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WRITING AND SIGNATURE IN THE CONSTITUTION AND PROOF OF CONTRACTS

TAN YOCK LIN*

The main aim of this article is to show that proof of pre-constituted contracts has been obscured by the parol evidence rule and the signature rule. After a brief demonstration that the parol evidence rule is primarily a rule of substantive law, rather than a rule of evidence, and, as such, must be rejected as the basis of the signature rule, it is argued that of three other possible bases, a theory of procedural fairness best explains the rule, leading to a narrower scope than hitherto supposed. The relationship between the signature rule and the Interfoto rule is next considered and the decision in *PATEC*, which has preferred the signature rule to the Interfoto rule where they clash, is closely examined. The argument here is that although the Interfoto rule is complicated by provisions of the *Unfair Contract Terms Act*, both rules can be reconciled if the signature rule is kept as narrow as possible to reflect its concern with procedural fairness. The other aim—to show that proof of recorded contracts has been hampered by inappropriate notions of hearsay—is accomplished by a detailed study of section 32(b) of the *Evidence Act* and it is argued that the desirable solution provided by *PATEC* to the problem of records of a composite nature is a little oversimplified.

I. INTRODUCTION

The recent decision in *Press Automation Technology Ltd. v. Trans-Link Exhibition Forwarding Pte. Ltd.*[1] (*PATEC*) inspires the two inquiries in this article. One concerns the role of writing, signature and incorporation in the constitution of contracts; the other, the role of writing and signature in the proof of contracts. The subject is not studied in its entirety and both inquiries are limited to issues of proof arising as between parties or alleged parties to an agreement or for the benefit of one party against another party to an agreement. Writing that is an essential feature of a disposition of immovable or intangible property, where it is by law invested with special probative force or efficacy against third parties for reasons of security of title, is left out for one reason only: to narrow and therefore deepen the study.[2] As the article attempts to be comprehensive, it begins immediately

* Professor, Faculty of Law, National University of Singapore.

1 [2003] 1 S.L.R. 712. Suit No. 1361 of 2001. Decision of Judith Prakash J. given on 3 December 2002.

2 *I.e.* apart from occasional references for contrast.

in section II with arguments that the parol evidence rule is only a rule of evidence in a very limited sense, and as such it can never exclude evidence of substantive unfairness which is legally effective to preclude enforcement of a contract. In consequence, the parol evidence rule is bound to fail as a basis for the signature rule which purports to be an aspect of that rule. That being so, section III seeks a new basis for the signature rule in the notion of procedural fairness, leading to a much narrower rule than hitherto supposed. Section IV then introduces important rules which determine when contractual terms are incorporated by writing, *i.e.* incorporation rules, and considers their relationship with the signature rule. Section V enters into a detailed discussion of *PATEC* which has applied the signature rule in preference to the incorporation rule in cases where they appear to clash. As the decision in that case was partly grounded on reflections about the manner in which the *Unfair Contract Terms Act* (UCTA) affects incorporation rules, a slight digression into the particulars of the Act is necessary. Section VI contains the results of a closer examination of the relationship between incorporation rules and the Act. To complete the study on proof of contracts, section VII clarifies the nature of recorded proof and considers the extent to which provisions of section 32(b) of the *Evidence Act* actually facilitate the proof of contracts by recorded proof. In this regard, *PATEC* adopted an interesting solution to the problem of composite reports and the court's reasoning is examined and criticised in section VIII.

II. Pre-Constituted Contracts

Two practical observations relating to proof of pre-constituted contracts are uncontroversial and may even be banal. First, proof of oral contracts incurs substantial likelihood of error when they contain terms which are complex. This error typically surfaces in the form of witnesses giving not direct evidence but evidence of inferences or reconstructed recollections representing their understanding or impressions of, sometimes their perspectives of and even their reasonings from, the primary verbal facts.[3] This is not to say that commercial witnesses are necessarily distinguished from other observers of primary facts in insincerity or as a source of error so that the trier of fact must be more on his guard against them. Plainly they are not, and cross-examination of such witnesses is neither more nor less effective in establishing the truth about commercial compared with non-commercial transactions. It is the complexity of the primary verbal facts that impedes accurate recollection in court. Secondly, for this reason and the sake of

[3] Section 62 of the *Evidence Act* (Cap. 93, 1994 Rev. Ed. Sing.) forbids a witness from giving indirect evidence, *i.e.* evidence of inferences, even though he has witnessed the primary facts from he draws the inferences.

expediency, businessmen desire certainty of proof as much as certainty of transaction. In a word, certainty of proof refers to the prospects of being derailed by evidence of recollections which are believed or disbelieved while certainty of transaction refers in an all encompassing sense to the prospects of being derailed by arguments of substance (essentially of substantive fairness in the enforcement of contracts), such as absence of consent or fraud or some other reason of right or equity to resile from or nullify the transaction.

It is important to appreciate that certainty of transaction and certainty of proof do not necessarily coincide, though they may overlap. Thus, constitution of a contract in writing increases certainty of proof by avoiding difficulties of oral recollection in court but it may also increase certainty of transaction by reducing the scope of substantive challenge, by for instance suppressing opportunities for out of court mistakes about what the other party is actually offering or accepting. In another respect, certainty of proof and certainty of transaction overlap. Neither is free from compromise but the nature of the compromise is different. If business people are asked whether they would desire complete certainty of proof, the answer is obvious: if pre-constitution were invariably cost-free, they would.[4] Asked the same question whether they would desire complete certainty of transaction, business people are more likely to say that it depends. What fell from Devlin speaking on the relationship between commercial law and practice many years ago is as valid today as it then was: "Businessmen as a rule like the idea of the written contract; it gives them the feeling that they have tied the deal up."[5] At the same time, however, they dislike the idea that writing which is substantively unfair will be used against them. So, the answer is: it depends.

Considerations of certainty of proof and certainty of transaction have led some jurisdictions to demand and recognise only pre-constituted proof of some commercial transactions.[6] We are less insistent. Our law tracing its descent from the common law of England has borrowed the same general indifference as to the form in which a contract is made.[7] The substantive

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4 If not all contracts are pre-constituted even though that would ensure certainty of proof, the reason is that the costs of pre-constitution may not be economical in all contracts.

5 Devlin, "The Relation between Commercial Law and Commercial Practice" (1951) 14 M.L.R. 249 at 266. As Devlin relates, the history of the development of pre-constituted contracts is a fascinating tale of the destruction of custom by writing and custom returning with a vengeance.

6 See, for instance, Louisiana Law State Institute *Planiol's Traite Elementaire de Droit Civil* (1959) Vol. 1 Pt. 2 para. 1114.

7 Originally, the law was very different and to lose one's deed was to lose one's right. See Ames, "Specialty Contracts and Equitable Defences" (1895–96) 9 H.L.R. 49 tracing the transition from the ancient rule to the modern parol evidence rule.

law admits that a contract may be partly written or partly oral.[8] There are exceptionally a few cases in which writing is made essential as a formality,[9] and they are invariably cases of dispositions of property.[10] Even in the case of contracts for the sale of land, we do not expect anything more exacting than the requirement which the *Civil Law Act* imposes of a memorandum in writing.[11] The contract for the sale of land is unenforceable against a party unless there is a signed memorandum in writing.[12] Despite this, if the formality is denied, constitution of the contract is not. The contract exists,

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8 These are sometimes, following Wigmore, referred to as partially integrated contracts. See *Wigmore on Evidence*, Chadbourn rev. ed. (Boston: Little, Brown, 1981) Vol. IX at para. 2425. The terminology is common in North American writings. See also Farnsworth, *Contracts*, 2nd ed. (Boston: Little, Brown, 1990) at para. 7.3.

9 The primary statute is the *Statute of Frauds 1677*, s. 4. See now *Civil Law Act* (Cap. 43, 1999 Rev. Ed. Sing.) s. 6(d) which stipulates that "No action shall be brought against any person upon any contract for the sale or other disposition of immovable property, or any interest in such property unless the promise or agreement upon which such action is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged therewith or some other person lawfully authorised by him."

10 This is because of the requirement of a deed. A deed must be signed, sealed and delivered. It is necessarily in writing. See also *Bills of Exchange Act 1882*, ss. 3, 17, 32, 62 & 83; *Marine Insurance Act 1906*, ss. 22–24; *Statute of Frauds 1677*, s. 4.

11 *Cf.* s. 40 of the U.K. *Law of Property Act of 1925* which, so far as material, provides that: "(1) No action may be brought upon any contract for the sale or other disposition of land or any interest in land, unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing, and signed by the party to be charged or by some other person thereunto by him lawfully authorised." Section 2 of the *Law of Property (Miscellaneous Provisions) Act 1989* which replaces s. 40 states that: "(1) A contract for the sale or other disposition of an interest in land can only be made in writing and only by incorporating all the terms which the parties have expressly agreed in one document or, where contracts are exchanged, in each." The 1989 Act makes it impossible to make an oral contract for the sale of land. It was thought that this might have the beneficial effect of enabling negotiations to proceed more freely as well as avoid the awkward results in *Law v. Jones* [1973] 2 All E.R. 437, [1974] Ch. 112 imperfectly mitigated in *Tiverton Estates Ltd. v. Wearwell Ltd.* [1974] 1 All E.R. 209, [1975] Ch. 146, of a contract being inadvertently evidenced in letters of correspondence written on the parties' behalf.

12 In some jurisdictions, a prorogation or arbitration agreement must be accepted in writing. See Art. 17 Brussels Convention (now Brussels I Regulation) before its amendment in 1978. See also *Estasis Salotti di Colzani Aimo e Gianmario Colzani v. R.U.W.A. Polstereimaschinen GmbH.* [1976] E.C.R. 1831. See also Art. 7(2) of the UNCITRAL Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law on 21 June 1985 which is as follows: "The arbitration agreement shall be in writing. An agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement, or in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by another. The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract."

notwithstanding it may be unenforceable[13] and if it be enforceable under some doctrine of estoppel despite the want of writing, proof of such verbal conduct or oral representation as is requisite will not be denied.[14] This flexibility to tailor a transaction to reflect the parties' costs averseness, their risk profiles, the differences in degree of trust subsisting between them, and their relative subject matter risks and priorities is considered vital.

Thus, we do not say that there *must* be pre-constituted proof of contracts but merely require that where the parties have voluntarily reduced their agreement to writing, the writing will be the sole and almost conclusive proof of their agreement. This is part of what is meant by the parol evidence rule. In the first instance, and this is the effect of section 93 of the *Evidence Act*, the writing and nothing else shall prove the transaction that is effected in writing.[15] In the second instance, as section 94 of the *Evidence Act* announces, the rule excludes or limits testimonial or even documentary proof to the contrary of the writing.[16]

It is deducible from what has been said about the distinction between certainty of proof and certainty of transaction that the parol evidence rule should only be concerned with preserving proof for the future, and hence ensuring certainty of proof.[17] The rule should not be concerned with certainty of

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13 See *Yaxley v. Gott* [2000] Ch. 192 [*Yaxley*].

14 See *e.g. Yaxley*, *supra* note 13. This is provided the formalities are imposed in order to protect a party.

15 Section 93 is in these terms: "When the terms of a contract or of a grant or of any other disposition of property have been reduced by or by consent of the parties to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property or of such matter except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions of this Act." There are two exceptions. See generally Tan, "Making Sense of Documentary Evidence" [1993] S.J.L.S. 504, [1994] S.J.L.S. 111.

16 Section 94 is in these terms: "When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to section 93, no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives in interest for the purpose of contradicting, varying, adding to, or subtracting from its terms subject to the following provisions …" There are six enumerated provisions which follow. See generally Tan, *supra* note 15.

17 Neither the writing nor the signature can or should guarantee reliability of the contents since neither can disprove of itself the absence of interpolations and freedom from forgery. The reason is simple. If the purported maker of the document could not deny that the writing is his or that the signature is his, the way to fraud would become a broad way. Logically, writing drawn up to serve as proof does not declare on its face that it is not forged or that its contents are true. Practically speaking, proof of forgery must often be sought outside the writing and the signature in the form of expert evidence of document examination or evidence of loss of custody suggesting opportunity to tamper with the document or signature. Several problems are then encountered, such as problems with the strength of the presumption of regularity and of achieving and maintaining a measure of consistency between proof of forgery in civil and

transaction for the simple reason that certainty of transaction raises issues of substantive fairness which can only be resolved by substantive law. Wigmore was among the first to perceive this when he objected to the parol evidence rule as a rule of evidence: "It does not exclude data because they are for one reason or another untrustworthy or undesirable means of evidencing some fact to be proved. It does not concern a probative mental process—the process of believing one fact on the faith of another. What the rule does is to declare that certain kinds of fact are legally ineffective in the substantive law; and this of course (like any other ruling of substantive law) results in forbidding the fact to be proved at all."[18] Put in positive terms, if the substantive law posits a fact as legally effective, that fact must be relevant and provable. Suppose the substantive law posits that a contract may be varied after its conclusion or that a contract can be varied collaterally. There is no further need for a rule of evidence that confirms that whenever a contract that is substantively varied is legally effective, proof of the variation must be allowed; or that confirms that collateral contracts may be proved.[19] Conversely, it would be wrong for a rule of evidence to require the courts to exclude evidence of a fact that is legally effective whenever that fact contradicts the written contract. The fact that the legally effective fact contradicts the written contract is immaterial because if the substantive law makes the fact legally effective, evidence of it must necessarily be allowed. This position is always true, though the English courts, and the Singapore courts, have in the past tended sometimes to overlook it.[20]

Nevertheless, Wigmore overstated his case in maintaining that the parol evidence rule was solely a rule of substantive law which did not belong in any sense to the law of evidence. In the present view, there is a non-trivial sense in which the parol evidence rule is evidentiary. This is because

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in criminal proceedings. Without intending to be exhaustive, we should note that disputes may also arise in relation to proof of dates of execution of documents.

18 *Wigmore on Evidence*, *supra* note 8 at para. 2400.

19 That is additional to the rule that relevant evidence is admissible save where its prejudicial effect exceeds its probativeness, arguably imperfectly reflected in s. 5 of the *Evidence Act*.

20 There was a time when the parol evidence rule was enforced strictly. The rule has been in decline as a rule of evidence and recognising its substantive nature, courts allow facts of substantive fairness to be proved whilst formally adhering to the rule as a rule of evidence. See Wedderburn, "Collateral Contracts" [1959] C.L.J. 58 at 59–64. Nevertheless, it is still classified as a rule of evidence. See Denning L.J. in *Vitkovice Horni a Hutni Tezirstvo v. Korner* [1950] 1 All E.R. 558 at 576: "The rule of our law which says that documents are exclusive evidence of the transaction which they embody is a rule of evidence, and, as such, it is to be applied by our courts even when they deal with foreign contracts, because, by private international law, the court of trial applies its own rules of evidence, just as it applies its own mode of trial … In contrast, I must point out that our rules for the interpretation of contracts—by which we usually exclude oral evidence, except to explain technical terms—are not, strictly speaking, rules of evidence at all—because they deal with construction and not proof." See also McLauchlan, *The Parol Evidence Rule* (Wellington: Professional Publications Ltd., 1976).

the notion, that the sole evidence of a contract reduced to writing is the writing, is in effect a preference for the writing over any oral recollection in court of its terms.[21] From this point of view, what the rule does is to declare certain evidence, *i.e.* the oral recollection in court, inadmissible, not so much because of its supposed comparative unreliability, but because of the parties' presumed preference for the writing as proof; and it is thus that the parties are allowed to create or make proof for the future, and to make it conclusive. If so, the parol evidence rule is far from being superfluous as a rule of evidence.[22]

Actually, Wigmore did not overlook rigorously refuting even the limited effect of the parol evidence rule as a rule of evidence. He argued thus: "That the writing cannot be shown to represent inaccurately some prior parol conduct, is not because the writing is conclusive evidence of what that parol conduct was, but because the parol conduct is immaterial and ineffective, and therefore … cannot be proved at all."[23] According to Wigmore then, the rejection of evidence of parol conduct is a consequence of the operative character of the writing, not of any rule of evidence. The disagreement in Wigmore's insight is that it puts the cart before the horse in presupposing that the parol conduct superseded by writing can never be evidence. That is not true. Parol conduct may be admitted as evidence in some cases, for instance, to show consistency in the usage, or to show the precise sense in which the parties have mutually conceived, of certain terms which are

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[21] Rules of preference are clearly rules of evidence. See also s. 23 of the *Evidence Act* which affords another example of party determined rules of preference as parties may determine to withhold evidence otherwise admissible in court.

[22] This is not to say that the parol evidence rule is a best evidence rule. Some maintain that it is. See *Phipson on Evidence*, 12th ed. (London: Sweet & Maxwell, 1976) at 793. See also the Law Commission Report No. 154 (1986) at 1. See also *Guardhouse v. Blackburn* (1866) 1 P.D. 117.

[23] *Wignore on Evidence*, *supra* note 8 at para. 2425. See also *Wigmore on Evidence*, 3rd ed. (Boston: Little, Brown, 1940) at para. 1345 and follg. *Cf.* Chadbourn rev. ed. (1981) Vol. IX para. 2430 where he says of partial integration, referring to collateral agreements as a prime example: "Here obviously the rule against disputing the terms of the document will be applicable to *so much of the transaction as is so embodied, but not to the remainder* [emphasis added]." [Footnotes omitted.] It is, however, clear that Wigmore envisaged the operative act, the act effective in law, to be a single written memorial whereas the provisions of s. 93 of the *Evidence Act* are not so constrained, referring as they do to the reduction of terms, as opposed to the contract, to writing. See also *Corbin on Contracts*, rev. ed. (St. Paul, Minnesota: West Pub. Co., 1960), vol. 3 para. 573; Farnsworth, *supra* note 8 at para. 7.2. This view commended itself to the English Law Commission in 1986: see *Law of Contract—The Parol Evidence Rule—Law Commission No. 154* (1986). The Commission argued that the parol evidence rule really only applied when the true intention of the parties is to make a contract entirely in writing. See also Treitel, *The Law of Contract*, 3rd ed. (London: Sweet & Maxwell, 1970) at 152. It is not clear whether this view is supposed to permit proof of oral terms to contradict written terms with which they are at variance, as opposed to proving such oral terms only when they are legally effective.

contained in the writing.[24] If then parol conduct may be evidence for certain purposes, it can only cease to be evidence for other purposes, notably for the purposes of contradicting the writing, provided that and because there is a rule of evidence to that effect. The writing does not become an operative act until and unless the law of evidence determines that the intention of the parties to prefer the written evidence over testimony in court should be supported; and it was because that law considered it desirable to afford parties to a written contract certainty of proof for the future that it gave the writing the quality of preferential and conclusive evidence over and against oral recollections, in the absence of proof of some legally effective fact. As further argument that the parol evidence rule has a non-trivial evidentiary significance as a rule of evidential preference, the possibility that its scope can be extended by agreement beyond what the substantive law prescribes is of outstanding importance.[25] The fact is that the parties can by agreement make their writing conclusive as to facts which the substantive law would otherwise consider as legally effective,[26] and an agreement to prefer the writing above legally effective facts which could otherwise be proved in contradiction to the writing is best seen as an agreement to alter a rule of evidence by extending the rule of preference which has been argued to be the sole evidentiary significance of the parol evidence rule.[27]

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[24] See s. 94(f) of the *Evidence Act* which allows any fact which shows in what manner the language of a document is related to existing facts to be proved. See also McLauchlan, "Admissibility of Parol Evidence to Interpret Written Contracts" (1974) 6 N.Z.U.L.R. 122.

[25] Going beyond "the role of equity which can be no more than, in certain circumstances, to intervene where it would be unconscionable to allow one of the parties to rely on the strict legal construction of the document." See *Taylor Fashions Ltd. v. Liverpool Victoria Trustees Co. Ltd., Old & Campbell Ltd. v. Liverpool Victoria Trustees Co. Ltd.* [1982] Q.B. 133.

[26] See *Chuan Hup Marine Ltd. v. Sembawang Engineering Pte. Ltd.* [1995] 2 S.L.R. 629 giving effect to a merger clause. Thus far, most of the conclusive evidence clauses encountered in the local case law are those which make liability and the amount due conclusive in accordance with certification by a stipulated person. See *Bangkok Bank Ltd. v. Cheng Lip Kwong* [1989] S.L.R. 1154, [1990] 2 M.L.J. 5; *Citibank N.A. v. Lim Tiong Hee* [1994] 2 S.L.R. 614.

[27] Save where such agreement violates the fundamental principles of relevance, there may be little objection to it on grounds of policy in civil cases. In some civil proceedings, such as matrimonial proceedings, it would be contrary to public policy to allow parties to affect the rights of third parties, such as the children of the marriage, by their agreement to prefer some evidence to another. See *Dobbs v. National Bank of Australasia Ltd.* (1935) 53 C.L.R. 643 where it was held that such a clause was not contrary to public policy as ousting the court's jurisdiction. This leads to an interesting observation. If the rule of substantive law which determines what facts are legally effective is capable of alteration, as it were, by agreement on what evidence may be adduced, the parol evidence rule as a rule of substantive law turns out to be substantially only a default position. The courts are in effect saying that they will not forbid the proof of legally effective facts which contradict the writing of the parties on their own motion. If the parties desire to preclude the proof of legally effective facts which contradict their writing, they must do this for themselves by agreeing on an appropriate conclusive evidence clause. This is valuable because it reinforces the flexibility earlier spoken of, which is to leave the decision with the parties but to provide a default position

III. The Signature

The previous paragraphs prove that the parol evidence rule as ordinarily applied to pre-constituted contracts has only a very limited role as a rule of evidence. Save where the parties have otherwise expressly agreed, the rule can never require a court "to exclude or ignore evidence which should be admitted and acted upon if the true contractual intention of the parties [or any other legally effective fact] is to be ascertained and effect given to it".[28] Considering the signature, however, one finds it surprisingly clothed with special probative force without an express agreement by the parties to that effect. This is the effect of the rule in *L'Estrange v. F. Graucob Ltd.*[29] which, however, purports to be based on the parol evidence rule. It will be argued that this basis of the rule in terms of the parol evidence rule must be rejected following clarification of the parol evidence rule as just described and that new explanations for the rule must be sought outside the parol evidence rule.

