Confirming House Transactions in Commonwealth Countries

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INTRODUCTION

The question of obtaining payment of the price in a contract for the sale of goods has always been one of prime importance. In international sales, the problem of how to ensure payment has been approached in several ways. The early merchants developed the negotiable instrument to overcome the physical problem of transferring large quantities of money in specie from place to place. This still, however, left unanswered the perennial problem of how to ensure payment. Among the various expedients adopted, the del credere agency was an important contribution, under which the seller's agent guaranteed payment of the price to his principal in return for a higher rate of commission.1 However, this has not proved adequate as a basis for international trade in its modern forms, and has been largely replaced by the confirmed banker's credit. At the same time however, the confirmed credit is merely a device whereby the exporter is guaranteed payment of the price and other incidental charges. It does not solve the problem of how a foreign buyer can obtain credit to buy goods, nor the associated one of obtaining the services of a representative in the exporter's own country to arrange transactions for him. Conversely, the problem also arises of the manufacturer of goods requiring specialist services to assist in exporting them. In other words the solution of the question of payment does not in itself solve that of arranging export sales transactions.

Large trading and manufacturing groups have long had local agents or branch offices in the principal countries with which they trade.

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Similarly, the larger overseas groups have tended to maintain a London office to handle imports purchased from British suppliers. This is not possible for the majority of medium and small commercial concerns. Consequently, certain specialist intermediaries have developed to fulfill the demand for such services. These are commonly given the generic name of "Export Houses", but that covers several categories of intermediary whose functions differ widely, although a particular trade house may combine several of them.

II. CATEGORIES OF INTERMEDIARY

Firstly, one of the oldest categories of intermediary is the Buying Agent, whose prime function is to act for and to look after the interests of overseas buyers. Historically the procedure originally employed was for the importer to write out an order for his British supplier, but, before dispatching it to him, tear off the signed part of the order, which was sent instead to his London buying agent. The latter would also receive a copy of the order, but would only forward the signed part of the original order to the supplier when he was satisfied that the quality of the goods and price were satisfactory. The supplier on matching up the two parts of the indent would then have a legally enforceable contract. Through the inconvenience of the procedure it was gradually replaced by a statement in the original order whereby it had to be "confirmed" by the buying agent. This did not imply more than the fact that the order would not be valid until the buying agent was satisfied as to the quality, etc., of the goods to be supplied, as in the original indenting procedure.

Another category of growing importance is the Manufacturer's Export Agent. This is the reverse of the Buying Agent. He acts solely as agent for the British manufacturer in respect of all or some of his products in one or more markets abroad. He is responsible for promoting sales, and all other work involved in the execution of export sales. For this he is remunerated either by way of commission or more rarely by an exclusive fee, the latter being more common where export possibilities are uncertain. He may also function as an Export Manager inasmuch as he may take over all the functions of an export department on behalf of a manufacturer, acting in the name of the manufacturer. This however is merely a particular variant of Export Agent, whose exact functions will usually depend upon the particular contract which he has negotiated with his principal, the manufacturer. ²

Neither of these categories of intermediary generally perform more than a limited range of services, however. There is therefore a need for an intermediary who can combine both the functions of an agent acting on behalf of an overseas buyer and, at the same time offer financial and physical responsibility to a home manufacturer under an export contract of sale. This category is best known by the name of a "Confirming House", but historically various names, such as commission agent, commission merchant, as well as that of confirming agent, have all been used at different times to describe the various overlapping transactions, while at the same time confusing the relationship with that of the buying agent. This has often been reflected in a noticeable lack of knowledge on the part of the judges as to the material trading practices.⁴ Diplock L. J. offered the following explanation of their functions:

[Confirming houses, formerly known as commission merchants, have played an important part in overseas trade for close on two centuries, particularly before the perfection of the modern method of financing purchases through bankers' confirming credits. . . . The business reason for the use of the services of confirming houses as distinct from brokers or ordinary buying agents is to provide a credit-worthy person in the country of the seller of goods required by an overseas buyer to whom the seller may look for payment of the purchase price and performance of the contract of sale. The same firm may act as forwarding agent for the overseas buyer as well as confirm the house in relation to the goods which are the subject of the contract of sale, but it is important in such cases to distinguish between its duties as confirming house and its duties as forwarding agent.⁵]

The confirming house is an essentially British institution and may vary in size from a multiple group to a one man concern. It will normally be employed by an overseas buyer, generally on a commission basis. The latter will forward his order to the confirming house who will confirm it with the manufacturer, who will not necessarily be operating in the United Kingdom.⁶ The confirming house may merely confirm

² See, With the help of an Export House, S.5.66, Board of Trade Journal, 315.

