermckenzie.com



Alberto Fornari
Partner | Milan
+39 02 76231 349
alberto.fornari@bakermckenzie.com



Lucy Frames Associate | London+44 20 7919 1266
lucy.frames@bakermckenzie.com



Camilla Franklin
Counsel | Stockholm
+46 8 566 177 73
camilla.franklin@bakermckenzie.com



Lamyaa Gadelhak Partner | Cairo +20 2 3537 9722 lamyaa.gadelhak@bakermckenzie.com



Jingjin Guo Partner | Geneva +41 22 707 9834 jingjin.guo@bakermckenzie.com



Joren Jansseune
Partner | Brussels
+32 2 639 37 16
joren.jansseune@bakermckenzie.com



Pitso Kortjaas Partner | Johannesburg +27 11 911 4317 pitso.kortjaas@bakermckenzie.com



Luka Lightfoot Partner | London+44 20 7919 1581

luka.lightfoot@bakermckenzie.com



Victoria Long Of Counsel | Bahrain +973 17102006 victoria.long@bakermckenzie.com



Samuel Marbacher
Partner | Zurich
+41 44 384 14 76
samuel.marbacher@bakermckenzie.com



Kathrin Marchant Partner | Frankfurt+49 69 2 99 08 629
kathrin.marchant@bakermckenzie.com



Phetole Modika
Partner | Frankfurt
+27 11 911 4368
phetole.modika@bakermckenzie.com



Aimee Saunders
Senior Associate | London
+44 20 7919 1591
aimee.saunders@bakermckenzie.com



Marta Zuliamis Counsel | Frankfurt +49 69 29 90 80 marta.zuliamis@bakermckenzie.com

Key Contacts

Asia Pacific



Kenneth Chuah*
Principal | Singapore
+65 6434 2627
kenneth.chuah@bakermckenzie.com



Duan Cui Partner | Beiijing+86 10 6535 3960

duan.cui@bakermckenzie.com



Sally Hung
Partner | Hong Kong
+852 2846 2380
sally.hung@bakermckenzie.com



Shinichiro Kitamura
Partner | Tokyo
+81 3 6271 9900
shinichiro.kitamura@bakermckenzie.com



Simon Leung
Partner | Hong Kong
+852 2846 2109
simon.leung@bakermckenzie.com



Shirley Wang**
Partner | Beiijing
+86 10 5649 6016
shirley.wang@bakermckenziefenxun.com



Andrew Zaw
Principal | Singapore
+65 6434 2785
andrew.zaw@bakermckenzie.com

* Partner of Baker McKenzie Wong & Leow, a member firm of Baker & McKenzie International

North America



Nick Brock
Associate | New York
+1 212 626 4206
nicholas.brock@bakermckenzie.com



Taryn Brown
Associate | Washington DC
+1 202 835 6248
taryn.brown@bakermckenzie.com

Latin America



Luis Ambrosio***
Partner | Rio de Janeiro
+55 11 3048 6823
luis.ambrosio@trenchrossi.com



Jesus Davila Partner | Caracas +58 212 276 5143 jesus.davila@trenchrossi.com



Gabriel Gomez-Giglio Partner | Buenos Aires+54 11 4310 2248

gabriel.gomez-giglio@bakermckenzie.com



Ricardo Trejos Partner | Bogota +57 60 1 634 1549 ricardo.trejos@trenchrossi.com



Lorenzo Ruiz de Velasco-Beam Partner | Mexico City+52 55 5279 2942
lorenzo.ruizdevelasco@trenchrossi.com



Sebastian Vivanco Partner | Santiago+56 2 2367 7011
sebastian.vivancosilva@bakermckenzie.com



^{**} Baker & McKenzie FenXun (FTZ) Joint Operation Office

^{***} Trench Rossi Watanabe (Brazil) and Baker McKenzie have executed a strategic cooperation agreement to consult on foreign law.

Leading and closing complex deals - every day

We are a transactional powerhouse providing commercially-focused, end to end legal advice to maximize deal certainty and secure the intended value of transactions. Our 2,500 lawyers combine money market sophistication with local market excellence. We lead on major transactions with expertise spanning banking and finance, capital markets, corporate finance, restructuring, funds, M&A, private equity and projects. The combination of deep sector expertise, and our ability to work seamlessly across each of the countries where we operate, means we add unique value in shaping, negotiating and closing the deal.

bakermckenzie.com/transactional

© 2025 Baker McKenzie. All rights reserved. Baker & McKenzie International is a global law firm with member law firms around the world. In accordance with the common terminology used in professional service organizations, reference to a "partner" means a person who is a partner or equivalent in such a law firm. Similarly, reference to an "office" means an office of any such law firm. This may qualify as "Attorney Advertising" requiring notice in some jurisdictions. Prior results do not guarantee a similar outcome.