A brief sketch of the context in which the signature rule arises is helpful. In common with the approach to writing, no law or rule makes the signature indispensable proof of execution of a contract except in the case of deeds of

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which favours substantive fairness. This is not to say that the agreement may not in some cases be unenforceable by virtue of the *Unfair Contract Terms Act* for being unreasonable or unfair. See text below at pages 366 and 367. In New Zealand, s. 4(1) of the *Contractual Remedies Act 1979* provides that "if a contract … contains a provision purporting to preclude a court from inquiring into or determining the question (a) whether a statement or promise or undertaking was made or given, either in words or by conduct, in connection with or in the course of negotiations leading to the making of the contract; or (b) whether, if it was so made or given, it constituted a representation or a term of the contract; or (c) whether, if it was a representation, it was relied on, the court shall not, in any proceedings in relation to the contract, be precluded from inquiring into and determining any such question unless the court considers that it is fair and reasonable that the provision should be conclusive between the parties".

[28] Note that in 1976, the English Law Commission in a working paper, *Working Paper No. 70*, entitled "The Law of Contract—The Parol Evidence Rule", provisionally recommended abrogation of the parol evidence rule. This recommendation was adopted by the Ontario Law Reform Commission for sale of goods contracts in its *Report on Sale of Goods* Vol. 1 at 115. In 1986, the English Law Commission re-visited the subject (see *Law Commission No. 154*) and concluded that in the light of developments under-estimated at the time of the working paper as well as clarification of the rule, it "no longer has either the width or the effect once attributed to it. In particular, no parol evidence rule today requires a court to exclude or ignore evidence which should be admitted or acted upon if the true contractual intention of the parties is to be ascertained and effect given to it." The Law Commission accordingly saw no reason to change the law.

[29] In what is a quirk of the common law, a decision of the District Court of England becomes the eponymous rule. As Lord Devlin put it in *McCutcheon v. David MacBrayne Ltd.* [1964] 1 W.L.R. 125 at 134, the signature is conclusive.

disposition.[30] In the kinds of cases with which we are concerned, writing unaccompanied by its maker's signature does not lose its probative force for want of a signature.[31] An example which instantly suggests itself is that a written contract may be accepted by conduct or in word or in print, without any accompanying signature. In relation to contracts for the sale of land, the famous requirement under the *Civil Law Act* of a memorandum signed by the person to be chargeable may seem to approach the idea of the signature as the operative act;[32] but then again its purpose is really evidentiary in nature: to provide evidence of a memorandum as an easy proof of an oral contract.[33]

The signature's principal effect is on proof of the existence or provenance of the writing since the signature helps to establish the document's execution or authenticity and the identity of the person executing it.[34] The signature has other functions. It has, for instance, been said that the primary function of a signature is to provide evidence of the identity of the signatory, his intention to make a signature, and his adoption of the contents of the document.[35] Consideration of the intention to make a signature need not detain

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30 Thus, there is nothing in the law that corresponds to the French notion of the solemn contract where the consent of the parties alone, without the establishment of the contract in writing, is inoperative. See Art. 1394 *Code Civile* (the marriage contract). We should not overlook the body of law that regulates what is a signature on a cheque mandating that the bank concerned must act to honour it.

31 In statutory law, the signature receives variable treatment, bordering sometimes on the deferential, sometimes on laxity. Some statutes prescribe a personal signature. See *Blucher, ex. p. Debtor* [1931] 2 Ch. 70 sub nom *Re Blucher, Debtor v. Official Receiver* (1930) 100 L.J. Ch. 292. Section 4 of the *Statute of Frauds 1677*, now s. 6 of the *Civil Law Act* in Singapore, is not such a statute, for since its inception, there has been little doubt that an agent may sign a memorandum of a contract of sale of land on behalf of his principal. A solicitor's bill of costs is another judicially approved example of writing that does not require a personal signature. See *Goodman v. J. Eban Ltd.* [1954] 1 Q.B. 550. See also *Firstpost Homes Ltd. v. Johnson* [1995] 1 W.L.R. 1567.

32 Section 6 of the *Civil Law Act*.

33 The memorandum is not a manifestation of consent. See also Fifoot, *History and Sources of the Common Law: Tort and Contract* (London: Stevens & Sons Ltd., 1949) at 360: "So long as the law of evidence forbade the examination of the litigants and therefore, in an oral contract, of the only persons likely to know the facts, the way was open, if not to perjury, at least to a process of conjecture which might or might not be intelligent. One of the by-products of [*Pinchon's case*] was the Statute of Frauds, of which it may justly be said that the cure was worse than the disease." [Footnote omitted.] See also Lord Mansfield in *Pillans v. Van Mierop* (1765) 3 Burrows 1663 at 1669: "I take it that the ancient notion about the want of consideration was for the sake of evidence only; for when it is reduced into writing, as in covenants, specialties, bonds, etc., there was no objection to the want of consideration. And the Statute of Frauds proceeded upon the same principle."

34 By authenticity is meant the document's genuiness or existence, in other words, that the document was executed as it purports to be. Authenticity is distinguished from contents.

35 See also Reed, "What is a Signature" (2000) 3 J.I.L.T.; an on-line journal at http://elj.warwick.ac.uk/jilt/00-3/reed.html. The signature serves other primary functions: in the case of official documents, to prevent forgery, since the signature is harder to forge than printed words; to signify due execution by the proper officer, identified by his signature.

us,[36] since ordinarily the intention to sign is a matter of inference to be drawn from the presumed knowledge on the part of the signatory that a signature differs fundamentally from writing one's name.[37] The significance of the signature as adoption of the signed document's contents is of primary concern. Its corollary is that the signature binds the author of the document not to repudiate its contents where these contents are legally effective. This last function of the signature is put too sweepingly. If the document is an admission of a transaction independently existing, the signature cannot have this function, for all admissions are in their nature inconclusive.[38] In addition, the signature may have been appended to indicate receipt of the document or the fact that the signatory has given it his personal attention and as such, it will not *ex hypothesi* serve as adoption of the contents in the sense of being bound by them to the other party.[39] In relation to pre-constituted contracts,

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There is a secondary function, often ignored or overlooked in the literature. The signature serves also to identify the original from a copy. The copyist who makes a copy after the writing has been signed may put a signature there but it is only a transcribed signature. Even then, the signature is dispensable; since there is no requirement that the pre-constituted writing must be signed, the proof that a document is a copy because it is not signed is not perfect.

[36] See *Pryor v. Pryor* (1860) 29 L.J. P.M. & A. 114. See also *Central Motors Birmingham Ltd. v. P. A. Wadsworth* (1982) 133 N.L.J. 555 (C.A.E.).

[37] See *Morton v. Copeland* (1855) 16 C.B. 517 at 535. This follows from the rule that a signature is any mark adopted by the signatory as his signature. *Cf. Re Cunningham* (1860) 29 L.J. P.M. & A. 71. So a printed name, or rubber stamp or initials may be a signature if there be an intention to adopt it as such. See *Schneider v. Norris* (1814) 2 M. & S. 286; *Re Cook's Estate* [1960] 1 All E.R. 689; *Hill v. Hill* [1947] Ch. 231; *Baker v. Dening* (1838) A. & E. 94; *France v. Dutton* [1891] 2 Q.B. 208; *Lazarus Estates Ltd. v. Beasley* [1956] 1 Q.B. 702. Generally, proof of intention to make the signature is gathered from the surrounding circumstances, including the nature of the document that is signed while proof of adoption is gathered from the nature of the writing, if it is under hand, and the surrounding circumstances including evidence of reading back and familiarity with the language in which the writing is expressed. The inclusion of one's name in the signature shows knowledge of the distinction and is very strong inference of the intention to sign. See *L'Estrange v. F Graucob Ltd.* [1934] 2 K.B. 394. See also *London County Council v. Agricultural Food Products* [1995] 2 Q.B. 218, a person sufficiently signs a document if it is signed in his name and with his authority by someone else. In some jurisdictions, it is provided that a signature includes a facsimile one by whatever process it may be reproduced. A scanned signature which is sent by fax modem is probably legally effective: see *Re A Debtor (No. 2021 of 1995)* [1996] 2 All E.R. 345 at 351.

[38] See *Hain Steamship Co. Ltd. v. Herdman & McDougal* (1922) 11 L1 L.R. 58 at 59–60: "A bill of lading contains an admission the captain is authorised to sign for goods which are put on board. If, inadvertently, a signature has been given for goods not put on board, the admission contained in the bill of lading may be got rid of by establishing that the goods were not put on board; but still the fact that the bill of lading was given by the representative of the shipowner throws upon him the burden of establishing that fact." See also *Evidence Act*, s. 31.

[39] The accomplishment of the functions served by a signature varies. The identity is proved typically by a comparison with a normal specimen undertaken by a witness familiar or acquainted

however, the signature is supposed to signify adoption of their contents in this very strong sense.

This is the effect of the rule in *L'Estrange v. F. Graucob Ltd*.[40] A party who signs, *inter absentes* or *inter praesentes*,[41] a completed document which purports to be a contract is bound by the contract though he does not read the terms or does not fully understand what is read.[42] Having signed what

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with the signature in question or by a handwriting expert while the intention to make a signature is usually proved circumstantially. Upon proof that the signature corresponds to that of the signatory, the evidential burden shifts to the person alleging otherwise to produce some evidence of forgery. See *Saunders v. Anglia Building Society* [1971] A.C. 1004.

40 [1934] 2 K.B. 394. The C.A. in *L'Estrange v. F. Graucob Ltd.* referred to a later decision, *Parker v. South Eastern Ry. Co.* (1877) 2 C.P.D. 416 at 421 where Mellish L.J. said: "In an ordinary case, where an action is brought on a written agreement which is signed by the defendant, the agreement is proved by proving his signature, and, in the absence of fraud, it is wholly immaterial that he has not read the agreement and does not know its contents." The learned judge went on to deal with the ticket cases as follows: "The parties may, however, reduce their agreement into writing, so that the writing constitutes the sole evidence of the agreement, without signing it; but in that case there must be evidence independently of the agreement itself to prove that the defendant has assented to it. In that case, also, if it is proved that the defendant has assented to the writing constituting the agreement between the parties, it is, in the absence of fraud, immaterial that the defendant had not read the agreement and did not know its contents." In *L'Estrange v. F. Graucob Ltd.* [1934] 2 K.B. 394 at 403 Scrutton L.J. added that: "In cases in which the contract is contained in a railway ticket or other unsigned document, it is necessary to prove that an alleged party was aware, or ought to have been aware, of its terms and conditions. These cases have no application when the document has been signed. When a document containing contractual terms is signed, then, in the absence of fraud, or, I will add, misrepresentation, the party signing it is bound, and it is wholly immaterial whether he has read the document or not." Spencer, "Signature, Consent, and the Rule in *L'Estrange v. Graucob*" (1973) 32 C.L.J. 104 points out that two cases decided before 1934 were not cited in *L'Estrange v. F. Graucob Ltd.* [1934] 2 K.B. 394. *Chitty on Contracts*, 28th ed. (London: Sweet & Maxwell, 1999), Vol. 1 para. 12-002 states: "Proof of terms. Where the agreement of the parties has been reduced to writing and the document containing the agreement has been signed by one or both of them, it is well established that the party signing will be bound by the terms of the written agreement whether or not he has read them and whether or not he is ignorant of their precise legal effect. (*L'Estrange v. Graucob* [1934] 2 K.B. 394.) But it by no means follows that the document will contain all the terms of the contract: it may be partly oral, and partly in writing. . . . In such cases, it will be necessary to prove which statements or stipulations, were intended to be incorporated as terms of the contract or to have contractual effect."

41 This assimilation of contracts *inter absentes* and *inter praesentes* could be criticised. If the signatory signs a pre-constituted contract *inter absentes*, so that there is no other evidence than the signature itself of the identity of the signatory, the signature may exceptionally signify merely the identity of the signatory who acknowledges that he has read the document's contents. If, however, the signatory signs the contract in the presence of the other party, so that there is no doubt as to the identity of the signatory, the signature arguably can only serve to signify adoption of the document's contents in a very strong sense.

42 The effect of signing a document in an incomplete state which is to be completed by another is of course outside the signature rule. The rule is that the signatory of an incomplete document authorises the person to whom he gives it to fill it up intending only the natural consequences

appears on its face to be a complete contract, the signatory cannot afterwards say that he did not read the document and would not have signed it if he had read it.[43] Only four exceptions are recognised.[44] The first is that the signatory is not bound by a separate document that is not within the scope of his signature.[45] The second is that the signatory who has reasonably relied on the other party's reading to him the contents of the writing is not bound by any term that has been incorrectly read.[46] The third is that the signatory is not bound by terms in small print not apparent to a reasonable person who has read the document unless his attention has been drawn to them or by misleading terms in respect of which reasonable people would not have sought clarification.[47] The fourth is that the rule has no application when the

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of his act. See *Montague v. Perkins* (1853) 22 L.J. C.P. 187. The same is true of execution of a deed which is incomplete and is filled up after the execution: *Hudson v. Revett* (1829) 5 Bing. 538. *Cf. Smith v. Prosser* [1907] 2 K.B. 735 where the signatory delivered promissory notes signed in blank to his agent intending him to be custodian of the instrument.

[43] But where the signed document is a time sheet purporting to incorporate the terms of a standard form contract, the terms are not in law incorporated. See *Grogan v. Robin Meredith Plant Hire* (1996) 15 Tr. L. 371. A reasonable man would not expect a time sheet to contain contractual terms. The court rejected the argument that the mere act of adding a signature resulted in incorporation of terms expressed in the document as incorporated by reference. There is no such mechanistic rule. Note that there are some cases from the 19th century which involve signing by both parties to the agreement such as *Field v. Lelean* (1861) 6 H. & N. 617 and *Syers v. Jonas* (1848) 2 Ex. 111.

[44] Arguments for a banking exception in favour of the consumer were rejected in *National Westminster Bank plc. v. Cavill* (unreported, 13 June 1996) (C.A.E.).

[45] *London General Insurance Co. Ltd. v. Commissioners of Customs and Excise* [1998] D. & V.R. 177 could possibly be an example of this exception. This exception is implicit in the rule next described pertaining to incorporation which for convenience is referred to as the *Interfoto* doctrine. *The Pioneer Container* [1994] 2 A.C. 324 exemplifies the argument that the term of a sub-contract relied on is so onerous or unreasonable that it cannot reasonably be understood to fall within the scope of the claimants' consent. In *Jarl Tra Ab v. Convoys Ltd.* [2003] All E.R. (D) 328 it was said that the *Interfoto* argument and *The Pioneer Container* argument are simply equivalent ways of addressing the question of consent.

[46] *Lewis v. Great Western Ry. Co.* (1860) 5 H. & N. 867 at 874. There is probably no requirement that the signatory must have been blind or otherwise incapable of reading the document himself. Where the signatory is under a physical or other personal disability, whether known or unknown to the offeree, see *Firchuk & Firchuk (trading as Atlas Textile Wholesale) v. Waterfront Cartage, Division of Waterfront Investments & Cartage Ltd.* [1969] 2 Lloyd's Rep. 533.

[47] *Roe v. Naylor* [1917] 1 K.B. 712 at 714 is especially instructive: "What are sometimes called the ticket cases are not in point; there seems to me to be a broad distinction between that class of case and the case of a contract of sale. There is, however, in my opinion, one exception to the rule that a buyer who accepts a sold note is bound by its terms even though he had not read them. The note may be misleading. The conditions may be so ambiguously worded that they may be read equally well in two different ways; or the conditions relied on by the seller may be placed in such a position in the document that a man of ordinary care and intelligence would not expect to find them there . . . In order to escape being bound by a clause the buyer must be able to satisfy a judge or jury that the document was misleading . . . In this case the question may be put thus: Taking the smallness of the print, and the fact that the clause is printed along

writing is not signed but is taken into possession.[48] The question whether the person taking the writing into possession is bound by terms which he has not read then depends on the circumstances of the case. The notion of *non est factum* oddly enough is not an exception but a defence,[49] alongside other defences such as fraud and misrepresentation.[50] These defences relieve the signatory from being bound by terms of a contract he signed without reading.

The rule in *L'Estrange v. F. Graucob Ltd.* was perhaps at first a true rule of evidence. It was phrased in terms of presumptive evidence in an old case.[51] It conceived of the act of signing a contract as generating a rebuttable

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the side of the document, can a reasonable careful businessman be heard to say that he did not see the clause, and could not have been expected to see it? If so, he is not bound by the clause." See also *Roe v. Naylor (No. 2)* (1918) 87 L.J. K.B. 958. See also *Harvey v. Ventilatorenfabrik Oelde Gmbh* (1988) 8 Tr. L. 138 where one set of documents was blank on the reverse side, and it was held that the signatory was "entitled to assume that the printed material on the other set, which he did not understand and which had never previously been discussed between the parties, was not intended to form part of the accepted orders which the documents purported to acknowledge. … To hold that the plaintiff must be treated as having assented to the German jurisdiction provision because he countersigned and returned one set rather than the other would be an unreasonable interpretation of the contractual terms mutually agreed between the parties." *Cf. P. S. Chellaram & Co. Ltd. v. China Ocean Shipping Co. (The Zhi Jiang Kou)* [1991] 1 Lloyd's Rep. 493 where the term in question was in small print and illegible without the use of a magnifying glass and the N.S.W. C.A. held that the respondent must be taken to have accepted the term which was plainly attached to the contract. "The ticket cases, which typically involve no signature of a written contract such as the present raise quite different considerations." Langley J. followed this in *Pirelli Cables Ltd. v. United Thai Shipping Corp Ltd.* [2000] 1 Lloyd's Rep. 663 at 669, though the contract in that case was not signed.

48 *Dillon v. Baltic Shipping Co. (The Mikhail Lermontov)* [1991] 2 Lloyd's Rep. 155.

49 "This plea, which means that the document is a nullity, requires proof of a false statement as to the nature as distinct from the contents of the document." See *Khatijabai Jiwa Hasham v. Zenab* [1960] A.C. 316.

50 *Curtis v. Chemical Cleaning and Dyeing Co.* [1951] 1 K.B. 805. See also *Jaques v. Lloyd D George & Partners Ltd.* [1968] 1 W.L.R. 625, where the agent misrepresented the effect of the document which was signed. There is some authority that an implied misrepresentation will avoid the signature rule. See the text below at page 374. There is a doubtful suggestion the signature rule is avoided where the parties have unequal bargaining power: see *Spriggs v. Sotheby Parke Bernet & Co. Ltd.* (1984) 272 E.G. 1171.

51 See *Lewis v. Great Western Ry. Co.* (1860) 5 H. & N. 867 at 872: "if a person signs a contract [without reading], and will not venture to deny that he was aware it was a contract, and that he saw the 'conditions', and there is no evidence to detract from the apparent result, he is bound by it". The contract in that case was partly in writing and partly in print. For a more recent case in which similar language was employed, see *Bahamas Oil Refining Co. v. Kristiansands Tankrederie (The Polyduke)* [1978] 1 Lloyd's Rep. 211 at 215: "Unless and until the master comes to give evidence seeking to displace the prima facie effect of his signature on the document, this must on any view be treated as what it purports to be, that is to say a contract which includes cl. 2(d). In the absence of such evidence, how can the Court assume, even if it might be relevant in law, that the master did not intend to enter into a contract in the terms of the document or that he failed to read and understand cl. 2(d)? Of course, people

presumption that the signatory wished to be bound contractually on the terms of the signed document. In the later cases, the parol evidence rule somehow became influential and usurped the notion of presumptive evidence as the pre-eminent explanation for the binding effect of the signature.[52] So much was clear from Scrutton L.J.'s judgment in *Roe v. Naylor (No. 2)* when he relied on this proposition, "There is no doubt as to the general rule that, when a contract has been reduced into writing, it is not open to give oral evidence to show that a term in the written document is not part of the contract",[53] for the decision that the signatory was bound to the contract, despite ignorance of its terms. Spencer has argued that "in reaching its decision in *L'Estrange v. Graucob* [footnote omitted] the Divisional Court had the parol evidence rule at the back of its mind" since Scrutton L.J. relied on the earlier case which he had explicitly grounded on the parol evidence rule.[54] Spencer then showed that parol evidence might be given to prove a mistake and that accordingly, it seemed unlikely that the parol evidence reasoning on which Scrutton L.J. implicitly relied was valid.[55] In the cases which Spencer had in mind, in which proof of operative mistake was admissible, the written contract was accepted by conduct, and there was no written consent in the form of a signature.[56] The vital question, however, is whether when the intention to enter into the contract is given in writing by signing it, the effect of the signature can be contradicted[57] by extrinsic evidence that consent was not actually given. Scrutton L.J.'s implicit answer was that extrinsic evidence that the document was not read to contradict the signature was impossible.

With respect, although he relied on cases which are strictly distinguishable, Spencer was essentially correct in arguing that the parol evidence rule

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habitually sign printed forms without reading or understanding them, but how can a Court assume this without at least having some evidence to suggest that it happened in the case in question?"

52 In the rectification cases, the presumptive view apparently persisted. See *Thomas Bates & Son Ltd. v. Wyndham's (Lingerie) Ltd.* [1981] 1 W.L.R. 505 at 521: "There is, however, a strong presumption that a signatory of a document intends to sign it in its executed form, since the purpose of signing it is to make the document do the legal job it purports to do; and, of course, the signatory has every opportunity to satisfy himself before he signs it that it is in a form which meets his needs, an opportunity which responsible signatories will usually take. Convincing proof is required in order to counteract the cogent evidence of the parties' intention displayed by the instrument itself. It is not, I think, the standard of proof which is high, so differing from the normal civil standard, but the evidential requirement needed to counteract the inherent probability that the written instrument truly represents the parties' intention because it is a document signed by the parties."

53 (1918) 87 L.J.K.B. 958 at 964.

54 Spencer, "Signature, Consent, and the Rule in *L'Estrange v. Graucob*" (1973) 32 C.L.J. 104.

55 [1973] C.L.J. 104 at 118–119.