⁴ In Isaac Gundie v. Mohenali Sunderji, (1939) 18 K.L.R. 137, Lucie-Smith J. complained that no evidence was given as to confirming house practice. In Telrite Ltd. v. London Confirmers Ltd., [1962] 1 Lloyd's Rep. 236, 239, Elwes J. commented with comment that "Confirming houses are not unknown to the law . . . I am told that this kind of business has been transacted for upwards of 100 years." Similarly there appears to have been a lack of direct knowledge on the subject in African Commercial Corporation Ltd. v. Hussainali & Co., (1955) 25 M.L.J. 124, where Butrous J. confused the confirming house with the confirmed credit. See also Sturz & Sons Ltd. v. House of Youth Pty Ltd., [1960] S.R. (N.S.W.) 220.


⁶ See cases in note 10, infra.
payment of the price and nothing else. However, it is more likely to offer a full range of ancillary services as well. In such circumstances the confirmation will guarantee payment on shipment of the goods when called forward by the confirming house, who will normally arrange shipping space, although larger exporters may in fact do this themselves, if they have an export department capable of handling it. Even so, many larger exporters still utilise a confirming house to forward goods on their behalf. The goods will normally be paid for by the confirming house on receipt of the supplier’s invoice subject to whatever terms have been agreed. The confirming house will often arrange insurance too. The latter’s only income is its commission from the foreign buyer at a prearranged rate. Any suppliers’ discounts, etc., which the confirming house has obtained will be passed on to the buyer. Also, normally being a contract—shipper of the various shipping conferences, preferential terms will be obtained for freight too, which will again be passed on to the buyer, and which may be a further incentive for the importer to leave freight arrangements to the confirming house.

By granting credit to the buyer, new capital is mobilised for the transaction. The usual method of payment is for a bill of exchange to be drawn by the confirming house for acceptance against documents by the buyer, to be presented through the latter’s bank. As no security is generally taken by the confirming house, the buyer’s other lines of credit remain unimpaired, so that local credit to back the bill may be obtained from a local bank on security, by means of debentures, etc.

The confirming house often informally settles disputes with the manufacturer as to quality, servicing, etc., if the buyer does not maintain a local office himself. The confirming house does not buy and sell commercially on its own account, even though a transaction may take this form. The sales impetus for new business may as often emanate from an exporter or manufacturer as from a prospective foreign buyer. For instance, a manufacturer may be dissatisfied with a local selling outline, and may request a confirming house to find an alternative. The latter will attempt to find one, checking its suitability

in all respects, both financial and commercial. This service is performed gratuitously in the expectation that if new business results, the confirming house will handle it. Finally, the confirming house must arrange its own financial backing. This may take the form of internal capital financing in the case of the bigger groups, but more generally money will be raised by discounting bills with those banks specialising in foreign trade or by similar devices. Many confirming houses also protect themselves against loss by using the British Export Credits Guarantee Department, the government backed export insurance scheme set up after the First World War to provide insurance facilities covering risks peculiar to export transactions not normally covered by the commercial insurance market.

III. THE CONFIRMING HOUSE DISTINGUISHED FROM OTHER INTERMEDIARIES

It can therefore be seen that it is possible to offer an adequate commercial analysis of the confirming house’s functions. The difficulty, however, is defining its legal status. To do so a careful analysis of the precedents in the various common law jurisdictions is necessary, as disputes are likely to arise in any part of the world, depending upon whether they involve the supplier and the confirming house, the buyer and the confirming house, or the supplier and the buyer.

The function of the confirming house must be distinguished from

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7 However, a confirming house may be involved in other financial activities such as in Telrite Ltd. v. London Confirmers Ltd., supra note 3, where the confirming house was also offering short-term unsecured finance to the third party to whom the buyer had arranged to sell the goods which had already been the subject of a confirming house transaction. Equally some of the larger confirming houses have attempted to enter the field of invoice factoring with varying success—see P.S.B. Foster, International Factoring, Export, Jan. & Feb. 1964.