56 Notably *City and Westminster Property v. Mudd* [1959] Ch. 129.

57 Which is how modern cases have understood it. See *Bahamas Oil Refining Co. v. Kristiansands Tankrederie (The Polyduke)* [1978] 1 Lloyd's Rep. 211.

fails as basis for the signature rule. The evidentiary aspect of the parol evidence rule, as we have seen, is limited to barring proof of oral recollections of the terms of a written contract. In application to the signature, alleged to be a written consent to be bound contractually, the parol evidence rule as a rule of preference for the writing is irrelevant. Either a person has signed or he has not and there is no sense in saying that the signatory wishes to adduce oral evidence that he has not signed. The only meaningful question is whether evidence can be led to show that the consent was not a real consent, not a legally effective consent.[58] The argument that was advanced and rejected in *L'Estrange v. F. Graucob Ltd.* was that the signatory could show that he had in fact not read the document which he signed and that had he done so, he would not have signed it. This involved a substantive question of the legal effectiveness of a signature which could not be answered by recourse to the parol evidence rule. Strictly, the flawed reliance on the parol evidence rule meant that this substantive inquiry was missing in *L'Estrange v. F. Graucob Ltd*.[59]

It could be argued that if this inquiry was begun afresh, a signature rule would have a better foundation in estoppel, which would clearly reveal its substantive and non-evidentiary character. Blackburn J. in *Harris v. Great Western Railway Co.* certainly thought that estoppel was the basis for the rule that a party who has expressly accepted a written contract by conduct is bound whether he has actually read its terms or not. He said:

> … though one of the parties may not have read the writing, yet, in general, he is bound to the other by those terms; and that, I apprehend, is on the ground that, by assenting to the contract thus reduced to writing, he represents to the other side that he has made himself acquainted with the contents of that writing and assents to them, and so induces the other side to act upon that representation by entering into the contract with him, and is consequently precluded from denying that he did make himself acquainted with those terms.[60]

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[58] There may also be a question whether the mark is indeed the signature of so and so. Extrinsic evidence may be adduced to establish the link between the mark and the identity of the signatory. See *Baker v. Dening* (1838) A. & E. 94; *Hill v. Hill* [1947] Ch. 231.

[59] [1934] 2 K.B. 394. The question before the court was substantive in nature because one was asking whether the signature could be controverted by substantive grounds related to the reality of consent. If we said we could not prove that the signatory did not recognise the document as a contract, because his signature was conclusive writing to the contrary, we would be arguing in a circle. The question being substantive, we would be assuming what we needed to prove if we invoked the parol evidence rule. It would make more sense to ask whether from the substantive view-point it would be necessary to give the signed document a special force that the unsigned document does not have.

[60] (1876) 1 Q.B.D. 515 at 530.

Blackburn J. was of course speaking of an acceptance by conduct of a written contract without reading its contents.[61] From the substantive view-point, the same question of estoppel could be said to be raised whether a contract is accepted by conduct or by appending a signature to the contract.[62] There is only a difference of degree between acceptance by conduct and acceptance by signature. In one case, let us say, the offeree prints his acceptance and in another the offeree signs his acceptance. In the latter case, the signature tending to be more unique, the proof of the identity of the accepting party is easier. It may also be easier to draw the inference in favour of assent to be bound when the assent is manifested by signature than by conduct which may be more equivocal.[63] But on principle, the manner in which the assent is manifested in a matter of degree ought not to make any material difference to the substantive law. If this were not so, a contract made by acceptance over the phone as a matter of urgency or by an exchange of faxes would be treated differently from a contract made by faxing an acceptance by signature in the same circumstances, resulting in artificiality.[64]

The artificiality of the signature rule did not escape Lord Devlin in *McCutcheon v. David MacBrayne Ltd.,*[65] when, asking whether signing a contract should make any difference, he answered: "If it were possible for your Lordships to escape from the world of make believe which the law has created into the real world in which transactions of this sort are actually done, the answer would be short and simple. It should make no difference whatever. This sort of document is not meant to be read, still less to be understood. Its signature is in truth about as significant as a handshake that marks the formal conclusion of a bargain."[66] Lord Devlin then cited Blackburn J.'s remarks earlier reproduced and added: "If the ordinary law of estoppel was applicable to this case, it might well be argued that the circumstances leave

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61 Estoppel, it has been said, also explains when a person is bound by a confirmation note purporting to confirm the terms of an earlier oral agreement as in *Harnor v. Groves* (1855) 15 C.B. 667 and *Malpas v. L.S.W.R.* (1866) L.R. 1 C.P. 336. See Hoggett "Changing a Bargain by Confirming It" (1970) 33 M.L.R. 518 who criticises these cases, arguing that estoppel could hardly arise from performance of the contract without protesting the inclusion of new terms or from silence.

62 The rule that the signatory of an incomplete document gives authority to the person to whom he gives it to fill it up intending only the natural consequences of his act could appear also to rest on estoppel. In *Smith v. Prosser* [1907] 2 K.B. 735 where the signatory delivered promissory notes signed in blank to his agent intending him to be custodian of the instrument, the language of estoppel is obvious in the court's judgment. The court said that the signatory was not estopped from denying the validity of the notes.

63 But in the present view, this is only true when a party relies on the supposition that the signature rule gives the signature a conclusive effect.

64 A scanned signature which is sent by fax modem is probably legally effective: see *Re A Debtor (No. 2021 of 1995)* [1996] 2 All E.R. 345 at 351.

65 [1964] 1 W.L.R. 125.

66 At 133.

no room for any representation by the sender by which the carrier acted."[67] But Lord Devlin did not agree with the estoppel of Blackburn J. He thought it unnecessary and possibly misleading to offer estoppel as the basis of the signature rule and concluded as follows. "Unless your Lordships are to disapprove the decision of the Court of Appeal in *L'Estrange v. F. Graucob Ltd.* [1934] 2 K.B. 394, CA—and there has been no suggestion in this case that you should—the law is clear, without any recourse to the doctrine of estoppel, that a signature to a contract is conclusive."[68] The rejection of estoppel as the true basis for the signature rule was odd. Lord Devlin's reason for this was simply that "when a party assents to a document forming the whole or part of his contract, he is bound by the terms of the document, read or unread, signed or unsigned, simply because they are in the contract."[69] This would appear to be circular reasoning when the very question is whether a party has assented to a document forming the whole or part of his contract by signing it without reading it.

The reader who, like Lord Devlin, wishes to dissociate himself from an estoppel theory of the signature rule could urge, negatively, that the implication of a representation raising an estoppel from a signature is just as artificial as the incorrect parol evidence basis of the rule in *L'Estrange v. F. Graucob Ltd.* and, positively, that the basis for the rule is objective, namely: would a reasonable man in the position of the party seeking to rely on the terms of the signed contract conclude that the other party both knew their contents and had accepted them as applicable when he put his signature to it? That basis is, of course, the familiar objective theory of assent said to underlie the larger issue of *consensus ad idem*, which concerns itself not with subjective intentions but with the external appearance of those intentions as manifested to and perceived by a reasonable person in the position of the party to whom the transactor has addressed his actions.[70]

Both an estoppel theory and the objective theory of assent have considerable flexibility to accommodate the variety of contracts that are entered

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67 At 134. He conceded, however, that "if there be an estoppel of this sort, its effect is … limited to the contract in relation to which the representation is made; and it cannot (unless of course there be something else on which the estoppel is founded besides the mere receipt of the document) assist the other party in relation to other transactions."

68 At 134.

69 *Ibid*.

70 Learned Hand J. put it colourfully in *Hotchkiss v. National City Bank* 200 F. 287 at 293 (1911) affd. 201 F. 664 (1912) affd. 231 U.S. 50 (1913): "A contract has, strictly speaking, nothing to do with personal, or individual, intent of the parties. A contract is an obligation attached by the mere force of law to certain acts of the parties, usually words, which ordinarily accompany and represent a known intent. If, however, it were proved by twenty bishops that either party when he used the words intended something else than the usual meaning which the law imposes on them, he would still be held, unless there were mutual mistake or something else of the sort."

into and the varied circumstances in which signatures are appended to those contracts and to avoid a dogmatic rule that a signature to what is *ex facie* a contract always binds the signatory to the contract, whatever may be the nature of the contract and the circumstances in which the signature is appended. Under an estoppel theory, the signatory is bound if, in the circumstances, he has by his signature asserted his consent to be bound without ascertaining the terms of the contract. Under the objective theory of assent, the signatory is bound if a reasonable man has reason to know or believe that the signatory has consented to be bound without ascertaining the terms of the contract. In both instances, the nature of the contract and circumstances in which the document is signed prove to be crucial. Grounded on either theory, the signature rule loses its inexorable edge and provokes us to inquire whether the signature truly carries the representation that the signatory has read the document he signs or objectively, the signature would be understood as signifying the intention to be bound.[71]

However, both theories have their limitations. Strictly speaking, an estoppel cannot be raised unless the signatory knows what the terms in question are[72] and, even then, the correct characterisation is that knowing what these terms are, he represents that he has no objection to them and not, that he represents that he has read them. By offering an inaccurate characterisation, that the signatory represents that he has read what he does not know about, the theory becomes a way of explaining when it would be right to disregard the fact that the signatory has not read the contract. This lays the theory open to the charge that it furnishes a superficial explanation and that, as a system of explanation, it will vary considerably according to the aims and temperament of the judge who employs it. Under the objective theory of assent, regardless of what the other party might have reason to know, if he actually knows that the signatory has not read the contents of the contract, he cannot assert that the signatory is bound by the contract. This may not be a very satisfactory result since we should allow that there are many cases

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[71] Not all is fluid because from this, it can be said to follow that if the offeror has misrepresented either the nature or a material effect of the written document to the signatory, the signatory will not be bound under the estoppel theory since the offeror cannot then be said to have been induced to act by the representation made by the signatory and the signatory would not have signed but for the misrepresentation. *A fortiori*, if the offeror has deceived the signatory about the nature or a material effect of the document. Under the objective theory of assent, the signatory will not be bound if the offeror has misrepresented either the nature or a material effect of the written document to the signatory because a reasonable person in the offeror's position would not suppose that the signatory has given his true consent. *A fortiori*, if the offeror has deceived the signatory about the nature or a material effect of the document.

[72] An estoppel presupposes knowledge of the true facts. In that species of estoppel known as estoppel by convention, there may or may not be knowledge of the true facts, but the parties agree that certain facts should be treated as true. See *Newis v. General Accident Fire & Life Assurance Corp.* (1910) 11 C.L.R. 620 at 636; *T.C.B. Ltd. v. Gray* [1986] Ch. 621.

in which although the proferens knows that the signatory has not read the contents, the signatory should be bound to the contract because a reasonable man would suppose that he has read the contract.[73]

In the present view, the solution to the problem of what substantive significance to assign to a signature, or conduct of acceptance, for that matter, should be found, not in either the estoppel theory or the objective theory of assent, but in a theory of procedural fairness which is compatible with the policy of facilitating the conclusion of contracts. This is easily done because rules of formation of contract should be procedurally fair if they are to function efficiently in promoting contract formation. Once a contract is concluded, the matter may be different; efficiency may be affected by liberal attempts to procure substantive fairness regardless whether the costs of guarding against substantive unfairness are more efficiently borne by the innocent party. These notions of substantive and procedural fairness must be explained more fully in order to substantiate the point being made. The distinction between substantive fairness and procedural fairness premises, not unreasonably, that the law may have to respond differently to unfair advantages of different kinds. Substantive fairness refers to fairness in the distribution of the risks of escalated burdens of performance of the contract, or of non-performance or deficient performance of the contract, or of destruction or severe market depreciation of its subject matter, as assessed in the light of the relative gains to the parties and the actual contingencies which have materialised whereas procedural fairness refers to fairness in the distribution of the costs of forming a contract, including the costs of violation of certain mutual assumptions or conventions about the process of reaching an agreement.[74] In sharp contrast with the case of a concluded contract, where the courts must hold the balance between efficiency and substantive fairness, concern with procedural fairness is indispensable in formulating a framework for contract formation that is efficient. Let us suppose that a party misrepresents that the motor car that he is seeking to sell has never been involved in an accident. The question whether a contract entered into in reliance on the representation should be set aside requires us

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[73] It is of course conceded that an objective theory of assent serves important purposes and discharges them well when the existence of the terms is not in dispute and only the sense or meaning of these terms is disputed. Very often, the nature of the terms themselves, when their existence is not questioned, furnishes the valuable evidence upon which, on the objective theory, the court can reach a definite conclusion as to their sense and meaning. But when the terms are in dispute, an objective theory may easily run into circular argument.

[74] This distinction departs from the distinction that Atiyah draws between matters relating to the fairness of the exchange and matters relating to the process of bargaining. See Atiyah, *Essays on Contract* (Oxford: Clarendon Press, 1986) Essay 11, Contract and Fair Exchange at 329–354. Atiyah concludes that there is an intimate relationship between certain processes of bargaining and the substantive justice of contracts. Those processes which impinge on the substantive justice of contracts are here included within the notion of substantive fairness.

to determine to what extent substantive fairness should override the principle of efficiency which the sanctity of contract embodies. Although holding the innocent party to his contract is efficient when the costs of the innocent party obtaining the correct information are less than the value of the loss to him because of the misrepresentation, it seems unfair that he has received a contractual performance which is less valuable than he thought it was and in virtually all cases the law intervenes to eliminate the substantive unfairness, despite possible inefficiency in result.[75] However, suppose that a potential contracting party represents that the terms of the contract he wishes to make are all the usual terms in the trade.[76] The question whether a contract entered into in reliance on the representation should be set aside is one of procedural fairness. The innocent party has not miscalculated the value of the contractual performance by relying on any specific information. There is no substantive unfairness in holding him to the contract. He has, however, been denied the opportunity to calculate that value as a result of the representation that the contract is simply a normal one in the trade. As he has been deprived of the opportunity to decide whether he would deal on the unusual terms, it would be procedurally unfair to hold him to those terms and only binding him to a contract with usual terms would be both procedurally fair and efficient. An inexorable signature rule which binds him to the unusual contract may seem to promote contractual efficiency, but this is superficial. Few will want to sign unless they have read through the contract and this fosters inefficiency when the terms are the usual terms in the trade. On the other hand, those who sign reasonably supposing that the terms are usual in the trade are penalised for their faith in the conventions of the market. Superficially, an inexorable signature rule seems to preclude difficult questions of fact as to whether terms are usual or unusual from arising and to afford a high degree of predictability as to enforcement of contractual terms; but in truth, it will not ultimately facilitate the conclusion of contracts. It will promote perhaps costly defensive conduct and worse, may create distortion as we propel forward into an increasingly signatureless electronic world.[77] It could, of course, be argued that such a rule would

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[75] It is generally efficient in the Kaldor-Hicks sense because it makes the loss fall on the party who has chosen not to invest in the discovery of the true position when the costs of obtaining the requisite information are less than the value of that loss. *Cf.* Atiyah, *supra* note 74 at 353: "So too the lack of information which often means that a party has mistakenly overvalued the other party's performance surely weakens the persuasive force of holding him bound by his consent, just as it weakens the argument that the exchange was a Pareto-optimal transaction."

[76] Of course, there may be trades in which no term can be said to be usual in the trade. There may also be difficulties as to whether a term is unusual by reference to the proferor or the proferens. What is unusual will change overtime and in transactions which cross borders, what is unusual in one jurisdiction may be usual in another.

[77] A strong signature rule will encourage undue concern with what constitutes an electronic signature.

promote contractual responsibility on the part of the signatory[78] and that would be efficient.[79] The argument suggests that a party should act responsibly by examining everything before he signs. But the question is whether this kind of responsibility is essential. We rightly recognise the importance of individual responsibility when there is loss to be prevented. But what loss does the offeror suffer when had the signatory read the contract, he would not have signed it on account of the onerous and unusual terms?

These brief arguments relating to procedural fairness must suffice for now. (They are considered more thoroughly below.) Reverting to Spencer's critique of the rule in *L'Estrange v. F. Graucob Ltd.*, we should also consider his more substantive criticism that it does not accommodate cases where the signatory to the contract labours under a mistake of which the offeror is aware or where the offeror is to blame for the signatory's mistake.[80] Although Spencer tried to show that a similar sort of mistake occurred in the case under examination, no such arguments had been canvassed before the court. The court was merely asked to find a case of misrepresentation and it could not on the evidence do so. Thus, it is possible that Spencer's criticism must be regarded as directed solely at the proposition which Scrutton L.J. articulated: "When a document containing contractual terms is signed, then, in the absence of fraud, or I will add, misrepresentation, the party signing it is bound, and it is wholly immaterial whether he has read the document or not."[81] The proposition evidently left out equitable mistake as a "defence" to the signature rule but there was nothing to suggest that Scrutton L.J.'s silence in that respect was intended to exclude the legal effectiveness of equitable mistake in the face of a purported signature of assent, or that he

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[78] "Contracting parties must have a care for their own legal positions by ascertaining what terms are to be part of a contract before signing it.": *PATEC* [2003] 1 S.L.R. 712 at para. 40.

[79] It might be argued that this would force consumers to be careful before signing on the dotted line and have the salutary effect of consumer protection. In reality, consumers often have no choice but to sign on the dotted line and if consumer protection is desirable, a strong signature rule is the least suitable device to employ as compared with direct measures such as prescribing forms which specify information consumers ought to know before they sign or imposing a mandatory cooling-off period.

[80] Thus the jurisdiction of equity did not extend to relieving a party from his contract when the nature of his mistake went not to the contract's subject matter or terms, but only to its commercial consequences and effect. Where the alleged mistake did not relate to the terms of the contract but merely to its potential for commercial exploitation, see *Clarion Ltd. v. National Provident Institution* [2000] 2 All E.R. 265. See also *Oceanic Village Ltd. v. Shirayama Shokusan Co. Ltd.* (unreported, 26 May 1999) where it was said that, "in normal arms-length negotiation, a businessman is [not] obliged to bring to the attention of the opposite party the fact that the opposite party may be under a 'mistaken' impression as to the commercial benefit or disadvantage of a certain proposed provision in the draft agreement".

[81] At 403.

was stating the signature rule exhaustively.[82] It is also possible that Spencer was arguing that, notwithstanding that no arguments based on equitable mistake were addressed to the court, since the facts of equitable mistake were indisputable, though not relied on by the parties, the decision must be taken to be a rejection of the legal effectiveness of equitable mistake[83] in relation to a signed contract in writing. This argument may be too strong to bear. In the cases said to establish equitable mistake, the mistake was as to either the nature or subject matter or a fundamental term of the contract.[84] In *L'Estrange v. F. Graucob Ltd.*, however, the mistake was as to the consequences of breach of the contract, in particular as to a clause which excluded liability for breach of condition or warranty.[85] It may be doubtful whether such a mistake would qualify as equitable mistake, all other things being equal. In any case, more importantly, it would be wrong to think that a party is mistaken whenever it turns out that had he read the contract before signing it, he would not then have signed it. A doctrine of mistake presupposes the existence in fact of a supposition which is false but which

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[82] He also left out *non est factum* but no one doubts that it is a valid defence capable of defeating a signed contract.

[83] See Evans L.J. in *William Sindall plc. v. Cambridgeshire C.C.* [1994] 3 All E.R. 932.

[84] It has been said that the modern English law stipulates four elements: (1) a party believes subjectively that a particular term is included in the contract; (2) the contract is executed with that omitted or varied; (3) the second-mentioned party executes the contract in the knowledge of requirement 2 and is not himself mistaken; and (4) the circumstances make it inequitable or unconscionable for the second-mentioned party to force the contract as executed on the first-mentioned party. See *J.J. Huber Investments v. The Private D.I.Y. Co. Ltd.* (unreported, 16 June 1995, E.W.H.C.). Alternative formulations stress unconscionability. See *e.g. Commission for the New Towns v. Cooper (G.B.) Ltd.* [1995] Ch. 259 at 280: "But were it necessary to do so in this case, I would hold that where A intends B to be mistaken as to the construction of the agreement, so conducts himself that he diverts B's attention from discovering the mistake by making false and misleading statements, and B in fact makes the very mistake that A intends, then notwithstanding that A does not actually know but merely suspects, that B is mistaken, and it cannot be shown that the mistake was induced by any misrepresentation, rectification may be granted. A's conduct is unconscionable and he cannot insist on performance in accordance to the strict letter of the contract; that is sufficient for rescission. But it may also not be unjust or inequitable to insist that the contract be performed according to B's understanding, where that was the meaning that A intended B should put upon it." In Australia, the doctrine of equitable mistake as it applies to rescission appears to be more restrictive. See *Taylor v. Johnson* (1983) 45 A.L.R. 265 at 432–433: "It is that a party who has entered into a written contract under a serious mistake about its contents in relation to a fundamental term will be entitled in equity to an order rescinding the contract if the other party is aware that circumstances exist which indicate that the first party is entering the contract under some serious mistake or misapprehension about either the content or subject matter of that term and deliberately sets out to ensure that the first party does not become aware of the existence of his mistake or misapprehension."

[85] See *Clarion Ltd. v. National Provident Institution* [2000] 2 All E.R. 265.

is thought mistakenly to be true. In that case, the signatory did not mistakenly suppose that there was a certain kind of exemption from liability which turned out to be false. He supposed nothing. He just signed the contract. If, then, the facts of the case did not warrant invocation of the doctrine of equitable mistake, there was no need to discuss it and the case would not be a rejection of equitable mistake.[86] Significantly, no court deciding a case on rectification of contract has ever supposed that the signature rule presented any obstacle to rectification on the ground of equitable mistake.[87] The fact that a contract is signed has never mattered in an application to rectify it on the ground of equitable mistake; and in view of these rectification cases, it would be anomalous if a signed contract could not be set aside on the ground of equitable mistake.

In the present view, the decision in *L'Estrange v. F. Graucob Ltd.*[88] was simply and narrowly that the act of signing the contract complete on its face *in the circumstances* which existed precluded an argument that the signatory did not read the document he had signed. But if there be some other fact warranting giving the signatory relief on some ground of procedural fairness, if for instance, there has been misrepresentation as to the nature of the manner in which assent to the contract is to be manifested or violation of the assumptions as to the manner in which the contract is to be formed, the act of signing will not bind the signatory to the other party by the document save to the extent it is within reasonable and legitimate expectations. It goes without saying that if there be facts warranting giving the signatory relief on some ground of substantive fairness which is legally effective, if for instance, there be facts calling for application of the doctrine of equitable mistake, going beyond arguments that the document was not read, the act of signing will not bind the signatory to the other party by the document.[89] A narrow reading of the signature rule is justifiable because it has nothing to do with the parol evidence rule but is based on procedural fairness while, now as it was then, the signature rule can never exclude evidence of substantive unfairness which is legally effective to preclude enforcement of the contract whether or not it is signed.