8 J. W. Wotherspoon & Co. Ltd. v. Henry Agency House, supra note 1. The Plaintiff was a London confirming house and the defendant was its unofficial agent who found prospective buyers in Malaya. The former checked the credit of the buyer through its own agents and then confirmed orders forwarded by the defendants and goods were supplied directly to the Malayan buyer. The defendant received no commission from the confirming house, but from the firms supplying goods for the plaintiff. The latter charged the buyer 39% buying commission, none of which was passed on to the defendant. In the case in question, the buyer went bankrupt after the plaintiff had shipped and invoiced the goods to him, the orders having been received through the defendant. In the resultant action against the defendant for the price as a del credere risk, the court held that the defendant was not liable as a del credere agent, as such an agency could not exist: unless additional commission was paid for such a risk. Merely to receive commission was not enough, and here there was in fact none at all passing between the parties concerned, so that the confirming house could not therefore hold the defendant liable.


associated transactions. Firstly, the confirmed letter of credit may be used as a method of payment. This is confirmed by a bank, and does not involve a confirming house. It is used where the parties in an export transaction agree that payment is to be made in the seller's country. Here the buyer arranges for credit to be opened with a bank in the seller's country, to be honoured in exchange for documents of title, etc. The only part of the transaction to be confirmed here is payment of the price. Similarly the confirming house must be distinguished from an acceptance house, which is a specialised form of merchant bank whose acceptances can be discounted at the Bank of England. The house adds its name for a small commission, undertaking but little risk. Confirmation by a confirming house, however, offers in its extent at least more safeguards to the seller than does a confirmed credit.

Factors

The problem of distinguishing the functions of the confirming house is one that has created considerable difficulty in the courts. For instance, in one recent case the plaintiff was an importer who had purchased sewing machines from South America. The defendant confirming house had confirmed the order and opened a letter of credit in favour of the seller. On receipt in England the confirming house refused to transfer the bills of lading to the buyer, on the ground that they had a general lien in respect of an outstanding account. It was argued on behalf of the confirming house that it was acting as a mercantile agent within the meaning of the Factors Act. Elwes J. held, however, that a confirming house does not come within that definition, and does not therefore possess a right of general lien:

I do not accept the submission that the business of a confirming house as have been given to understand it, is indistinguishable from that of a factor.

(B) Forwarding Agents

The distinction between a confirming house and a forwarding agent was discussed in the recent case of Anglo-African Shipping Corporation of New York Inc. v. J. Mortner Ltd. The facts were that the plaintiff confirming house undertook to confirm an order for 2,000 yards of plastic sheeting on behalf of the defendant buyer to be supplied by an American supplier “delivery 2/3 weeks f.a.s. New York.” The relationship created was twofold. Firstly, the plaintiff assumed the obligations of a confirming house in the transaction. Secondly, the plaintiff also undertook to act as forwarders on behalf of the buyer for the purpose of shipping the goods to the United Kingdom. As a result of a dispute concerning samples supplied, the buyer cancelled the order, and refused either to accept the goods or to pay the plaintiff, who was liable to the supplier for the price. The plaintiff therefore sued the buyer for breach of contract. In his defense the defendant alleged, firstly, that since the plaintiff had failed to exercise due diligence in making contracts with the supplier and the goods were not delivered alongside ship within the contract time, he was entitled to cancel the contract. Secondly, he alleged that the plaintiff was under a duty to have shipping space available at all times during the delivery period, not merely when he knew the goods were available.

At first instance, Megaw J. held that in his capacity as a confirming house the plaintiff had not failed to use due diligence in making a contract with the suppliers, and that the latter had only failed to bring the goods alongside the ship within the delivery period because they had not been given instructions as to the place or time. There was therefore no breach by the suppliers of their delivery obligation. Consequently, the plaintiff, in his capacity of a confirming house had neither the right, nor obligation, vis-a-vis the defendant, to resile from his contract with the suppliers on the grounds that the latter were in breach of contract. Secondly, in his capacity of a forwarding agent, the plaintiff's obligation was merely to act with all reasonable promptness and arrange for shipping space when he knew the goods were available. In the absence of such knowledge he was not obliged to arrange for shipping space in advance to ensure that the goods could be brought alongside a ship within the delivery period. Consequently, in neither capacity was the plaintiff at fault. This decision was upheld by the Court of Appeal.12