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86 It could be argued that in equity the word "fraud" is *nomen generalissimum* and covers equitable mistake. In any case, the omission of undue influence from the list has made no difference to the proposition that undue influence is relevant despite the signature of the plaintiff. See *The Governor & Co. of the Bank of Scotland v. Kustow* (unreported, 22 July 1997).

87 See footnote 53. See also the cases cited in footnote 80.

88 [1934] K.B. 394.

89 Indeed, there is authority in relation to a signed release. See *B.C.C.I. S.A. (in liq) v. Ali* [2000] 3 All E.R. 51.

IV. INCORPORATION

In this section, the rules of incorporation are first considered before their relationship with the signature rule is discussed. The question is important because incorporation as a way of constituting a commercial contract can no longer be glossed over. In the organised trades, contracting in accordance with pre-constituted standard form contracts, kept up to date by the traders themselves, is of prime importance. In the usual course, the parties sign a standard form contract but increasingly, they sign a shorter document which incorporates the standard form contract.

Incorporation as a way of constituting a contract is perhaps the most difficult to analyse. It has not received the attention it deserves and where it has been considered, studies are typically limited to the way it operates in relation to onerous terms such as exemption clauses.[90] Incorporation is in one sense similar to making a contract that is partly oral and partly written or a contract, wholly written, but contained in two or more documents. There are cases in which incorporation is the conscious result of choice and negotiation and is merely the short-hand mode of reproducing another contract as part of the contract finally reached. In such cases, the fact of incorporation does not raise any doubts as to the reality of consent between the parties because it merely transmits the details and particulars efficiently from one source to another. Then there are cases in which the question is whether an oral or written contract incorporates a separate oral or written contract in the absence of negotiation.[91] Apart from the so-called ticket cases,[92] a common example occurs when there is a main contract and a related contract and it is desired that there should be some consistency of risk and liability as between parties to the different contracts. The terms of the related contract may for that reason be incorporated into the main contract

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[90] See also *O.K. Petroleum A.B. v. Vitol Energy S.A.* [1995] 2 Lloyd's Rep. 160 at 162 where Colman J. said: "The effect of contractual provisions which are directed to the incorporation of the terms of one contract, to which one party to the incorporating contract is a party, into another has given rise to much controversy and to many decided cases. These authorities are particularly prevalent in this field of the incorporation into bills of lading of the terms of charter-parties in respect of the same voyage or, in the case of time charters, relating to the same vessel."

[91] For an example of an oral contract which incorporates a written contract, see *Moores v. Yakeley Associates Ltd.* (1998) 62 Con. L.R. 78.

[92] *I.e.* where there is an oral contract which purports to incorporate written terms usually printed on the back of a receipt or ticket. See *Dillon v. Baltic Shipping Co. (The Mikhail Lermontov)* [1991] 2 Lloyd's Rep. 155 (N.S.W. C.A.); *Thornton v. Shoe Lane Parking Ltd.* [1971] 2 Q.B. 163 at 170. In determining whether sufficient notice of a term or condition limiting the defendant's common law liability has been given, the courts pay attention to the fact, and extent, and not only the precise mechanics, of the limitation. The fact and extent are said to be of primary importance. See also *Daly v. General Steam Navigation Co. Ltd. (The Dragon)* [1979] 1 Lloyd's Rep. 257 at 262.

or *vice versa*.[93] In the organised trades, parties may enter into a standard form contract with a few negotiated changes typed out or superimposed on the printed form or with a few terms in the standard form contract crossed out. Alternatively, they may incorporate the standard form contract in a written contract which contains the negotiated changes and modifications. These are in essence negotiated contracts only in a few critical terms and the parties are apparently content that the rest of the terms should be the terms and conditions contained in the standard form contract. Reality of consent is an issue in such cases.

A little reflection leaves us in little doubt that there is considerable futility and confusion in using the terminology of incorporation when the so-called incorporated contract is the subject of negotiation and incorporation is merely a shorthand device to avoid writing out the entire contract again. When a contract is fully negotiated, the assent is indivisible. The entire contract which is made up of oral and incorporated terms takes effect at the same time and either the party has given his entire assent or he has not. Every term of such a contract is equally effective if valid and equally ineffective if invalid whether it is an incorporated term or an original term of the contract.[94] That being the case, to say that a term is incorporated when it has been fully negotiated is to convey nothing further that is meaningful.

When incorporation is used in the second sense, this is no longer true. There is a real or non-negligible possibility that the parties may not have

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[93] For instance, in reinsurance contracts, the purpose is to make the arrangements back to back with the underlying insurance. See *Citadel Insurance Co. v. Atlantic Union Insurance Co. S.A.* [1982] 2 Lloyd's Rep. 543 at 546. Again, where there is "but one carrier under both charter-party and bill of lading, and that is the shipowner, and but one voyage, it [will be] the shipowner's interest will be to procure, by incorporation into the bill of lading of the terms of the charter-party, the minimum dislocation between his rights and obligations as carrier *vis-à-vis* the charterer and his rights and obligations *vis-à-vis* the original and any subsequent bill of lading holder. That interest is likely to be known to any bill of lading holder whose goods are carried by a chartered ship": *O.K. Petroleum A.B. v. Vitol Energy S.A.* [1995] 2 Lloyd's Rep. 160 at 163.

[94] Thus, while an incorporated term is in every respect a term of the contract and it functions as such and has all the attributes of a term of the contract, its scope may be limited by the date of incorporation. When a clause in a contract governed by Singapore law incorporates provisions of a foreign law, those provisions in force as at the date of incorporation apply and subsequent changes to the foreign law are irrelevant. Incorporation in this case has the effect of insulating the parties against changes in the law. See also *Jacobs, Marcus & Co. v. The Credit Lyonnais* (1884) 12 Q.B.D. 589 at 604. However, there is a rule of construction that greater weight should attach to terms which the particular contracting parties have chosen to include in the contract than to pre-printed terms probably devised to cover very many situations to which the particular contracting parties have never addressed their minds. See *Homburg Houtimport B.V. v. Agrosin Private Ltd. (The Starsin)* [2003] U.K.H.L. 12. See also *Robertson v. French* (1803) 4 East 130 at 136; *Glynn v. Margetson* [1893] A.C. 351 at 358; *Re an Arbitration between L. Sutro & Co. and Heilbut, Symons & Co.* [1917] 2 K.B. 348 at 361–362.

assented to the terms which have not been negotiated or they may have only assented in a limited manner.[95] In particular, where an incorporating clause is used to carry over terms from another contract without negotiation, which are inconsistent in part with the terms of the containing contract, the parties may have only assented to the incorporated terms in a limited manner. That is why care should be taken to ensure that unsuitable terms are not forced into the containing contract. The shoe ought to fit without a significant degree of manipulation and the principal purpose of the containing contract therefore should exert a dominant control over the extent to which the terms are incorporated.[96] There will of course be cases, exceptional no doubt, in which the unnegotiated provisions of the incorporated contract may be preferred over the negotiated terms of the containing contract.[97]

Experience shows there are two complications in true incorporation cases. Where a contract is purportedly incorporated by a clause in another contract, confusion between incorporation and interpretation is the first.[98]

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[95] Note that "If a man is given a blank ticket without conditions or any reference to them, even if he knows in detail what the conditions usually exacted are, he would not, in the absence of any allegation of fraud or of that sort of mistake for which the law gives relief, be bound by such conditions": Lord Devlin in *McCutcheon v. David MacBrayne Ltd.* [1965] 1 W.L.R. 125 at 136. Of course, it is impossible for a party who has inserted terms and conditions on the reverse side to argue that those terms and conditions were not intended to be part of the contract contained on the front of the document: see *Lafi Office and International Business S.L. v. Meridien Animal Health Ltd.* [2000] 2 Lloyd's Rep. 51.

[96] The courts have enjoyed a good measure of success in a number of quarters. Inconsistencies between the incorporated contract and the main contract are also best resolved with the principal purpose firmly in view. Thus, as *Garbis Maritime Corporation v. Philippine National Oil Co. (The Garbis)* [1982] 2 Lloyd's Rep. 283 shows, general words of incorporation in a bill of lading may be effective to incorporate terms of an identifiable charter-party which are relevant to the shipment, carriage and discharge of the cargo and the payment of freight, provided of course that the terms of the charter-party are consistent with the terms of the bill of lading. This rule was applied to a bill of lading containing blanks since there appeared to be no doubt that the relevant charter-party was the charter between the owners and the charterers. As in *The San Nicholas* [1976] 1 Lloyd's Rep. 8 the general words of incorporation in the bill of lading were, despite the uncompleted blanks, effective to incorporate the charter-party terms.

[97] Unless however there is proof of negotiations leading to that particular incorporation, a result which gives overriding effect to the incorporated contract would be exceptional. *Adamastos Shipping Co. Ltd. v. Anglo-Saxon Petroleum Co. Ltd.* [1959] A.C. 133 is instructive, although it was probably not a case where the incorporated term was unnegotiated. The typed slip in the charterparty had the effect of incorporating the provisions of the *Carriage by Goods by Sea Act 1936* of the United States. The typed slip referred to "This bill of lading" whereas the containing contract was a charterparty. Further, the Act in s. 5 stated that it was not applicable to charterparties. The House of Lords held that these inconsistencies in the typed slip had to be rejected as being meaningless.

[98] A contract can be impliedly incorporated under the business efficacy or officious bystander or generic contract necessity tests. See *Larussa-Chigi v. C.S. First Boston Ltd.* [1998] C.L.C. 418.

Interpretation easily passes for incorporation and incorporation for interpretation.[99] Logically, interpretation can only proceed after the contract is ascertained as formed and the process of ascertaining that there is a contract of a particular nature is not interpretation but incorporation. Nevertheless, as a matter of practice, there is a considerable shading of one to the other, as two examples will suffice to demonstrate. Everybody knows that evidence of prior negotiations is admissible to interpret the meaning of an ambiguous term of the contract while evidence of a course of dealing even more securely reveals that meaning.[100] But the same question may be framed as an issue of incorporation to be resolved by asking whether a contractual term has been incorporated by course of dealing.[101] The same device, a previous course of dealing, may be an interpretive guide or a mode of incorporation, making it imperative that we must be clear about what is being done.[102]

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[99] Farnworth, *supra* note 8 at para. 7.7 designates as interpretation the process by which a court ascertains the meaning that it will give to the language used by the parties in determining the legal effect of the contract. There is a narrower meaning which sees interpretation as a non-neutral exercise informed by certain policies to protect reasonable reliance or expectations created by words that are used. The term "construction" has been used to describe this more activist exercise and the task that befalls the court. The courts often use the terms interchangeably. Thus, "Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract": see *Alford v. West Bromwich Building Society, Armitage v. West Bromwich Building Society* [1998] 1 All E.R. 98 at 114.

[100] This has been defined as "A sequence of previous conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct." See U.C.C. § 1–205(3).

[101] See *Henry Kendall & Sons v. William Lillico & Sons* [1968] 2 All E.R. 444 affmg [1966] 1 All E.R. 309. See also *Circle Freight International Ltd. (T/A Mogul Air) v. Medeast Gulf Exports Ltd. (T/A Gulf Export)* [1988] 2 Lloyd's Rep. 427. *Cf.* Lord Devlin at *McCutcheon v. David MacBrayne Ltd.* [1965] 1 W.L.R. 125 at 134: "previous dealings are relevant only if they prove knowledge of the terms, actual and not constructive, and assent to them. If a term is not expressed in a contract, there is only one other way in which it can come into it and that is by implication. No implication can be made against a party of a term which was unknown to him. If previous dealings show that a man knew of and agreed to a term on 99 occasions there is a basis for saying that it can be imported into the hundredth contract without an express statement. It may or may not be sufficient to justify the importation,—that depends on the circumstances; but at least by proving knowledge the essential beginning is made. Without knowledge there is nothing." Course of dealing is distinguished from usage. *Cf. Roe v. Naylor (No. 2)* (1918) 87 L.J.K.B. 958.

[102] Note that there is authority that incorporation can occur by implication arising out of usage. See *Fal Bunkering of Sharjah v. Grecale Inc. of Panama* [1990] 1 Lloyd's Rep. 369 at 373 where Saville J. said: "The time may well come when it can be said to be generally known and accepted among those (and their professional advisers) using London maritime arbitration, that the acceptance of an appointment by an LMAA arbitrator carries with it, literally without saying, that the appointment is subject to the application of the LMAA Terms. In such a situation, it seems to me that provided each party notifies the other that he has appointed an LMAA member, both will be taken to have agreed by that means to incorporate the LMAA

If incorporation is in view, there are authorities that the test by which to determine whether the incorporation by course of dealing succeeds is that which the House of Lords laid down in *McCutcheon v. David MacBrayne Ltd.*,[103] namely: would a reasonable man in the position of the party seeking to found on the incorporated terms conclude that the other party both knew their contents and had accepted them as applicable?[104] This test is derived from the objective theory of assent.

In a second line of cases, the question of incorporation is not just whether there has been incorporation in general terms but whether particular terms have been incorporated by the general words referring to the contract in which they occur.[105] This question theoretically is answered by construing the general words of incorporation.[106] In fact, the only issue is one of

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Terms in their reference." Note also the line of cases of which *The Pioneer Container* [1994] 2 A.C. 324 is a chief example. In these cases, a bailee or sub-bailee can invoke terms of another contract between the owner and another contracting party to the extent that the owner has expressly or impliedly consented to them or has ostensibly authorized them, by authorising the other contracting party to make a sub-contract on the same terms contained in the main contract or terms usually current in the trade. In the case above-mentioned, a carrier of goods sub-contracted part of the carriage to a shipowner under a "feeder" bill of lading and the shipowner sought to enforce an exclusive jurisdiction clause contained in that bill of lading against the owners of the goods. It was held that the shipowner was entitled to enforce an exclusive jurisdiction clause contained in the bill of lading against the owners of the goods because they had authorised the carrier so to sub-contract "on any terms". See also *Spectra International plc. v. Hayesoak D.R. Warehousing Ltd.* [1997] 1 Lloyd's Rep. 153.

103 [1964] 1 W.L.R. 125.

104 "In short, did the parties, by word, writing, deed, and silence, so conduct themselves as to justify the inference that it was their mutual intention that the pursuers' conditions of sale should be part of the particular contract which is in dispute?": *Continental Tyre & Rubber Co. Ltd. v. Trunk Trailer Co. Ltd.* [1987] S.L.T. 58 at 61. These remarks followed on a citation of earlier authority, including an excerpt from the speech of Lord Reid in *McCutcheon v. David MacBrayne Ltd.* at [1964] 1 W.L.R. 125 at 128 where his Lordship quoted from *Gloag on Contract*, 2nd ed. (Edinburgh: W. Green & Son Ltd., 1929) at 7 to this effect: "The judicial task is not to discover the actual intentions of each party; it is to decide what each was reasonably entitled to conclude from the attitude of the other." This test is broad enough to cover the case where although there is no course of dealing there is a common understanding derived from the conduct of the parties that they contracted on one party's standard terms and conditions. For the common understanding point, see Lord Denning M.R. in *British Crane Hire Corp. Ltd. v. Ipswich Plant Hire Ltd.* [1975] 1 Q.B. 303. See also *Thames Tideway Properties Ltd. v. Serfaty & Partners* [1999] 2 Lloyd's Rep. 110.

105 Note that according to the English Court of Appeal in *Circle Freight International Ltd. (T/A Mogul Air) v. Medeast Gulf Exports Ltd. (T/A Gulf Export)* [1988] 2 Lloyd's Rep. 427 at 433, "it is not necessary to the incorporation of trading terms into a contract that they should be specifically set out provided that they are conditions in common form or usual terms in the relevant business. It is sufficient if adequate notice is given identifying and relying upon the conditions and they are available on request."

106 Thus, words that the contract is subject to the general terms and conditions are sufficient to incorporate those terms and conditions: *Wyndham Rather Ltd. v. Eagle Star & British Dominions Insurance Co. Ltd.* (1925) 21 Ll L. Rep. 214 where the slip stated that it was subject to the proposal form which in turn stated that it was subject to the usual conditions

interpretation because once the general words are interpreted to mean that the contract includes the terms in question, incorporation follows.[107] But the cases are actually not as transparent.[108] In some of these cases, the question was whether an arbitration or jurisdiction clause was incorporated by general words referring to another contract containing the clause. Here, the reasoning based on construction has emphasised its ancillary nature.[109]

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of the company's policy. It was held that as one of those terms was an arbitration clause, the contract of insurance contained a submission to arbitration. *Cf. Aluminium Industrie Vaassen B.V. v. Romalpa Aluminium Ltd.* [1976] 1 W.L.R. 676. See also *Homburg Houtimport B.V. v. Agrosin Private Ltd. (The Starsin)* [2003] U.K.H.L. 12 where it was held, as a matter of construction, that as businessmen expected the identity of the carrier together with other variables which described the objects of the particular voyage, such as the vessel, the goods, and the ports of loading and discharge, to be found on the face of the bill and not tucked away among the standard terms and conditions printed on the back; that since 1994 the practice of the market had been adopted by the I.C.C. Uniform Customs and Practice for Documentary Credits, Art. 23 of which indicated that banks did not in practice examine the contents of the terms and conditions of carriage on the reverse of a bill of lading; that against such a commercial background it would create an unacceptable trap to allow the detailed conditions on the back of a bill of lading to prevail over an unequivocal statement of the identity of the carrier on the face of the bill. The same arguments could as well have been reasons to regard the case as one where the term as to identity of the contracting party printed on the reverse side of the bill of lading was not incorporated.

[107] Where there is an express reference to the clause to be incorporated, the express reference "is sufficient to render the [party] aware of the clause so as not to inhibit incorporation of the clause": *H.I.H. Casualty & General Insurance Ltd. v. New Hampshire Insurance Co.* [2001] 1 Lloyd's Rep. 378 at 386.

[108] The court in *H.I.H. Casualty & General Insurance Ltd. v. New Hampshire Insurance Co.* [2001] 1 Lloyd's Rep. 378 at 386 summarized the effect of the case law on reinsurance contracts as follows. "Incorporation of a specific term (or condition) is only achieved if: (i) The term is germane to the reinsurance. (ii) The term makes sense, subject to permissible "manipulation", in the context of the reinsurance. (iii) The term is consistent with the express terms of the reinsurance. (iv) The term is apposite for inclusion in the reinsurance." It is the last item which is decided as a matter of general principle and not interpretation.

[109] *T.W. Thomas & Co. Ltd. v. Portsea S.S. Co. Ltd.* [1912] A.C. 1 is the source of the rule of construction that that when it is sought to introduce into a document like a bill of lading, which is a negotiable instrument, a clause such as an arbitration clause, not germane to the receipt, carriage, or delivery of the cargo or the payment of freight, distinct and specific words, and not general words, of incorporation are necessary. See *The Annefield* [1971] 1 Lloyd's Rep. 1; [1971] P. 168; [1970] 2 Lloyd's Rep. 252. For a case not involving a bill of lading, see *Authgon Ltd. v. M.F. Kent Services Ltd.* [1991] 31 Con. L.R. 60. The same rule has been applied to time bar clauses in these terms: "where the incorporated contract does not exist when the incorporating contract is entered into and cannot be presumed by the parties to the latter to contain any specific wording or terms, the established approach to construction is that general words of incorporation will not normally be construed as wide enough to incorporate any provision from the other contract unless that provision is part of the subject-matter of that contract and not merely ancillary to it, such, for example, as an arbitration clause or a jurisdiction clause. Such ancillary provisions will not generally be treated as relevant or germane to the rights and obligations of the parties under the incorporating contract": *O.K. Petroleum A.B. v. Vitol Energy S.A.* [1995] 2 Lloyd's Rep. 160 at 168. For jurisdiction clauses, see *A.I.G. Europe Ltd. v. The Ethniki* [2000] 2 All E.R. 566 in which the Court of

In other contexts, the question has been assumed to be one of formation of contract by incorporation.[110] What is particularly striking is that in many of the cases where the question is regarded as one of construction, it is questionable whether the courts were really engaging in an exercise of construction.[111] In *Interfoto*, the English Court of Appeal concluded that "[t]he tendency of the English authorities has … been to look at the nature of the transaction in question and the character of the parties to it; to consider what notice the party alleged to be bound was given of the particular conditions said to bind him; and to resolve whether in all the circumstances it is fair to hold him bound by the condition in question".[112] This is not the language of interpretation, at least as we normally understand it. As if to confirm all this, more than a few courts have pronounced the *Interfoto* proposition to be a general principle, not restricted in scope to the so-called ticket cases in which written terms printed on the reverse side of a document are said to have been incorporated in an oral contract.[113] Some have called it a doctrine

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Appeal distinguished the cases above-mentioned but nevertheless held that the general words "as original" in the re-insurance did not have the effect of incorporating the jurisdiction clause from the underlying insurance. See also *H.I.H. Casualty & General Insurance Ltd. v. New Hampshire Insurance Co.* [2001] 1 Lloyd's Rep. 378.

110 Examples begin to proliferate. See *Welex A.G. v. Rosa Maritime Ltd. (The Epsilon Rosa) (No. 2)* [2002] 2 Lloyd's Rep. 701; *Egon Oldendorff v. Libera Corp.* [1995] 2 Lloyd's Rep. 64; *Partenreederei M/s "Heidberg" v. Grosvenor Grain and Feed Co. Ltd. (The Heidberg)* [1994] 2 Lloyd's Rep. 287; *Rich (Marc) & Co. A.G. v. Societa Italiana Impiante P.A. (The Atlantic Emperor) (No. 1)* [1989] 1 Lloyd's Rep. 548.

111 In insurance cases, an incorporating clause merely confirms the presumption that the proposal is on the insurer's standard terms of business. See *Nsubuga v. Commercial Union* [1998] 2 Lloyd's Rep. 682.

112 *Interfoto Picture Library Ltd. v. Stiletto Visual Programmes Ltd.* [1989] Q.B. 433. In *Interfoto*, Lord Justices Dillon and Bingham reached the same conclusion by different routes. To the former, the clause was not incorporated in the contract. To the latter, the clause was incorporated but should not be given effect to in the circumstances of the case. The doctrine first appeared in the ticket cases. See *Parker v. South Eastern Railway Co.* (1877) 2 C.P.D. 416; *Thornton v. Shoe Lane Parking Ltd.* [1971] 2 Q.B. 163; *Spurling v. Bradshaw* [1956] 2 All E.R. 121. *Garbis Maritime Corporation v. Philippine National Oil Co. (The Garbis)* [1982] 2 Lloyd's Rep. 283 indicates, perhaps as an exception to the doctrine, that unusual terms may be incorporated despite the absence of notice where unusual clauses are a feature of the relevant trade. It was there held that it is a notorious fact that charter-parties may contain not only, in their printed terms, clauses which provide shipowners with sweeping exemptions from liability, but also special typed clauses, which can provide shipowners with exemptions from liability in special circumstances. The contract itself contemplated that special provisions might be inserted in the charter-party. *Cf. Homburg Houtimport B.V. v. Agrosin Private Ltd. (The Starsin)* [2003] U.K.H.L. 12.

113 The holding in *Consmat Singapore (Pte. Ltd.) v. Bank of America National Trust & Savings Association* that the *Interfoto* doctrine is thus restricted has been superseded. Note, however, that the doctrine does not apply where the proferor intends to be bound to the contract whatever the terms and conditions may turn out to be. See *Laceys Footwear (Wholesale) Ltd. v. Bowler International Freight Ltd.* [1997] 2 Lloyd's Rep. 369 where the proferor knew that the proferens was contracting on terms and conditions which limited or were likely to

which determines the question of whether general terms of incorporation can import an onerous or unusual or collateral term, to be distinguished from questions of the binding force of usual terms which are extended or expanded.[114]

It is not surprising that questions should be agitated concerning the relationship between the test of incorporation by course of dealing and the *Interfoto* doctrine. There is at least one opinion that these are different tests, although many more courts have commented that they are the same.[115] This is a more profound rift than what the courts are willing to concede. The *Interfoto* doctrine is couched in the language of duty and that implies its underlying concern is with procedural fairness. It asks whether the fact that one party chooses not to read the incorporated terms is reasonable in the circumstances so that the proferens has a duty to act if he desires any other result. The objective theory of assent, however, stresses the external appearance of the proferor's actions to the proferens as a reasonable observer and makes assumptions about the proferor's knowledge and conduct from the perspective of the proferens.[116]

There is a second complication arising from the corruption of rules of incorporation, from which the *Interfoto* doctrine has not been spared. Perhaps unfortunately, many incorporated terms in practice tend to be onerous terms and the application of rules of incorporation prior to passage of the *Unfair Contract Terms Act 1977* (UCTA) was something of an exercise in

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limit their liability as carriers but did not bother to read them because he was going to take out insurance on the goods. It was held that whether the steps taken by the proferens to draw the conditions to the proferor's attention were adequate was beside the point and that the terms and conditions did apply to this contract of carriage.

114 *Bankway Properties Ltd. v. Penfold-Dunsford* [2001] 1 W.L.R. 1369. Or a matter of general principle as in *H.I.H. Casualty & General Insurance Ltd. v. New Hampshire Insurance Co.* [2001] 1 Lloyd's Rep. 378 at 387; or as a general rule in *T.I.C.C. Ltd. v. Cosco (U.K.) Ltd.* (unreported, 5 December 2001). There is no doubt that the *Interfoto* doctrine applies to collateral terms except where incorporation occurs by operation of law. Note that this article does not pause to consider whether unusual or onerous terms may be overlapping concepts.

115 *Cf. The Pioneer Container* [1994] 2 A.C. 324 at 346 where the *McCutcheon v. David McBrayne Ltd.* test was applied to an incorporation by incorporating clause. "In England, there have been at least three cases where conditions referred to in non-contractual documents passing between the parties in the course of prior dealings have been held to be incorporated in a subsequent verbal contract. These are *Eastman Chemical International A.G. v. N.M.T. Trading Ltd.*; *Keeton Sons & Co. v. Carl Prior Ltd.* and, most recently, *Circle Freight International Ltd. v. Medeast Gulf Exports Ltd.* In the last of these cases, the English Court of Appeal appears to have decided that the "notice" test and "*McCutcheon*" or "*Hardwick Game Farm*" test were, in effect, synonymous": *William Teacher & Sons Ltd. v. Bell Lines Ltd.* 1991 S.L.T. 876 at 878. See also *Buchanan t/a Warnocks v. Brook Walker & Co. Ltd.* [1988] N.I. 116.

116 *Parker v. South Eastern Railway Co.* (1877) 2 C.P.D. 416 at 420–424. *Cf.* Bramwell L.J. at 428.

prescribing standards of substantive fairness. The courts found it hard to resist adopting a protective attitude towards a vulnerable contracting party and, lacking a doctrine of unfair terms, resorted artificially to either the device of refusing incorporation, or of *contra proferentem* construction.[117] Arising out of this protective attitude, and not any firmly declared policy, the question of incorporation was deliberately obscured by manipulating the rules of incorporation so as to control unfair terms which excluded or restricted liability for breach of contract. The UCTA which has been on the law books since 1977 should lead to the elimination of this distortion since "[t]he reasonableness of clauses is the subject matter of the *Unfair Contract Terms Act* and it is under the provisions of that Act that problems of unreasonable claims should be addressed and the solution found".[118] This was Hobhouse L.J.'s main justification for insisting, in his dissent in *A.E.G. (U.K.) Ltd. v. Logic Resource Ltd.*,[119] that the *Interfoto* doctrine must be confined to terms which are unusual or onerous by type only and should not be enlarged to reach terms which are unusual or onerous by reason that they are so in effect or that they produce an unreasonable result.

This has produced another rift in the law; between those who say, with Hobhouse L.J., that because of passage of the UCTA, the *Interfoto* doctrine is primarily addressing terms that are unusual or onerous by type, and those who claim, with the majority, that it is addressing terms which are unusual or onerous by effect as well.[120] The rift has not been lost on courts deciding subsequent cases relying on the doctrine; but there seems to be more support for the majority view.[121] There seems to be in Hobhouse L.J.'s distinction a sense that the doctrine, which before passage of the UCTA had transformed into a principle of substantive fairness, must be restored to its concern with procedural fairness and that the line between procedural and substantive fairness is drawn precisely at the distinction between unusualness or onerousness in type and unusualness or onerousness in effect. With respect, the assumption that it coincides with the line between type and effect is questionable because, as will be seen shortly, the UCTA has not been drafted

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117 Waddams, "Unconscionability in Contracts" (1976) 39 M.L.R. 369 at 381–382.

118 *A.E.G. (U.K.) Ltd. v. Logic Resource Ltd.* [1996] C.L.C. 265 at 277.

119 [1996] C.L.C. 265.

120 In *A.E.G. (U.K.) Ltd. v. Logic Resource Ltd.* [1996] C.L.C. 265, Lord Justice Hobhouse, who dissented, held that the proper approach was to consider what kind of clause was in issue, and then to decide whether sufficient steps had been taken to bring the existence of that kind of clause to the notice of the other party and also to decide whether the particular clause was onerous or unusual by reference to the kind of clause that it was. It was wrong, he said, to apply that test to the specific terms of the clause in question. It seems to me that the question of incorporation must always depend upon the meaning and effect of the clause in question. It may be that the type of clause is relevant. It may mean that the effect of the particular clause in the particular case is relevant.

121 See *O'Brien v. M.G.N. Ltd.* [2001] E.W.C.A. Civ. 1279.

so as to be a comprehensive statute and there are not a few cases where the *Interfoto* doctrine has to be applied without any possibility of further applying the UCTA. At least where the doctrine alone is applicable, it must embrace both terms which are unusual or onerous by type as well as terms which are so by effect.

All the same, no one would disagree that passage of the UCTA does not signal an end to questions of incorporation. In commercial cases in which the parties deal on standard terms of business, the UCTA is limited in scope to contract terms which exclude or restrict liability for breach of contract[122] including contract terms which purport to entitle one party to render a contractual performance substantially different from that which was reasonably expected of him or to render no performance at all in respect of any or the whole of his contractual obligation.[123] Such terms are unenforceable in so far as they are unreasonable.[124] Section 13 of the Act gives a very wide meaning to terms which exclude or restrict liability. Terms which make the liability or its enforcement subject to restrictive or onerous conditions; exclude or restrict any right or remedy in respect of the liability, or subject a person to any prejudice in consequence of his pursuing any such right or remedy; exclude or restrict rules of evidence or procedure are also brought within the scrutiny which the Act empowers. Thus, a term which conditions enforcement of a contract of sale on making full payment despite non-delivery of the goods is caught and prevented from enforceability in so far it is unreasonable.[125] Such a term makes enforcement subject to a

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[122] Section 3(2)(a). For an example of a clause which does not restrict or exclude liability, see *Britvic v. Messer* [2002] 1 Lloyd's Rep. 20.

[123] Section 3(2)(b).

[124] But it is not envisaged that the terms can be re-written. The terms are either valid or invalid. In *R.W. Green Ltd. v. Cade Bros. Farm* [1978] 1 Lloyd's Rep. 602, a clause of the contract required the buyer to complain to the seller of any defects within three days after arrival of the potatoes. The potatoes were affected by a potato virus which could not have been detected within the stipulated 3 days and it was held that the clause was unreasonable. The whole clause was thrown out.

[125] Or conditions it on giving notice or performance of a particular stipulation. See *Blast King Shipping Corp. & Wayang (Panama) S.A. v. Mark Ranald Massie (The Litsion Pride)* [1985] 1 Lloyd's Rep. 437 where the combined effect of two provisions in the contract was that unless express notice was given by the assured before commencement of the voyage, he would in any event be liable to pay the premium. This led to a possible extremely one-sided consequence that the underwriter would be entitled to his additional premium for a voyage where he would not have been on risk. Or as in *Saveheat Insulations Ltd. v. Alexander McVean* 1991 S.C.L.R. 28 where the contract, in terms of condition 8, could be cancelled only if: (1) the company exceeded the anticipated delivery date; (2) the defender wrote to the pursuers by recorded delivery advising them that if they failed to install the door within six weeks from the date of receipt of the letter, the defender would cancel the contract and require return of his deposit, and (3) the door was not in fact delivered and fitted within that six-week period. The terms of this condition effectively tied the defender to the contract with the pursuers unless and until, by invoking this procedure, he cancelled the contract.

restrictive or onerous condition.[126] A conclusive evidence clause which precludes a plaintiff from proving breach of contract is also caught.[127] Such a term excludes a rule of evidence. Similarly, a term which shortens the statutory limitation period is a term which restricts a rule of procedure and is unenforceable in so far as it is unreasonable.[128] However, extensive as the Act may be, there are some matters which are outside its domain.[129] A retention of title clause is plainly outside its domain. An agreement in writing to submit present or future differences to arbitration is not to be treated as excluding or restricting any liability even though the effect may be to exclude or restrict liability. This is expressly stated.[130] Unlike the arbitration agreement, the prorogation agreement is not expressly covered and it could be argued *expressio unius exclusio alterius*. Perhaps the better view is that the prorogation agreement is simply outside the scope of the Act for the simple reason that though it is a rule of procedure, there is no meaningful sense to saying that a prorogation agreement excludes or restricts a rule of procedure within the meaning of the Act.[131] Perhaps more controversially,

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126 Clauses which create the rectification obligation, and the contractor or supplier's corresponding right to rectify defects, and which do not contain words of exclusion, cannot be treated as exclusion or limitation clauses, as in *Hancock v. B.W. Brazier (Anerley) Ltd.* [1966] 1 W.L.R. 1317 and *Pearce and High Ltd. v. Baxter* [1999] B.L.R. 101; [1999] C.L.C. 749. Clauses of this kind typically they confer additional rights and obligations requiring the contractor or supplier to undertake additional work to rectify defects which appear within a defined time after completion usually without additional payment. They may be seen as benefiting both parties. See also *B.H.P. Petroleum Ltd. v. British Steel plc.* [2000] 2 Lloyd's Rep. 277.

127 *Consmat Singapore (Pte. Ltd.) v. Bank of America National Trust & Savings Association* [1992] 2 S.L.R. 828 where the court, assuming the UCTA was applicable, found the conclusive evidence clause to be reasonable in the circumstances. I am grateful to Assoc. Prof. Yeo Tiong Min for drawing my attention to this case as well as s. 13 of the UCTA.

128 It is doubtful that the abrogation of a statutory right is included.

129 In *Oversea-Chinese Banking Corp. Ltd. v. The Timekeeper Singapore Pte. Ltd.* [1997] 2 S.L.R. 526 it was thought that, assuming it existed, a term imposing a duty on the part of the creditor to inform guarantors of accounting particulars of the debtor and of a grant of credit in excess of the guarantee limits to the debtor and one of the guarantors to be used for the purposes of a competitor's business would not be one excluding or restricting liability. This kind of approach enjoys the support of the House of Lords in *Arthur White (Contractors) Ltd. v. Tarmac Civil Engineering Ltd.* [1967] 1 W.L.R. 1508. But the effects theory is preferred in *Phillips Products Ltd. v. T. Hyland and Hamstead Plant Hire Co. Ltd.* [1987] 2 All E.R. 620. "To decide whether a person 'excludes' liability by reference to a contract term, you look at the effect of the term".

130 By the same token, a reference to alternative dispute resolution or ADR, which is analogous to a prorogation agreement: see *Cable & Wireless plc. v. I.B.M. U.K. Ltd.* [2002] E.W.H.C. 2059 (Comm.). It was there held that the reference to ADR in clause 41.2 included a sufficiently defined mutual obligation upon the parties to go through the process of initiating a mediation, selecting a mediator and at least presenting the mediator with its case and documents and was therefore of binding effect.

131 A prorogation agreement certainly neither excludes nor restricts a rule of procedure directly. Indirectly, a prorogation agreement can have the effect of by-passing certain limits on liability which the law has set and there is a decision, *The Hollandia* [1983] 1 A.C. 565, which struck

as the Act predicates a claim of liability against which reliance on the contract term excluding or restricting liability is opposed as a defence, it could be argued to have no application to a claim of specific enforcement of a duty or an application for an injunction to restrain a breach of a negative covenant such as covenant not to sue.[132] The UCTA appears to have nothing to say about such claims and if so, the question of incorporation will remain important in relation to these claims.

V. *PATEC*

That the incorporation rules, especially the *Interfoto* rule, and the signature rule may be inconsistent becomes embarrassingly clear in cases where a party signs a document which incorporates another by reference to it. In such cases, does the rule in *L'Estrange v. F. Graucob Ltd.* apply so that the signatory is bound to the other party by the incorporated terms though he never read them or does the *Interfoto* rule apply so that the other party despite his signature is never bound by unusual or onerous terms to which his attention was not specifically drawn? This important issue was one of the two principal issues in *PATEC*.[133] The defendant freight-forwarders

down a submission to a foreign jurisdiction on the ground that it would lead to subversion of these limits.[131] But the case was a decision under the U.K. *Carriage of Goods by Sea Act 1972* and it was not suggested there that the UCTA would have been applicable in the alternative.[131] Note that s. 26(1) read with s. 26(3) withdraws the Act from a contract of sale of goods or one under or in pursuance of which the possession or ownership of goods passes; made by parties whose places of business (or, if they have none, habitual residences) are in the territories of different States. According to s. 26(4), a contract falls within subsection (3) only if either (a) the goods in question are, at the time of the conclusion of the contract, in the course of carriage, or will be carried, from the territory of one State to the territory of another; (b) the acts constituting the offer and acceptance have been done in the territories of different States; or (c) the contract provides for the goods to be delivered to the territory of a State other than that within whose territory those acts were done. Note also that in *The Mahkutai* [1996] A.C. 650 it was held that unlike exceptions and limitations which gave rights without correlative obligations, an exclusive jurisdiction clause, embodied a mutual agreement under which both parties agreed with each other as to the relevant jurisdiction for the resolution of disputes and therefore created mutual rights and obligations and that accordingly, even if the shipowners qualified as a "sub-contractor" within the meaning of a Himalaya clause (which remained an open question) the exclusive jurisdiction clause could not be described as an exception, limitation, provision, condition or liberty benefiting the carrier within the meaning of the clause. *Cf. Unfair Terms in Consumer Contracts Regulations 1994* S.I. 1994/3159; *Union Discount Co. Ltd. v. Zoller* [2002] 1 All E.R. 693 at para. 5.

[132] As is *Gore v. Van Der Lann* [1967] 2 Q.B. 31. See also *Nippon Yusen Kaisha v. International Import and Export Co. Ltd. (The Elbe Maru)* [1978] 1 Lloyd's Rep. 206; [2000] 1 Lloyd's Rep. 85 at 99–100.

[133] *PATEC* did not raise any conflictual issues presumably because the issues were either contractual or evidential and in either event would be governed by Singapore law. The possibility of arguing that Trans-Link could not in good faith take advantage of clauses unfamiliar in the trade was not explored.

and transporters had given PATEC three quotations for their services. Each quotation contained five clauses. Three of them fixed the price and the terms of insurance. Another stipulated that all business was only transacted in accordance with the Singapore Freight Forwarders Association (SFFA) standard trading conditions, a copy of which was available on application. The last negotiated clause stipulated that use of the defendants' services implied acknowledgement and acceptance of the above terms. The offers contained in the quotations were accepted by signing.[134] From what has been said thus far, it was not evident how the case should be classified, whether as a signature case governed by the rule in *L'Estrange v. F. Graucob Ltd.* or an incorporation case governed by the *Interfoto* doctrine? It was held that the case was governed by the signature rule. That rule as we have seen has an exception where the document is outside the scope of the signature and it was not considered further whether even if the case was governed by the signature rule, it fell within the exception just described. However, this is essentially the same question as the question whether an incorporation case should be governed by the *Interfoto* doctrine, notwithstanding the contract is signed.

Before *PATEC*, there was *Consmat Singapore (Pte. Ltd.) v. Bank of America National Trust & Savings Association*[135] in which Thean J. declined to apply *Interfoto* to a signed standard form contract in writing.[136] This case was not an incorporation case. Next was *Hakko Products Pte. Ltd. v. Danzas (Singapore) Pte. Ltd.*[137] in which the offeree accepted a written quotation which purported to incorporate the offeror's standard terms of business which was available upon request. Goh Joon Seng J. applied *Interfoto*. This case was an incorporation case and the incorporated contract was accepted by conduct. Then came *Rapiscan Asia Pte. Ltd. v. Global Container Freight Pte. Ltd.,*[138] a decision of Rajendran J., in which the offeree accepted a written quotation which purported to incorporate the offeror's standard terms of trade which was available upon request. Strangely, the applicability of *Interfoto* was not considered. This case was an incorporation case and the incorporated contract was purportedly accepted by conduct and not by signing.

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134 If *PATEC* had asked for a copy of the SFFA standard trading conditions, it would have discovered that Trans-Link liability was limited to $100,000 (clause 27) and that actions brought outside nine months would be barred (clause 30).

135 [1992] 2 S.L.R. 828.

136 Post *Interfoto* cases show that the doctrine is also applicable to written terms incorporated by an incorporating clause in another written contract. See *H.I.H. Casualty & General Insurance Ltd. v. New Hampshire Insurance Co.* [2001] 1 Lloyd's Rep. 378. See also footnote 109.

137 [2000] 3 S.L.R. 488.

138 [2002] 2 S.L.R. 325.

PATEC therefore did not seem to be one covered by any rule deducible from the earlier authorities. In that sense, the court's decision which appeared to extend or to have the effect of extending *L'Estrange v. Graucob* to a case of a signed incorporation could be said to break new ground. Prakash J. said:

> Where a party has signed a contract after having been given notice, by way of a clear incorporating clause such as the one used in the present case, of what would be included among the contractual terms, that party cannot afterwards assert that it is not bound by some of the terms on the ground that the same are onerous and unusual and had not been specifically drawn to its attention. Contracting parties must have a care for their own legal positions by ascertaining what terms are to be part of a contract before signing it. If they do not do so, they will be bound by those terms except to the extent that the UCTA offers them relief.[139]

It is evident from the passage just reproduced that the court laid down a very cautious extension of the signature rule, suggesting that the extension may be denied when the incorporating clause is unclear as to the existence and extent of incorporation.[140] Had the same conclusion been reached after a thorough consideration of post *Interfoto* cases, it would perhaps have been a very strong authority. The fact, however, is that the attention of the court does not appear to have been drawn to some significant post *Interfoto* cases. Four of these cases may be singled out because they directly addressed the same point in *PATEC*.[141] In *Yoldings Ltd. v. Swann Evans (a firm)*[142] it was held, as the case was one in which the document including the provisions in question had been signed by both parties, that the question of applying the *Interfoto* doctrine did not arise.[143] This was a case where the standard terms

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[139] At para. 40.

[140] As has been said, the extension of the signature rule to incorporated terms cautious, though it may have been, was innovative since the cases relied on by the court for the most part were silent on the significance of signing. Of the two cases, which were Canadian cases, which the court found more helpful, the first, *Trident Holdings Ltd. v. Danand Investments Ltd.* (1988) 64 O.R. (2d) 65 was about incorporation by implication or conduct amounting to a course of dealing and not really relevant. *Tilden Rent-A-Car Co. v. Clendenning* (1978) 83 D.L.R. (3d) 400 was the second. The court in *PATEC* described it as a case which provided direct support for the plaintiff's contention. In fact, it was not an incorporation case.

[141] *Grogan v. Robin Meredith Plant Hire* (1996) 15 Tr. L. 371. A reasonable man would not expect a time sheet to contain contractual terms. The court rejected the argument that the mere signature resulted in incorporation of terms expressed in the document as incorporated by reference. There is no such mechanistic rule.

[142] 12 October 2000, a decision of Blunt Q.C.

[143] *Jonathan Wren & Co. Ltd. v. Microdec plc.* (1999) 65 Con. L.R. 157 was a decision to the same effect, the court saying that it was unlikely that the *Interfoto* doctrine would be applied to a contract signed by both parties. But in *Saveheat Insulations Ltd. v. Alexander McVean* 1991 S.C.L.R. 28 it was suggested that the *Interfoto* doctrine could apply to a signed contract.

were printed on the reverse sides of the printed order form which was signed. The court relied on *L'Estrange v. F. Graucob Ltd*. In *Bankway Properties Ltd. v. Penfold-Dunsford,* the court thought that the same effect applied to incorporation cases but did not have to express a concluded view.[144] The third case, *Harvey v. Ventilatorenfabrik Oelde GmbH.*,[145] an incorporation case,[146] has resisted giving the signature supremacy, saying that even in cases where there is no doubt that a document was intended to be contractual in nature and this fact was recognized by the offeree by his signing of it, there was still scope for inquiring whether in all the circumstances the offeree was misled in some way which goes towards negativing his assent to one or more terms of the document.[147] The fourth case, *Ocean Chemical Transport Inc. v. Exnor Craggs Ltd.*[148] offered a syncretic solution. A contract for the supply of bunkers incorporating the supplier's standard terms and conditions was entered into by an exchange of faxes and therefore the pronouncements in relation to the effect of signing a contract incorporating standard terms and conditions are in the nature of observations. It was said that in extreme cases even a signature might not have the effect of binding the signatory to terms incorporated by express reference in the signed contract; but that in all cases, the question is whether, having regard to the nature and effect of the incorporated terms in question, the person relying on the terms has discharged his duty to bring the existence of the terms to the notice of the other party in the circumstances of the particular case.[149]

As the foregoing division of opinions indicates, one cannot say that from the point of view of logic and authority *PATEC* represents a firm conclusion on any point wider than the narrow facts of that case. It is perhaps too late to argue that the signature rule should not be applied to a standard form contract in an unqualified manner.[150] Generally speaking, the fact that the

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144 [2001] 1 W.L.R. 1369. Not an incorporation case but the court observed that it was not clear that the *Interfoto* doctrine applies to a contract that a party signs.

145 (1984) 8 Tr. L. 138.

146 Not by way of a clause but by placement on the reverse side of the document which was signed.

147 Viewed objectively, a reasonable person in the position of the plaintiff could naturally conclude that the printed material on the back could be regarded as irrelevant. The court could draw the inference that the plaintiff was misled by the difference between the two sets of documents and did not in reality assent to the incorporation of the jurisdiction clause.

148 [2000] 1 Lloyd's Rep. 446.

149 It was held that there was an express acknowledgement by the buyers of the existence of the term in question and that, given the nature of the term in question and its effect, as relied upon by the respondents, it could not be said that the respondents failed in their duty to bring the existence of that term to the notice of the buyers, through, of course, their agents, to whom the term had been long available for their perusal.

150 Defined as "provisions which are prepared in advance for general and repeated use by one party and which are actually used without negotiation with the other party." The contract in *L'Estrange v. F. Graucob Ltd.* [1934] 1 K.B. 324 was probably a standard form contract

contract made is a standard form contract has of itself been considered sufficient in many jurisdictions to warrant special consideration and to deserve a special rule that no term contained in standard terms, regardless whether the acceptance is verbal or signed, which is of such a character that the other party could not reasonably have expected it is effective unless it has been expressly accepted by that party. There is increasing convergence along these lines[151] and viewed against this trend, a decision not to extend the signature rule to standard form contracts but to apply instead the *Interfoto* doctrine would be in line with international developments.[152] However, given that the contract in *L'Estrange v. F. Graucob Ltd.* was a standard form contract,[153] it would be difficult now to resist the conclusion that the signature rule is applicable to standard form contracts. However, if as has been argued the basis for the rule is procedural fairness, what courts arguably can still do is restrict the scope of the rule by withdrawing the rule from some standard form contracts, especially those which the offeror would not expect the offeree to read. This was the effect of *Tilden Rent-A-Car Co. v. Clendenning*,[154] a decision of the Ontario Court of Appeal. In that case, a contract to hire a car was signed which contained in small print provisions regarding "collision damage" waiver and providing that the waiver would not apply if the hirer drove the car whilst intoxicated. The Ontario Court of Appeal held that as the plaintiffs in contracting with the hirer had emphasised speed and ease of transaction, they could not bind the hirer to onerous or unusual terms not drawn to the attention of the hirer. The court in *PATEC* was of the view that the proposition which commended itself to the Ontario Court of Appeal was contrary to the common law of England, and therefore, the law in Singapore. With respect, this would be correct if the signature

since there was some evidence that the printed order form was for repeated use although there was no evidence that it was actually used without negotiation with the other party. Thean J.'s rejection of the *Interfoto* doctrine in *Consmat Singapore (Pte. Ltd.) v. Bank of America National Trust & Savings Association* [1992] 2 S.L.R. 828 could be based on partial integration and not signing.

151 Differences in detail are only to be expected. For instance, s. 2.20 of the UNIDROIT proposal sets the appropriate standard of unusualness by the expectation of the proferor whereas the Restatement (Second) of Contracts adopts the reasonable belief of the seller as to what would surprise a buyer.

152 There is little doubt that that doctrine can be moulded and adapted to resolve the problem of standard form contracts. From the angle of policy, dealing on standard terms is a familiar practice which ought to be fostered. Its objective of facilitating speed and economy in contracting is important.

153 Standard form contracts became common in the 19th century, probably in response to the pace of industrialisation. See also *Watkins v. Rymill* (1883) 10 Q.B.D. 178 at 188: "A great number of contracts are in the present state of society made by the delivery by one of the contracting parties to the other of a document in common form, stating the terms by which the person delivering it will enter into the proposed contract."

154 [1978] 83 D.L.R. (3d) 400.

rule was based on the parol evidence rule. If the true basis for the signature rule is procedural fairness, it would arguably be wrong to apply the rule to standard form contracts which the offeree was not expected to read.

In any case, even if the signature rule is applicable to all standard form contracts without qualification, to extend the signature rule generally to cases where a standard form contract is incorporated is another thing. If the desirable policy with respect to standard form contracts is to facilitate the making of contracts by eliminating surprises, the courts should be slow to extend the signature rule to the incorporation of standard form contracts when ideally the rule should not in the first place have been applied to standard form contracts. From the substantive view-point, the question, as we have seen, should be what is procedurally fair in the circumstances. It could be argued that save in exceptional cases when a party not obviously in a dominant position devises a standard form and insists he will not deal on any other terms, but does not provide a copy to the other party, although giving him the option to request for a copy, he purports to be interested in dealing on terms which are standard terms in the trade and to be concerned about speed and convenience. The signatory should then be bound only to terms which are in fact usual in the trade because not only will this achieve procedural fairness, it will also encourage the making of the contract and result in mutual advantages of speed and convenience.

A weaker position is possible. Even if incorporated terms must be taken as within the scope of a signature when the incorporating clause is clear, it could be argued that in many cases the application of the rule to incorporation of a standard form contract should be more exceptional than the rule. One of the exceptions to the signature rule is that the signatory has been misled by the appearance of the contract and the conduct of the proferens to sign without reading the document. The facts of *PATEC* offered some hope of arguing that *PATEC* was misled by the reference to incorporated terms to think that they were the usual terms or else Trans-Link would have drawn them to its attention. The arguments were not made or substantiated and these hopes seemed to be dashed when the court rejected the bald attempt to rely on *Tilden Rent-A-Car Co. v. Clendenning*,[155] which was mentioned earlier. Some comments have already been made in connection with this part of the judgment. It remains to add that even if the argument about the signatory having been misled cannot be made with respect to a contract complete on its face, it would be unfortunate to dismiss its significance with respect to incorporated terms. Some courts are already hinting that it will not take that much to find that there has been an implied representation that the incorporated terms are the usual terms in the trade. One argument is that when a reasonable party devises a standard form and insists he will not deal

[155] [1978] 83 D.L.R. (3d) 400.

on any other terms, but does not provide a copy to the other party, although giving him the option to request for a copy, he impliedly represents that he is interested in an expeditious conclusion of the contract for mutual advantage. He impliedly represents that the offeree may assume that the terms are the standard terms in the trade. Therefore when his representation is relied on, the representee will not be bound to him by those terms which take the representee by surprise or which are collateral to the risk allocation intrinsic to the contract. The representation may be stronger if in the circumstances, the offeror is aware of the urgency with which the offeree required performance of any contract that is made. In *Jones v. Northampton Borough Council*,[156] the council produced a form which required the signatory to recite that he had received, read and understood the conditions of hire which were not produced by the council for him to read. It was said that the signatory might reasonably suppose that "the conditions were therefore not in fact relevant to his particular hiring, or that in his case there was no condition which the council thought it necessary to draw to his attention before asking him to sign the form, and he might therefore contend that it was misleading for him to be invited to sign on the basis that he personally was to indemnify the council in respect of personal injury suffered by any one playing on the pitch by reason of his hiring." So, with respect to the limitation period term which was unusual in its extent in *PATEC*, if not also existence, a case of implied misrepresentation might have been possible, that the offeror impliedly represented that the terms contained in the incorporated contract would be terms usual in the trade, had *PATEC* proved affirmatively that speed and mutual convenience was of prime concern in making the contract and that *PATEC* reasonably had no reason to expect that such a clause would be included. This is further reason to be cautious about applying *PATEC* liberally.

VI. Expedience and UCTA

PATEC has been examined from the point of view of logic and authority. We should not fail to assess it from the angle of expediency. The argument that strict rules of incorporation (which require sufficient notice of unusual or onerous terms to be given) are no longer necessary when unfair terms can now be regulated under the UCTA will not have been forgotten when it furnished influential support for the decision. In preferring the signature rule to the *Interfoto* doctrine, the court relied heavily on these remarks of Hobhouse L.J. in *A.E.G. (U.K.) Ltd. v. Logic Resource Ltd.*: "[This reliance on strict rules of incorporation] is no longer necessary in view of the *Unfair Contract Terms Act*. The reasonableness of clauses is the subject matter of the *Unfair Contract Terms Act* and it is under the provisions of that Act

[156] *The Times*, 21 May 1990.

that problems of unreasonable claims should be addressed and the solution found".[157]

This quotation requires at this time no further comment than that its validity depends on whether the UCTA encompasses both the regulation of substantive unfairness and procedural unfairness. If procedural unfairness is relevant and the UCTA responds to it fully, the proposition above is proven. If, however, the notion of procedural unfairness is valid and the UCTA does not deal with it or deals with it partially, the proposition is undermined or weakened *pro tanto*.

The *Interfoto* doctrine is clearly a doctrine of procedural unfairness and what we need to consider is whether the UCTA also protects against procedural unfairness in such a manner as to render the doctrine superfluous whenever parties deal on standard terms of business. Section 3 of the Act is germane because *PATEC* dealt with Trans-Link on Trans-Link's written standard terms of business and Trans-Link was, among other things, seeking to exclude or restrict its liability for breach of contract.[158] It has correctly been shown that under the provisions of that section the court applies an objective standard of unfairness and not a subjective one.[159] The party to be relieved under section 3 might have entered into a contract believing the term in question to be fair. That matters not because he is not precluded from seeking relief if it turns out that the term operates unfairly on him.[160] Section 11 furnishes the test of reasonableness as follows: "[T]he term shall have been a fair and reasonable one to be included having regard to the circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties when the contract was made."

Does this test of reasonableness cover procedural fairness? The answer seems obvious: it does cover some kinds of procedural fairness and if so, it must cover all kinds of procedural fairness. A glance at the guidelines set

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157 [1996] C.L.C. 265 at 277.

158 Section 3 states as follows: "(1) This section applies as between contracting parties where one of them deals as consumer or on the other's written standard terms of business. (2) As against that party, the other cannot by reference to any contract term (a) when himself in breach of contract, exclude or restrict any liability of his in respect of the breach; or (b) claim to be entitled (i) to render a contractual performance substantially different from that which was reasonably expected of him; or (ii) in respect of the whole or any part of his contractual obligation, to render no performance at all, except in so far as (in any of the cases mentioned in this subsection) the contract term satisfies the requirement of reasonableness."

159 Adams and Brownsword, "The Unfair Contract Terms Act: A Decade of Discretion" (1988) 104 L.Q.R. 94.

160 Unreasonableness has to be judged with reference to the time of contracting. But *cf. George Mitchell (Chesterhall) Ltd. v. Finney Lock Seeds Ltd.* [1983] 2 A.C. 803 where a subsequent *ex gratia* offer to compensate in excess of the contractual ceiling of liability was taken as recognition that reliance on the ceiling would not be fair or reasonable. Criticised in Adams and Brownsword, *supra* note 159, as amounting to asking whether it would be fair and reasonable in all the circumstances of the case.

out in Schedule 2 to the Act suggests this.[161] Two of these guidelines have procedural fairness in mind. Paragraph (b) requires account to be taken of whether the customer received an inducement to agree to the term, or in accepting it had an opportunity of entering into a similar contract with other persons, but without having to accept a similar term.[162] Paragraph (c) requires account to be taken of whether the customer knew or ought reasonably to have known of the existence and extent of the term (regard being had, among other things, to any custom of the trade and any previous course of dealing between the parties).

Concerning the intriguing reference to the reality of consent in para. (c), Hobhouse L.J. in the case above-mentioned said:

> What the Unfair Contract Terms Act is concerned with, and in particular Sch 2, paras (a) and (c), is, among other aspects of reasonableness, the actuality or the reality of the consent of the party that it is sought to bind by the particular clause. Para (c) … presupposes that the clause has already been incorporated in the contract; otherwise the point does not arise. It is necessary in order to assess reasonableness to consider to what extent the party has actually consented to the clause.[163]

There are some difficulties about these remarks. For instance, the Singapore Edition of *Cheshire, Fifoot and Furmston's Law of Contract* explains that incorporation is to be objectively ascertained whereas the subjective reality

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[161] In determining whether the requirement of reasonableness is satisfied, the court is entitled to have regard to the guidelines contained in Sch. 2 to the Act: see *Flamar Iterocean Ltd. v. Denmac Ltd. (formerly Denholm Maclay Co. Ltd.)* [1990] 1 Lloyd's Rep. 434 at 438–439.

[162] Thus, the fact that the standard terms have been used for many years is relevant (see *R.W. Green Ltd. v. Cade Bros. Farm* [1978] 1 Lloyd's Rep. 602) or that the terms have not in the past been relied upon (see *Rees-Hough Ltd. v. Redland Reinforced Plastics Ltd.* (1985) 2 Con. L.R. 109). Other matters to be considered include mutual advantage, unequal bargaining power, the difficulty of the contractual performance being bargained for, and the capacity of the plaintiff to protect his interest, whether diminished by his mental or physical condition. See *Smith v. Eric S. Bush* [1990] 1 A.C. 831. Absence of opportunity to arrange insurance was taken into account in *Phillips Product Ltd. v. T. Hyland and Hamstead Plant Hire Co. Ltd.* [1987] 2 All E.R. 620. See also *Consmat Singapore (Pte.) Ltd. v. Bank of America National Trust & Savings Association* [1992] 2 S.L.R. 828. There is a suggestion that the defendant's disability must be known to the plaintiff in *Standard Chartered Bank (now known as Standard Chartered Bank Malaysia Bhd.) v. Bloomland Development Sdn. Bhd.* [1997] 4 A.M.R. 3442. However, cases are unlikely to have significant value as precedents: see *Phillips Product Ltd. v. T. Hyland and Hamstead Plant Hire Co. Ltd.* [1987] 2 All E.R. 620.

[163] *A.E.G. (U.K.) Ltd. v. Logic Resource Ltd.* [1996] C.L.C. 265 at 277. *Cf.* Hirst L.J. at 274: "of course, applies in circumstances where ex hypothesi the term has been validly incorporated in the contract, and there is therefore an additional burden on the … to make good that requirement."

of consent is relevant to reasonableness; but then drops a hint of disagreement when saying that the distinction of Hobhouse L.J. "may, with respect, engender difficulties, because the literal language of guideline (c) *also* implies an *objective* approach" to the reality of consent.[164]

The important point is that the Second Schedule presupposes that the clause challenged as being unreasonable has already been incorporated in the contract and this is an important qualification to Hobhouse L.J.'s earlier warnings about the UCTA making it no longer necessary to perpetuate strict rules of incorporation. As previously shown, the legislature in enacting the UCTA has not designed to subsume all questions of incorporation under questions of reasonableness, even though procedural fairness is intended to be a factor of consideration in assessing reasonableness. In the present view, there is a sensible way to make sense of the manner in which rules of incorporation and paragraphs (b) and (c) of the Second Schedule accommodate procedural fairness without detracting from the role of the *Interfoto* doctrine in eliminating unusual and surprising terms. If an unusual incorporated term is not sufficiently brought to the notice of a party, the doctrine rejects it and application of the UCTA is moot.[165] If an unusual incorporated term is in fact assented to or must be taken as having been assented to after sufficient notice is given, it comes under the scrutiny of the UCTA and must also be reasonable as must any usual term of the contract. In judging its reasonableness, the courts are directed to take into account the degree of subjective reality of consent. But there is no superfluity in this because the *Interfoto* doctrine is really only looking out for one particular aspect of procedural unfairness, namely, the element of surprise as measured by terms usual in the relevant trade. A term which ceases to surprise the proferor because he has expressly accepted it after his attention was drawn to it by the proferens may be unreasonable in another sense if the proferor in the circumstances of making the contract did not fully understand or appreciate its implications as a result of the proferens's conduct or words.[166] Whether that is ground

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[164] Phang, ed., *Cheshire, Fifoot and Furmston's Law of Contract*, 2nd ed. (Singapore: Butterworths, 1998) at 338 [emphasis added].

[165] Note that the courts accept that a term usual in the trade may be unreasonable as between the parties. See *Kenwell & Co. Pte. Ltd. v. Southern Ocean Shipbuilding Co. Pte. Ltd.* [1999] 1 S.L.R. 214. See also *PATEC* [2003] 1 S.L.R. 712 at 727–728.

[166] In *Charlotte Thirty Ltd. and Bison Ltd. v. Bison Ltd.* (1990) 24 Con. L.R. 46, the defence of misrepresentation and the Act led to the same result. It was in evidence that the signatory had asked Mr. Short to confirm that the contract did not contain any "wobblers", which Mr. Short did. Following *Curtis v. Chemical Cleaning & Dyeing Co.* [1951] 1 K.B. 805, the court held that Mr. Short misrepresented that there were no unfair contract terms in the Standard Conditions, and the proferens was therefore precluded from relying on such conditions. The court had earlier reached the same conclusion via the Act. Note that where the case is one where a complete calculation of risks is impossible on the part of a party without such information as the other has exclusively and which the first mentioned party needs to perform

for intervention is the *raison d'être* of the UCTA and not the *Interfoto* doctrine. In short, even in incorporation cases, where the *Interfoto* doctrine applies, the UCTA responds to procedural unfairness but not in a way which detracts from the *Interfoto* doctrine. It follows that the reliance in *PATEC* on the UCTA to cope with procedural fairness as a ground for preferring the signature rule to the *Interfoto* doctrine was not fully convincing.

VII. Recorded Proof

Although the foregoing discussion has been lengthy, its main thrust is short, namely that problems of pre-constituted contracts have been compounded by the application of an inappropriate or misconceived parol evidence rule (including the signature rule as originally conceived) to matters of substantive law. The prescription therefore is to focus the parol evidence rule solely on certainty of proof while re-focussing the signature rule on procedural fairness, thereby aligning it with incorporation rules which already bear this focus. Turning from pre-constituted contracts to recordations of oral contracts, we find that the problems encountered are overwhelmingly evidential in nature. Finality in recorded proof is of course no less, indeed perhaps it is more, important than finality of proof for the future when proving commercial transactions. Not every commercial transaction is cast in the aftermath of reflection as an inscription in permanent documentary and pre-constituted form. The shopkeeper certainly does not enter into a pre-constituted contract every time he sells a little article for household use. Each transaction is verbal or oral[167] and the only document is the record of the independently existing transaction. Although the means of pre-constituting a contract in electronic form or of creating real evidence of a contract are certainly readily available, there are still far more transactions done orally or verbally which are evidenced by some record, whether electronic or non electronic,[168] than is perhaps optimal and thus, the availability of the recording as proof continues to be of greater practical significance by reason of greater incidence.

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the contract for the benefit of the second mentioned party or when there is an expectation to be thus assisted, the subjective reality of consent will also be important.

[167] In the *Evidence Act*, the former is used in a wider sense signifying the process of utterance or communication and therefore encompasses non speech acts or communications by means of gestures while the latter is confined to statements and opposes them to written statements. See *Chandrasekera v. R.* [1937] A.C. 220 which settled the distinction for dying declarations.

[168] Note that an electronic record is writing for purposes of the *Evidence Act*. See also *R. v. Mills* [1962] 1 W.L.R. 1152.

The essential problem of recorded proof is how to relax the strictures of the hearsay rule.[169] Hearsay is inevitable when we are looking for recorded proof of business dealings. Admit the recorded proof despite its intrinsic hearsay difficulty and we open up the range of proof very considerably.[170] Evidence may no longer be confined to those within the expectation or anticipation of the proferor, severely prejudicing the proferor's capacity to challenge the evidence through cross-examination. Yet few doubt that there is need to facilitate the proof of commercial transactions by admitting recorded proof. This idea is something very old in the law. More than a hundred years ago, Taylor presented the case for relaxing the hearsay rule by recognising an exception in favour of business entries in these terms:

> The considerations which have induced the courts to recognise this exception appear to be principally these—that, in the absence of all suspicion of sinister motives, a fair presumption arises that entries made in the ordinary routine of business are correct since, the process of invention implying trouble, it is easier to state what is true than what is false; that such entries usually form a link in a chain of circumstances which, mutually corroborate each other; that false entries would be likely to bring clerks into disgrace with their employers; that as most entries made in the course of duty are usually subject to the inspection of several persons, an error would be exposed to speedy discovery; and that as the facts to which they relate are generally known but to few persons, a relaxation of the strict rules of evidence in favour of such entries may often be convenient, if not necessary, for due investigation of truth.[171]

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169 Is finality in recorded proof compromised in the same way as finality of future proof? Allegations of forgery are plainly possible and perhaps only slightly less serious in the case of recorded proof. It is true that recorded proof is not the same as a copy of pre-existent writing which if successfully forged will at once miscarry in legal effect. As a matter of practice, however, it commonly happens that receipts are forged and accounts are falsified. We are not astonished therefore that the primary motivation behind the *Statute of Frauds* was evidentiary. See footnote 33. It is interesting that a memorandum signed by a person to be charged with a contract for the sale of land is admissible either as an admission or simply because the statute implies its admissibility.

170 Another complication is easily removed if we open the range of proof. In many cases, the trier of fact is presented with two conflicting oral accounts; and the choice between them can seldom be satisfactorily resolved by the niceties of credibility. The limited opportunities of appellate review or correction are another deterrent. Moreover, the widescale prevalence of secondary documentation even suggests that if none is offered as corroboration or in support of the oral testimonies, an adverse inference will be justified for the purposes of weakening the oral evidence. Evidence is neutral in weight but circumstances of use may explain the stronger preference for documentary proof in such cases.

171 As reproduced in M.C. Sarkar, S.C. Sarkar and Prabhas C. Sarkar, *Sarkar's Law of Evidence*, 15th ed. (Agra: Wadhwa and Co., 1999) at 683–684 [footnotes omitted].

Taylor, in that passage, referred to entries made in the course of business (*i.e.* written statements) and highlighted a number of factors which would guarantee a high degree of reliability of evidence of such entries. We can reduce them to two: the independent need in business to maintain records (what Wigmore called the difficulty of falsification) and the probability, if not certainty, of inspection by other parties serving as a check against the perpetuation of erroneous records (what Wigmore called the fair certainty of ultimate detection).[172]

It may seem strange that we are citing Taylor since in the nature of things something concocted well over a century ago seems unlikely to be capable of serving without modification the way we prove things about modern business transactions. The rationale that it is easier for business people to state what is true than false, for one thing, overlooks the impact of taxation on the way business people generate documents. Today, documents are created for many purposes; there are secret books and memoranda, understated invoices and bills for non-existent transactions. There was a time when one could begin with an absence of suspicion of sinister motives. That time perhaps has gone. Again, the rationale of ultimate detection presupposes the existence of overlapping personal knowledge in several persons who are thereby in a position to correct errors made by one of their number and verify entries which are accurate. There must, however, be fewer businesses today as to which that supposition continues to be well founded. The job stratification and specialization implicit in modern multi-leveled business structures call into question the rationale of ultimate detection as conceived by Taylor. What more commonly happens is that each functionary has a degree of personal knowledge of facts to which another is not privy but the business relies on a well constructed or designed system of computerised record keeping in order to ensure reliability of its business data.

A more serious peculiarity is the requirement of personal knowledge which Taylor stressed. Everybody readily recalls the lessons of *Myers v. D.P.P.*[173] where the prosecution was denied the use of extremely reliable records kept by the manufacturers of motor-cars in the prosecution of persons accused of receiving stolen cars.[174] A majority of the House of Lords held that the microfilm records could not be said to be public documents open to inspection by the public, nor could they be brought within

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[172] Both add to the circumstantial probability of trustworthiness. See *Wigmore on Evidence*, 3rd ed. (Boston: Little, Brown, 1940) Vol. V at para. 1522.

[173] [1965] A.C. 1001.

[174] The case for the prosecution was that the accused would buy wrecked motor cars with their log books, and then would disguise stolen cars, which were as nearly identical as possible to the wrecked cars, so that they conformed to the details of the log books of the wrecked cars. The small plates which contained the engine and chassis numbers would be transferred from the wrecked cars to the stolen cars.

any other exception to the hearsay rule, notably the business statements exception.[175] It sufficiently appears in the consideration of the business statements exception in that case that the critical objection to admissibility of the microfilm records of what engine and chassis numbers were matched with the cylinder block numbers of certain cars being manufactured was that the persons who made the microfilm records did not have personal knowledge of the numbers recorded.[176] The common law exception implies that the record maker must have personal knowledge of the facts recorded and this is particularly awkward for computer records or other records which are generated out of entries made by a number of persons employed for the purposes of keying in or recording information supplied by a number of other persons employed to obtain and furnish the information.[177]

The barrier which the business statements exception creates for business records is actually greater because the exception requires not personal knowledge but a duty to transact on the part of the record maker.[178] (Although in the text the term "records" has been used liberally to mean statements in writing, the truth is that the common law acknowledged no hearsay exception in favour of business records except books of accounts,[179]

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[175] The minority dissented on the ground that it was open to the courts to recognise new hearsay exceptions by application of established principles and provided that it would be impractical to expect first-hand evidence. See the adoption of the minority view for Scotland in *Lord Advocate's Reference (No. 1)* 1992 S.L.T. 1010.

[176] The microfilm records were created by filming cards containing the engine, chassis and cylinder block numbers which were filled in by a workman, presumably the one who stamped the block number on the engine. The cards were then destroyed. The relevant microfilms were extracted and the numbers were scheduled for the purpose of the trial. The schedules and films were produced on oath by the witness and these schedules showed that the cylinder block numbers of the cars in question belonged to the stolen cars. If the microfilm records (including the extracted schedules) were real evidence of the nature and condition of the cards, there would still be the objection that their contents were hearsay evidence of the facts asserted in the cards about the association of engine, chassis and cylinder block numbers.

[177] Hence, the impetus to devise a computer printout exception. See s. 35 of the *Evidence Act*.

[178] Someone may have personal knowledge but no duty to transact. The shopkeeper's wife or relation who happens to be present when the transaction is struck will have personal knowledge of the transaction though not under a duty to transact.

[179] The scope of this common law exception was greatly whittled down by statute (7 Jac. I. c. 12 of 1609) before being finally restored as a statutory rule in the 1800s. See *Wigmore on Evidence*, 3rd ed. (Boston: Little, Brown, 1940) Vol. V at para. 1518. In Singapore, s. 34 of the *Evidence Act* makes account books admissible in evidence. Section 34 stipulates that entries in books of accounts regularly kept in the course of business are relevant whenever they refer to a matter into which the court has to inquire, but such statements shall not alone be sufficient evidence to charge any person with liability. For a more general provision admitting evidence of statements contained in a record, see s. 380 of the *Criminal Procedure Code*, which was adapted from the *English Civil Evidence Act 1968*. Section 380 states that: "Without prejudice to section 35 of the *Evidence Act*, in any criminal proceedings a statement contained in a document shall, subject to this section, be admissible as evidence of any fact stated therein of which direct oral evidence would be admissible, if the document is,

if by records we understand compilations by persons under duty to keep the record who do not have personal knowledge of the facts recorded.[180]) The common law requires that the maker of the business statement must have been obliged to transact the very transaction the particulars of which he subsequently records. That the person recording is under a duty to record, though not a duty to transact, is not enough to satisfy the common law exception. This stringent requirement of a duty to transact implies that a record compiled by a person under a duty to record information supplied by another with personal knowledge of the facts recorded but no duty to transact fails to satisfy the common law.[181] The common law in consequence is unable to meet the probative needs of businesses which rely on oral reports from non transacting field agents which are transmitted to other employees to be recorded; even less so when the records are compiled with the assistance of a chain of intermediaries.

In a word, the common law exception in favour of business statements predicates a more personal and intimate way of recording business data which has slipped away from us over time.[182] The fortunate thing was that

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or forms part of, a record compiled by a person acting under a duty from information which was supplied by a person (whether acting under a duty or not) who had, or may reasonably be supposed to have had, personal knowledge of the matters dealt with in that information and which, if not supplied by that person to the compiler of the record directly, was supplied by him to the compiler of the record indirectly through one or more intermediaries each acting under a duty; and some condition as to witness unavailability is satisfied."

180 To some, it is no wonder that at the slightest provocation, courts are apt to side-step this narrowness of the common law by calling evidence based on a concatenation of statements original when there is evidence of reliability of record keeping and the fact to be proved is not directly asserted in the record. See *Shone* (1983) 76 Cr. App. R. 72. See also *Muir* (1983) 79 Cr. App. R. 153.

181 The contrary position is hinted at in the observations of the Federal Court of Malaysia in *Sim Tiew Bee v. P.P.* [1973] 2 M.L.J. 200 where the accused was charged with and convicted of the offence of being concerned in the importation of uncustomed goods. The accused claimed in his defence that the boxes containing the uncustomed goods were not his and had been loaded onto his lorry by his workers under mistake and without his knowledge. The trial judge had admitted, among other things, a tally sheet made by a clerk as proof of the measurements of these boxes. The recording clerk in fact had a duty apart from recording the number of units tallied, to take and check the measurements of the cargo but failing in his duty, relied solely on the apparently oral communications of measurements made by a third person who was not called to give evidence of those measurements. There was no satisfactory proof of that third person's unavailability as a witness in accordance with the prescribed requirements of the section and the tally sheet was therefore inadmissible in evidence. The court, however, observed that had such proof been forthcoming, the tally sheets of the measurements being made in the course of the business of the shipping company would have been admissible. This suggestion that a record is admissible in evidence under section 32(b) if the information contained in it was supplied by someone with personal knowledge and made by the report maker under a duty to record is quite untenable. Even if tenable, it would be unlikely to extend to cases involving a chain of intermediaries.

182 Seriously, the time has come and is overdue to think about abandoning the hearsay rule as it applies to statements made in the course of business to the discretion of the judge. But that

though a creature of the 19th century, section 32(b) as drafted was able to avoid some of the drawbacks of the common law exception as just described. It was formulated so as not to embody the common law, but to modify it by widening it.[183] On the question of duty to a third party to transact, the best opinion is that section 32(b) rejects it.[184] There was actually a simple reason for omitting the requirement of duty from section 32(b). The common law recognised then and of course continues to recognise two exceptions relating to business statements, one in favour of statements made in the ordinary course of business by transactors under a duty to transact and another in favour of statements made by transactors, not under any duty, but who are parties to the transaction. Statements of the latter kind are often termed a party's shop-books.[185] What the draftsman of section 32 did was to combine the exception relating to declarations under duty and the exception relating to a party's shop-books.[186] This makes it impossible to suggest that the duty to transact was prescribed as a blanket requirement. Though the phrase "discharge of professional duty" occurs in one of the instances enumerated in section 32(b), there was no intention to prescribe a requirement which would at once exclude statements made in shop-books by the proprietor but would admit statements made by a subordinate under a duty to transact.

On the question of personal knowledge, a strong case could be mounted against any suggestion that it is required by section 32(b) as drafted; and despite case law affirming personal knowledge as being an element required by the enactment,[187] it may not be too late to re-look this point.[188] One may too quickly assume that the requirement of personal knowledge which is certainly not express is nevertheless implicit and is concomitant with the rejection of multiple hearsay, which is also implicit in section 32(b). The argument would be that the provisions of the section render statements of relevant facts relevant but multiple hearsay, conceived of as being statements of statements of relevant facts, would not be relevant under the section. If multiple hearsay is rejected and the duty to record is not an element of the section, it follows that statements made without personal knowledge on the

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is a different story and it is more pertinent for the time being to say that we are still served by section 32(b).

183 Note, however, statements made and not contained in a document.

184 *Sarkar on Evidence*, *supra* note 171 at 686 concedes that the Act is silent on the question of duty to transact but adds that it is difficult to say for certain whether any departure from the common law was intended.

185 This terminology is employed in *Wigmore on Evidence*, 3rd ed. (Boston: Little, Brown, 1940) Vol. V at paras. 1518 and 1536 and follg.

186 He dealt with parties' account books separately in section 34.

187 See *Tan Siak Heng v. R.* [1950] M.L.J. 214; *Sim & Associates v. Tan Alfred* [1994] 3 S.L.R. 169; *AlliedBank (Malaysia) Bhd. v. Yau Jiok Hua* [1998] 6 M.L.J. 1; *Vaynar Suppiah & Sons v. K.M.A. Abdul Rahim* [1974] 2 M.L.J. 183.

188 *Sarkar on Evidence*, *supra* note 171 at 687–688 questions the existence of the requirement.

part of the maker of the facts contained in them are irrelevant. But this argument would overlook the fact that the subject matter of section 32 is not the fact, but the relevant fact, contained in a statement. The relevant fact is any fact made relevant by the Act, including an admission against the maker thereof, which is made a relevant fact by section 21 of the Act. If the relevant fact is an admission by X and a statement by Y of that admission is made in the course of business, section 32(b) would secure admissibility to the statement as evidence, provided Y is unavailable in the prescribed sense. In this instance, the maker of the statement, Y, would not have personal knowledge of the facts admitted to by X. It could be argued that the supposed requirement that the maker of the business statement must have personal knowledge of the facts recorded would only be inconsistent with the express wording of the statute in only this one instance. But it is impossible to treat this one instance as an exception and therefore, the requirement of personal knowledge must be rejected for all instances.[189]

The remarkable prescience of the drafter of section 32(b) led him to avoid the pitfalls of concentrating on the duty to transact, but it could not lead him to a more enlightened approach to multiple hearsay business records and, as will be demonstrated below, composite business records. The difficulties posed by such records have been known for a long time but somehow complacency set in and the section has not been the subject of any direct reform until this day.

This almost tenacious persistence of section 32(b) is also strange because there seems little reason to be complacent about the notions of necessity which it embodies. The section follows generally the common law thinking that a statement is justifiably admissible as proof of the facts asserted in it if none of the few people in the know is available to be a witness. In its time, it already made a significant advance on the common law exception under discussion as it contained a far wider prescription of witness unavailability than the common law acknowledged. The famous case of *Myers v. D.P.P.*[190] also showed how severely restrictive the common law exception was in that the exception was only to operate if the record maker was proved to have died.[191] No other circumstance of witness unavailability was admitted: an

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[189] This is not saying that therefore multiple hearsay is admissible under the section. The section guards against admissibility of multiple hearsay in general by restricting admissibility to evidence of statements of relevant facts.

[190] [1965] A.C. 1001.

[191] See Lord Morris of Borth-y-Gest at 1027–1028: "It has long been a part of our law that if a person in the regular course of his duty makes a contemporaneous record (which he could have no interest to make falsely) of some business matter which it was his duty to transact and if such person dies evidence of the record may be given to prove the performance of the transaction. The considerations that there was an obligation to perform the duty faithfully and that in matters of business routine, where no personal interest arises, accuracy can as a rule be expected, have been thought to give some reasonable guarantee of credibility. It can

incredible fact! The drafter of section 32(b), however, had adopted a wider and more defensible notion of witness unavailability. Even so, the prerequisites of the section which define or delineate what constitutes witness unavailability are bound to be the first to be held up as out of date, inadequate and seriously incomplete.[192] Some conspicuous omissions are that cases where a witness has completely forgotten the transaction recorded or refuses to give the evidence either wilfully or on the ground that the evidence is privileged or where a witness's refreshing his memory is pretence, are not stipulated as being other categories of witness unavailability. It is small wonder then that in jurisdictions in which the rule has been kept but altered, the categories of witness unavailability have been greatly expanded to include some or all of these omissions.[193]

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very powerfully be argued that the law might be changed so as to make admissible certain records made by persons who cannot be identified and who may or may not be alive. There was every reason in the present case to suppose that the workmen or mechanics concerned would make correct entries. They could have no other purpose than to do so. They would have neither advantage nor interest in failing or neglecting to do so. Furthermore, neither they nor their employers could have any concern in regard to the criminal proceedings, save that of assisting the course of justice. All this may suggest that some modification of the law could without dangerous consequences and with advantage be made. The existing exception to the hearsay rule which admits evidence of declarations in the course of duty is, however, subject to the firmly established condition that the death of the declarant must be shown. It would be a positive alteration of the law to say that the condition need no longer be satisfied."

[192] The conditions of witness unavailability which s. 32 enacts are confined to cases where a person who is dead or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appears to the court unreasonable.

[193] Even in Singapore, ss. 378 and 380 of the *Criminal Procedure Code* (Cap. 68, 1985 Rev. Ed. Sing.) are significantly more expansive. The conditions of witness unavailability to be satisfied for admissibility under s. 378 are that the maker of the statement being compellable to give evidence on behalf of the party desiring to give the statement in evidence, attends or is brought before the court but refuses to be sworn or affirmed; that he is dead, or is unfit by reason of his bodily or mental condition to attend as a witness; that he is beyond the seas and that it is not reasonably practicable to secure his attendance; or that, being competent but not compellable to give evidence on behalf of the party desiring to give the statement in evidence, he refuses to give evidence on behalf of that party. The conditions of witness unavailability to be satisfied for admissibility under s. 380 are that the person in question has been or is to be called as a witness in the proceedings; that the person in question, being compellable to give evidence on behalf of the party desiring to give the statement in evidence, attends or is brought before the court but refuses to be sworn or affirmed; that he is dead or is unfit by reason of his bodily or mental condition to attend as a witness; that he is beyond the seas and that it is not reasonably practicable to secure his attendance; that, being competent but not compellable to give evidence on behalf of the party desiring to give the statement in evidence, he refuses to give evidence on behalf of that party; or that, having regard to the time which has elapsed since he supplied the information and to all the circumstances, he cannot reasonably be expected to have any recollection of the matters dealt with in the statement. Oddly, the provisions above leave out the simpler case where the maker cannot

There has also been an unusual and perhaps unnecessary amount of activity regarding these prerequisites.[194] By far, the courts demand strict proof of these pre-requisites and the theory that justifies it is essentially an attitude of caution against liberally relying on hearsay proof.[195] The section is given limited scope because it is construed as an exceptional provision to be construed narrowly.[196] This makes sense in criminal cases but is inappropriate in civil cases because the received wisdom that hearsay is unfair in any guise is questionable in civil cases.[197] But, of course, when you have the same provisions applicable to proceedings without any distinction between the civil and the criminal, it would not be legitimate to create that distinction judicially. So you are compelled also to apply the business entry exception strictly in civil proceedings.

A. *Secondary Proof and Hearsay*

Perhaps the most academically engaging problem which besets provisions such as section 32(b) is that touching the relationship between secondary

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be found. Instead he must be overseas such that it is not reasonably practicable to secure his attendance. A proposal which would go further but stop short of abrogating the hearsay rule is to dispense with these categories but require evidence of the system of recordation from the proponent of the hearsay.

194 On proof of diligent search, see *Sim Tiew Bee v. P.P.* [1973] 2 M.L.J. 200; *P.P. v. Karim bin Ab Jaabar* [2002] 2 M.L.J. 488. No proof of prerequisites, see *Ben Foods (S.) Pte. Ltd. v. Limbangan Supermarket Sdn. Bhd.* 1998 M.L.J.U. LEXIS 964.

195 *Mohamed Ghouse v. R.* (1909) 11 S.S.L.R. 31; *Kee Siak Kooi v. R.* [1955] M.L.J. 57; *Sim Tiew Bee v. P.P.* [1973] 2 M.L.J. 200.

196 *Sim Tiew Bee v. P.P.* [1973] 2 M.L.J. 200 was apparently relied on in *Muller & Phipps (M.) Sdn. Bhd. v. Penang Port Commission* [1974] 2 M.L.J. 39 but on the facts there was simply no proof. See also *Vaynar Suppiah & Sons v. K.M.A. Abdul Rahim* [1974] 2 M.L.J. 183 and *Sim & Associates v. Tan Alfred* [1994] 3 S.L.R. 169; *Nahar Singh v. Pang Hon Chin* [1986] 2 M.L.J. 141. Strict proof of witness unavailability was insisted on in *Mahmod bin Kailan v. Goh Seng Choon* [1976] 2 M.L.J. 239. It was in evidence that the company's signboard was missing and that some people on the first floor said that the company had shifted but nobody knew where to and that the company's address was omitted from the phone book. But the fact that there was no inquiry made to the Business Registration Department or of the Registry of Companies was fatal and the court concluded that not all reasonable efforts had been made to find the maker within the meaning of the proviso to sub-s (1) of s. 73A of the *Evidence Act*. It seems that waiver of proof is rejected. See *Toh Fok Tiak v. Chop Swee Kee & Co.* [1959] M.L.J. 59.

197 In England, the hearsay rule as it formerly applied in civil proceedings has been abolished in England following adoption of the recommendations of the Law Commission. See The Law Commission *The Hearsay Rule in Civil Proceedings* (Law Com. No. 216) (London: H.M.S.O., Cm. 2321, 1993). See also *The Hearsay Rule in Civil Proceedings* (1991) Consultation Paper No. 117 (1991). See also the U.K. *Civil Evidence Act 1995*.

proof and hearsay[198] which, as it turns out, bears significantly on the question of admissibility of composite business records. A simple example will serve to illustrate the difficulty. X wants to prove that he made a purchase by adducing evidence of a receipt for his payment. If he still has the receipt, he can tender it as evidence under section 32(b) (which requires of course proof of witness unavailability). If he has lost the receipt, he must prove the loss and he is then permitted to tender secondary evidence, such as a copy of that receipt or even oral evidence of the contents of the receipt.[199] The question is: Why do we say that the oral evidence is secondary evidence as opposed to being hearsay evidence? Our first impression is that a hearsay characterization of X's evidence is not at all far-fetched. If we imagine the receipt to be the utterance of its maker, which it is in a real sense, then the giving of oral evidence of the contents of the receipt is tantamount to telling us about the utterances of the maker of the receipt. Since this is done to prove the facts asserted, X's evidence should be hearsay. But we call it secondary evidence, and with good reason, we are told. The receipt has an objective existence once put in circulation and the witness X is called to confirm the correctness of the correspondence between the oral evidence and the contents of the receipt. The correctness or reliability of the contents of the receipt or the correspondence between the contents and the true facts is properly the concern of the hearsay rule, not the correctness of the correspondence between the oral evidence and the contents of the receipt, namely the facts asserted in the receipt.

The cynic, however, may remain unsatisfied by this explanation. To him, it makes little sense to call something secondary evidence when the same testimonial dangers which hearsay excites are present. Suppose X heard from Y who heard from Z about a certain relevant fact. Even though what

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[198] The same best evidence rule has been urged in some quarters as informing both the hearsay rule and the primary evidence rule. That the primary evidence rule is informed by the best evidence rule is uncontroversial even though in *R. v. Governor of Pentonville Prison, ex. p. Osman* [1990] 1 W.L.R. 277, the court said it would be more than happy to say goodbye to the best evidence rule. The rule served an important purpose in the days of parchment and quill pens. But, since the invention of carbon paper and, still more, the photocopier and the telefacsimile machine, that purpose had largely gone. Where there was an allegation of forgery the court would obviously attach little, if any, weight to anything other than the original so also if the copy produced in court was illegible. But to maintain a general exclusionary rule for these limited purposes was hardly justifiable.

[199] Section 65 of the *Evidence Act* provides that secondary evidence means and includes certified copies given under the provisions hereinafter contained in the *Evidence Act*; copies made from the original by electronic, electrochemical, chemical, magnetic, mechanical, optical, telematic or other technical processes, which in themselves ensure the accuracy of the copy, and copies compared with such copies; copies made from or compared with the original; counterparts of documents as against the parties who did not execute them; oral accounts of the contents of a document given by some person who has himself seen it.

Z said is admissible under some hearsay exception, what Y said is not necessarily so. X may be available to testify to exact correspondence between his oral evidence and what Y said that Z had said about the fact but the law stigmatises X's evidence as double hearsay. Should it make a difference because X read from Y's writing about what Z said? The cynic claims that it should make no difference whether X heard or X read about it. If we reply to the cynic that oral evidence of the writing is permitted in exceptional circumstances when the writing is unavailable, it only confirms him in his suspicions that the so-called secondary evidence is hearsay admissible out of necessity.

The reason that the cynic is wrong is simply that our confidence is in the writing. The writing has an objective experience. It can of course be multiplied to persons far removed from the experience recorded. Its objective existence is the cause of that. But it is also the reason that the reproduction can be verified and tested against the original writing for correspondence. When, however, Y told X what he heard Z say about the fact, the utterances once made passed into the realm of memory and ceased from objective existence. It is impossible thereafter to project them onto the present for comparison and any comparison is necessarily based on past recollection. This is the only difference between secondary proof and hearsay; without the testimony by someone as to the correctness of the secondary evidence based on actual comparison with the primary document,[200] the copy or the oral evidence would be hearsay of the copyist or the witness.[201] The received wisdom tells us that it is a sufficient difference.

We can illustrate the line which separates hearsay from secondary proof with the facts of *Vaynar Suppiah & Sons v. K.M.A. Abdul Rahim*[202] where the Court of Appeal held that there was no evidence of the nature and extent of cargo damage to support the cargo consignee's claim against the shipowner. The principal holding in that case followed upon the rejection by the court of an expert report, signed by someone who did not carry out a personal

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[200] Of course, the problem is still that the evidence of comparison is coming from the same copyist, who can so easily claim to have done it.

[201] The distinction adverted to was pointedly illustrated in *Roy Selvarajah v. P.P.* [1988] 3 S.L.R. 517. On the one hand, "the evidence of PW1 that she had checked the records with the Data Processing Centre in the Immigration Department which showed that PW10 entered Singapore on a social visit pass which expired on 7 January 1995 was admissible as evidence to show that PW10 was an overstayer." The records were admissible under s. 380 of the *Criminal Procedure Code* and the evidence of PW1 was secondary evidence. On the other hand, PW1's evidence that she was informed in a document issued by the Work Permit Department that no work permit was ever issued to PW10 was hearsay because the document issued by the Comptroller of Work Permits was not admissible in the first place.

[202] [1974] 2 M.L.J. 183.

examination of the goods in question.[203] On the evidence, it appeared that the field survey books from which this report was compiled had been disposed of and no longer were in existence. It therefore seemed to the court that this report could not be admissible under section 32(b) as an entry or memorandum made in a book kept by the expert either in the ordinary course of business or in the discharge of his professional duty. In other words, the expert's reliance on the findings of the field surveyor contained an element of hearsay since it depended upon facts observed and found by another and that other person who carried out the work on which the findings were based was not called to give evidence.[204] Why do we not say that the surveyor's report is secondary evidence of the field survey reports when the surveyor's report obviously drew, and was based, upon those reported facts? It was because the two essential characteristics of secondary proof were missing. The expert was not available to testify first to the exactness of the correspondence between the findings as he reported and the findings as originally recorded and secondly, the findings were not reported verbatim but represented a selection or selective compilation by the report maker from the findings as originally recorded.

So here we are already with one possible source of confusion and we might as well take stock of another for the sake of completeness. This is the related division between hearsay and the doctrine of memoranda of past recollection, which is enacted as sections 161 and 162 of the *Evidence Act*. The sections produce the effect that (1) a witness may while under examination refresh his memory by referring to any "contemporaneous" writing made by himself;[205] (2) the witness may also refer to any contemporaneous writing made by any other person and read contemporaneously by the witness, if, when he read it, he knew it to be correct; and (3) a witness may also testify to facts mentioned in any such contemporaneous document although he has no specific recollection of the facts themselves, if he is sure that the facts

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[203] None of the witnesses called on behalf of the plaintiffs personally made any physical inspection of the goods in question either at the godowns of the P.S.A. or at the premises of the plaintiffs in High Street. The consultant chemist who examined a plastic bag containing dry pieces of material, as one sample, for the presence of salt water ingredients had no personal knowledge of the provenance of the pieces he examined.

[204] See also *Myers v. D.P.P.* [1965] A.C. 1001; *R. v. Turner* [1975] Q.B. 834; *English Exporters v. Eldonwall Ltd.* [1973] 1 All E.R. 726. There is a different rule that experts may make use of textbooks and the work (including unpublished work) of others in the same field as a basis for their opinions and as part of the process of arriving at their conclusions. See *R. v. Abadom* [1983] 1 All E.R. 364 at 368: "Once the primary facts on which their opinion is based have been proved by admissible evidence, they are entitled to draw on the work of others as part of the process of arriving at their conclusion."

[205] By contemporaneous is meant that the document was made at the time of the transaction concerning which the witness is questioned, or so soon afterwards that the court considers it likely that the transaction was at that time fresh in his memory.

were correctly recorded in the document. The line between refreshment with the aid of a memorandum of past recollection and hearsay has many times been the subject of adverse comments. Suppose X makes a contemporaneous statement to Y that an event which he witnesses has taken place. Y immediately creates a document to that effect which X promptly reads and confirms as being correct. If X is called as a witness, he may refresh his memory with the aid of the writing made by Y. But if Y is called, not having personal knowledge of the facts, he has to tender the document and it does not then matter that he can testify to the correctness of his writing and X's confirmation of its correctness. His document is hearsay evidence of the facts recorded. For many commentators, this difference is rather delicate.[206] X could easily be adopting the written statements which Y made recording what X said; thereby giving hearsay evidence under guise of refreshing his memory. Yet X is not giving hearsay evidence when he purports to refresh his memory but Y is seen as giving hearsay evidence when he tenders his document as to what X told him in circumstances in which X confirmed its correctness. The difference becomes extremely delicate or approaches a vanishing point if X can no longer recall the facts observed but is sure that he communicated them correctly and accurately to Y. If X is called as witness, he can tender the writing as evidence under section 162. The document is not hearsay evidence. But if Y is a witness, he cannot tender the writing as evidence under section 162. The writing is hearsay. For many commentators, this seems to defy common sense.[207]

VIII. *PATEC* AND COMPOSITE REPORTS

This shading at the boundaries, of hearsay and secondary proof, and of hearsay and assisted evidence, as *PATEC* shows, continues to bedevil the proof of relevant facts by means of expert reports.

In that case, which was earlier reviewed for another purpose, PATEC's machine was damaged whilst being transported by Trans-Link to Thailand and PATEC claimed damages for breach of contract. It was clear that PATEC had to tender evidence of damage in support of its claim. The evidence of damage, of an expert nature, was obtained from a Thai expert in Thailand. Perhaps unexpectedly, the expert could not write his report in English, though he apparently could understand it well enough to be able to confirm the correctness of the English version shown to him. The English version was produced by the expert's employer. She was called

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[206] *Cf.* Tan, "Weight of Oral Evidence in Criminal Proceedings" [2000] S.J.L.S. 443.
[207] *Cf.* Tan, *ibid*.

as a witness and she tendered the report in English as well as proved that the expert was unavailable as witness in the sense prescribed by section 32(b).

The question was whether the report written in English was admissible under the section. In order to avoid any element of hearsay when proving relevant facts by inference from expert opinions, one would normally call both the report maker who is the expert and the transactor, providing the materials on the basis of which the expert will render an opinion, as witnesses. Had that been done in *PATEC*, it would be very likely that neither the report maker nor the transactor would have had any recollection of the matters in question and section 161(2) or 162 would have been invoked. However, as the facts disclose, only the report maker was called as a witness and the transactor was unavailable. Under those circumstances, as a matter of speculation, for it was not argued before the court, the answer to the question would be easy if the report could be said to be the report of the transactor notwithstanding someone else was the amanuensis.[208] It would be a question of fact whether the report maker was merely the amanuensis of the transactor so that the report was that of the transactor. There was evidence that the transactor confirmed the correctness of the translation of his oral statements to the report maker. That should not preclude the analysis above provided the transactor understood the English language; nor should the fact that he was not proficient in speech and writing. However, two important considerations might have stood in the way of concluding that the report was the transactor's, written under the hand of an amanuensis. First, the transactor did not appear to have adopted the report as his own, though he confirmed the correctness of the translation. Second, he appeared to be an employee only and it was not apparently his job to undertake responsibility for the report. It seems more likely then that on the facts as reported, the report was a composite report, made by the report maker who undertook responsibility for the report, using information provided by the transactor,

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[208] In *P.P. v. Abdul Rahim bin Abdul Satar* [1990] 3 M.L.J. 188 the court was confronted with a rare submission that a list of trap notes prepared by a police officer but signed by another in acknowledgement that he had delivered the notes to a third party was hearsay of the signatory. The court correctly answered that the person who prepares a document is not necessarily its maker but the maker is the person who authenticates the document and adopts it as his own document. It was held that the signatory who had compared the trap notes with the prepared list and confirmed the correspondence between the actual notes and the entries in the list was the maker of the statement in question. *Cf. R. v. McGillivray* (1993) 97 Cr. App. R. 232 which construed s. 23 of the *Criminal and Justice Act 1988* to have the effect that, if a person clearly indicated by speech or otherwise that the record of what he had said was accurate, he being at the time being unable to sign the record because of some physical disability, he is taken in law to be the maker of the statement.

with the added feature that the report maker translated the information provided by the transactor while the transactor confirmed the correctness of information provided by him as translated.[209]

A. *Submissions and the Court's Decision*

Counsel for Trans-Link, seeking to deny admissibility to the report, relied on a passage from *Halsbury's Laws of Singapore: Evidence* as follows: "The section envisages evidence of written statements made in the ordinary course of business; oral statements made in the ordinary course of business are inadmissible under the section." Trans-Link argued "that this meant that for s 32(b) to apply to the report, the report must have been written by [the Thai expert] himself in the first place. As the report had been prepared from an oral statement taken from [the Thai expert], it was inadmissible".[210] The court did not consider whether the argument from the proposition was right[211] but addressing the proposition as just described, thought that it was wrong. This was because the opening words of the section were "Statements, written or verbal, of relevant facts" and they clearly indicated that the both written and verbal statements were contemplated. Prakash J. said:

> A plain reading of s 32(b) envisages the admissibility of verbal statements made by a person in the ordinary course of business although that section does give examples of particular documents, made in the course of business, that would be admissible. The enumeration of these various documents in subparagraph (b) does not detract from the description at the beginning of the section which clearly states that both oral and written statements may be admitted.[212]

B. *A Critique*

With respect, the expression "written or verbal" in the opening words of section 32(b) does not have the effect of making the manner or process of

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[209] The hearsay rule applies to translations. See *Attard* (1962) 43 Cr. App. Rep. 257n. However, there is no hearsay of the transactor's statements in the translation because of the transactor's confirmation as to the accuracy of the translation.

[210] [2003] 1 S.L.R. 712 at 717, para. 17. Note that in *Vaynar Suppiah & Sons v. K.M.A. Abdul Rahim* [1974] 2 M.L.J. 183 it was observed that s. 32(b) would not permit the admission of expressions of opinion within the meaning of s. 45 of the *Evidence Act*. This point was not taken in the case under consideration.

[211] With respect, the above passage nowhere states nor implies that the written statement must have been written by the person conducting the business, here the expert. And even if this was the case, it is abundantly clear that one can use an amanuensis.

[212] [2003] 1 S.L.R. 712 at para. 19. The court also cited *Sarkar on Evidence*, *supra* note 171 at 684 in support. *Sarkar on Evidence* states the English position and this is discussed below.

utterance irrelevant. The section has eight paragraphs.[213] In at least two of them, namely paragraphs (f) and (g), the statements of which evidence is admissible are exclusively written statements. If the expression had the effect attributed to it by the court, paragraphs (f) and (g) would be flatly contradicted and no one would lightly suppose that the drafter had committed such a gross or egregious error in virtually the same breath. What the expression in the opening words does is that it covers written or verbal statements as well as written and verbal statements if that would be appropriate.[214] Its effect is exactly as if the words "whichever is appropriate" had been added immediately following the expression "written or verbal".

Since that is the case, the question whether any paragraph of section 32 envisages both written and verbal or only verbal or only written statements must be determined on its own terms, without reference to the expression in the opening part of the section. There is abundant authority, for example, that the dying declaration may be written or verbal or partly written and partly verbal;[215] likewise the predigree declaration within the meaning of section (e).[216] As already stated, paragraphs (f) and (g) plainly announce that written statements only are relevant while paragraph (h) envisages only verbal statements.

What of paragraph (b) which admits evidence of:

> the statement … made by such person in the ordinary course of business, and in particular when it consists of any entry or memorandum made by him in books kept in the ordinary course of business or in the discharge of professional duty, or of an acknowledgment written or signed by him of the receipt of money, goods, securities or property of any kind, or of a document used in commerce, written or signed by him, or of the date of a letter or other document usually dated, written or signed by him?

It seems quite straightforward that since the specific instances of the same class or genus enumerated in paragraph (b) all involve written statements, the general words which otherwise may include verbal statements are cut down to that extent and confined to written statements. The familiar maxim of statutory interpretation, *noscitur a sociis*, guides us to this conclusion.[217] To

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[213] There are eight paras.

[214] As distinguished from "as the case may be".

[215] *Chandrasekera v. R.* [1937] A.C. 220.

[216] Implicit in *Re Lai Teng Fong decd* [1950] M.L.J. 34.

[217] *I.e.* a thing is known by its associates. This maxim is widely considered to be an extended version of another maxim known as the *ejusdem generis* rule. Although the rule is typically employed to restrict the meaning of general words (the *ejusdem generis* rule) or words of ordinary meaning (the *noscitur* maxim) which are found in the company of particular words or words of specific or technical meaning, their underlying premise is that we infer from the particular words or words of specific or technical meaning to the class or genus and then we cut down the general words or words of ordinary meaning accordingly.

elaborate, first, we see the general words "[s]tatements made in the ordinary course of business". Next, we see particular instances of such statements. Then, if we wish to know whether these statements may be written or verbal, we examine the society in which the instances are found. These are the three instances all of which involve writing. Therefore, the statements made in the ordinary course of business are written statements.

For the sake of argument, we may suppose that particular instances do not exhaust the generic description of the phrase "statements made in the ordinary course of business". Should we then construe the term "statements" to include verbal statements? We have already seen that the opening words offer no guidance because they merely say that the answer has to be sought in the wording of the paragraph in question. The question is whether the wording of paragraph (b) implies that verbal statements are included.

The common law, on the best view, has given a positive answer that verbal statements may be proved under its corresponding exception. There is a simple reason for this. The common law exception requires the maker of the statement to be under a duty to transact which is owed to a third person and that requirement is the guarantee that oral statements made in the course of business will generally be reliable. Wigmore was very explicit about this when he said:

> That the statement admissible under the present exception must be a *written* statement has been generally assumed in the United States in the judicial phrasings of the rule. In England, however, it seems to be settled that an oral statement is equally admissible. Since in that jurisdiction the third motive of trustworthiness … is regarded as most important, and the statement must be made under a duty to a third person . . . , it may be conceded, that an oral statement would be scarcely inferior to a written one in trustworthiness. In this country, however, where that limitation does not obtain, the trust worthiness of an oral statement would seem to be far inferior to that of a written one, especially as affected by the second reason for the rule …[218]

In Singapore, too, the requirement of a duty to a third person does not exist and the same reason that Wigmore gave for differentiating in the United States between oral and written statements made in the course of business is cogent argument against adopting the English position.

This does not overlook the fact that Wigmore went on to suggest that where the element of duty does actually exist in any particular case, there may be a proper case for adopting the broader English exception and admitting a composite report which incorporates oral statements made by another under a duty to transact who is not available as a witness provided the maker

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[218] *Wigmore on Evidence*, 3rd ed. (Boston: Little, Brown, 1940) Vol. V at para. 1528.

of the final report is called as a witness. Would section 32(b) permit this result as well?[219]

One difficulty is that whereas a court applying the common law can innovate, at least incrementally, and rely on common law's malleability to craft another qualification, there is some doubt whether that eclecticism is possible in Singapore where the courts are to apply the section as drafted. Recourse to a purposive approach is unlikely to deliver a fully favourable result.[220] Although it is a powerful approach, it cannot be used as an instrument of judicial activism. The approach does not serve to re-write the statute but to give effect to its true purpose of admitting reliable business statements. A lot of oral statements are made in the course of business. Indeed, before the writing or record is drawn up, it is often preceded by an oral statement. But the very reason the record is made is that business people prefer the written record of such oral statements as may have been made. It would not advance the purposes of section 32(b) to construe it as admitting oral statements as well as written statements. Take the case of an expert. He can make his oral statements but it is his written statement that his principal wants and it is that he crafts with care whereas he may be less careful with his oral statements. We obviously do not want noisy tentative and preliminary statements which are made as a prelude to the real statement.[221]

But though that construction is ruled out, could we not construe the section to cover a composite report made up of oral or written statements made by another than the report maker? If the oral statements have been incorporated into the final report, we should be able to avoid the difficulty mentioned earlier of having to sieve out oral statements which are made with less circumspection. But in the end, we are still missing the element that the report maker must be called as a witness that Wigmore insisted upon. There is no way that one may add the requirement that the report maker must be

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[219] There is a decision of the Singapore Court of Appeal, *Vaynar Suppiah & Sons v. K.M.A. Abdul Rahim* [1974] 2 M.L.J. 183, which seems to be against admissibility of oral business statements which are incorporated into a final written report. As has been related, the court in that case held that there was no evidence of the nature and extent of cargo damage to support the cargo consignee's claim against the shipowner. In so holding, it was held that a report, signed by someone who did not prepare the report himself as a result of personal examination of the goods in question, but relied on written facts provided by another was not an entry or memorandum made in books kept in the ordinary course of business or in the discharge of the expert's professional duty. The decision was a rejection of written statements made in the course of business which were incorporated, as it were, into a final written report also made in the course of business. If so, the rejection of oral statements incorporated into a final written report must follow. But this decision does not of itself stand in the way of adopting Wigmore's suggestion because the report maker was not called as a witness.

[220] *Cf. Soon Peck Wah v. Woon Che Chye* [1998] 1 S.L.R. 234.

[221] It is conceded that the requirement that the statement must be made in the ordinary course of business could deal with this problem if it could be shown that in the ordinary course of business the expert would not intend his oral statements to be relied on.

called as a witness to section 32(b) under a purposive approach, without re-writing the provisions of the section.

Reverting to *PATEC*, the decision that oral statements are admissible under section 32(b) seemed odd because the witness did not testify to the oral statements but tendered the report in evidence. The court held that the oral statements of the transactor were admissible but received the report in evidence.[222] We have seen that a writing which is a reduction of oral utterances is hearsay and not secondary proof. We have also seen that if the oral utterances are admissible under section 32(b), as was held, the report maker who is called as witness must testify to those statements but he can refresh his memory with the aid of a report which is confirmed to reproduce correctly those statements. The disadvantage of *PATEC*'s compromised solution is that it blurs the division between secondary proof and hearsay. Logically, if the section truly admits oral statements, it must do so whether or not they are reduced to writing but then, the consequences of admitting oral statements when they have also been reduced into writing are not palatable. People will argue corroboration between the oral and the written or suppress the written in favour of the oral. Moreover, chiefly from the perspective of doctrine, there would cease to be any justification to maintain the line between secondary proof and hearsay. Let it be conceded that the idea of secondary proof is to extend the proof of documents in limited circumstances. If in these circumstances, X can testify as to what Y said he or Z did in the course of business, even though Y wrote down what he or Z did, it seems odd that B cannot testify to what X said Y said he or Z did in the course of business

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[222] In the alternative, it was held relying on *Goh Ya Tian v. Tan Song Gou* [1981] 2 M.L.J. 317 that Trans-Link had waived its right to object to admissibility of the report by agreeing to its inclusion in the Agreed Bundle without making any reservations on admissibility. We have known for a long time that there is something not quite right about the agreed bundle. As a way of narrowing the evidential combat with respect to documentary proof, the agreed bundle has few equals in avoiding for mutual benefit the provenance proof. Many things relate to the provenance; such as the existence, the genuineness, the incorruption, and where the original is not produced, the circumstances in which the original is lost, destroyed, misplaced and so on. If everything had to be proved, though no one seriously cared for it, the course of trial would not be expedient. But, really, you do not need the *Evidence Act* to act according to common sense. Since provenance proof may be waived in the trial, it follows that it may be waived before the trial. The agreed bundle does a great job of doing this. However, the proof of a fact by a statement asserting it is another matter. The *Evidence Act* comes down against it. There is no common sense here when the Act forbids it. This criticism is very familiar. It depends on the way we conceive of hearsay in terms of irrelevant facts. Hearsay is an irrelevant fact and the courts have nothing to do with irrelevant facts. If hearsay was conceived in terms of means of proof, the authority of the rules is quite conclusive that here is another hearsay exception. Despite strict logic, the agreed bundle became the vehicle to admit the expert report as second-hand hearsay in *PATEC* but who could chide the court for thus side-stepping the Act? As a kind of hearsay by agreement, the agreed bundle obviously is a boon to commercial practice and a bane to academics.

when the same circumstances justifying secondary proof exist. Anyone who has read the writing can furnish secondary proof of it. So why cannot B who has heard from X? To avoid these difficulties, one should conclude that despite what was said, the question for the court was not one relating to the admissibility of oral statements made in the course of business but concerned the admissibility of a composite report made up from oral statements but without any proof of those oral statements. The court's final decision showed that it was concerned with the composite report and not as some of the reasoning might suggest, with the admissibility of oral statements as such.

Arguments opposite to those just canvassed, however, carry weight when evidence is to be given of oral statements made in the course of business which have not been incorporated in writing. In these circumstances, one advantage must be conceded to the opposite view. The view that oral statements are admissible fills a gap when oral statements are made in the course of business and are never reduced to writing;[223] although these must be quite rare since the making of oral reports by subordinates is common but these are then entered by another, producing a report of composite character. Such admissibility is valuable but, as has been argued, the only trouble is that it is justified by duty and the duty requirement is missing from the section as drafted.

In conclusion, *PATEC* is further argument that section 32(b) is ripe for reform. We must always be wary of statutory constructions which destroy certainty of proof in practice or make certainty available at a cost. Section 32(b) can be charged with provoking liberal constructions in its failure to address the widely used composite report. The courts failing to find a theory of hearsay completely or rationally worked out in the section will react as pragmatists and admit composite reports because it seems practically speaking right to do so.

[223] Note that oral statements made in electronic form are regarded as written statements. See *R. v. Mills* [1962] 1 W.L.R. 1152.