11 Sellers L.J. stated that, “If the plaintiffs were throughout acting as agents for the defendants, who were buyers of the goods, then I do not think it matters whether their obligation to arrange shipping space arose under their services as a confirming house or as shipping agents. They had to perform the buyer's duty and that was an absolute duty to find space and to notify it. But, as agents, the plaintiffs had only to exercise reasonable care and diligence in carrying out their mandate.” Id. at 616. Similarly in Sobell Industries Ltd. v. Cory Bros. & Co. Ltd., [1955] 2 Lloyds Rep. 82, 89, McNair J. stated that “there must be implied in the relationship... an implication that the defendants as confirming house will, when notified by the (suppliers) that goods are at the packers ready for shipment, give the (suppliers) shipping instructions in order that they may produce the shipped bills of lading against which the defendants say they will pay.”
IV. CLASSIFICATION OF CONFIRMING HOUSE FUNCTIONS

An analysis of the status and functions of a confirming house has not been rendered any easier by the loose terminology used by the courts to describe such operations. However in practice the legal relationships created will largely depend upon the form of documentation used by the parties. As a preliminary, therefore, it is necessary to consider the indent in some detail. Generally, a copy of the indent will be received by the confirming house either direct from the foreign buyer or else through a local branch office if the latter is large enough to possess one. Alternatively, the manufacturer himself may pass a copy to the confirming house on the instructions of the foreign buyer.1 6

Indents fall into two classes. Firstly, there is the specific indent which relates to an order for goods directed to a particular named manufacturer. Secondly, there is the open indent in which the goods required are specified, but it is left to the discretion of the confirming house as to which supplier will execute the indent. The open indent is generally used only where the goods in question are subject to common standards in respect of which little variation will arise from one manufacturer to another.1 7 It is not very widely used nowadays though, owing to the increasing number of local agents which manufacturers possess throughout the world. The procedure employed where both local agent and a London buying agent or confirming house are involved was admirably described in Parker's Music & Sports House v. Motorex Ltd.1 8 by Rudd J. in the following words:

The general procedure of contract in the case of contracts arising under this type of indent is as follows. No contract arises upon the mere giving of the indent. The local representative of the supplier or merchant abroad transmits the indent to the supplier for acceptance and it is only upon such acceptance that a contract arises. The supplier's duty is then to deliver the goods in accordance with the indent, in this case f.o.b. European port. The shipper is the person who pays the supplier, and normally he deals with the goods as instructed by the purchaser. The shipper arranges for the transmission of the goods to the purchaser and recovers his expenses and charges from the purchaser. In the normal course the supplier's local agent in Kenya plays no part in the delivery of the goods, nor does he receive the price of the goods from anyone. I do not wish to be taken as saying that the local agent could not contract in terms which would render him personally liable for the due performance of the contract, but I think that normally such a contract does not impart a personal liability upon him. In my opinion the form in which the contract is expressed is crucial to the decision of the point in each particular case.

If therefore the indent is drawn upon a standard form used by a local manufacturer's agent, there will generally be no binding contract until supplier notifies his acceptance of the order. On the other hand, however, if a foreign buyer does not act through a local agent, but orders direct by letter or on his own order form, difficulties may arise as to the actual terms of the contract and with whom the buyer is intending to enter into contractual relations, the confirming house or the supplier.1 9

The problem however is how to reconcile the various and often conflicting decisions and dicta of the courts. At first glance this appears an almost insuperable task, but in fact the various dicta of the judges are all basically correct interpretations of the particular relationships before the court. The hiatus lies in the fact that the judges have generally failed to realise that they have only been dealing with part of the problem and have not therefore attempted to relate it to any other aspect of confirming house operations.2 0 Even though the precedents span over a period of about a century, each of the various methods considered therein are still in use to a greater or lesser degree depending upon the particular place and the practice currently operative there. What is obsolete in one place may be current in

1 7Exceptionally in Anglo African Shipping Company of New York, Inc. v. J. Moirner Ltd., [1962] 1 Lloyd's Rep. 610, 620, Diplock L.J. obviously realised this when he observed that "there appears to be no reported case which deals specifically with the legal relationship between the confirming house and the overseas buyer for whom it acts or with the mutual rights and liabilities which flow from that relationship." See Cassabouglo v. Gibb, (1883) 11 Q.B. 797, where the dispute was between a British buyer and a commission merchant in Hong Kong, and to which Diplock L.J. did not refer on this point. See also the other cases referred to in note 10.
another, and what is more, discarded methods of operation may be reintroduced where conditions warrant it. Consequently, an analysis of the principles involved may be of more than transitory or historic value.\footnote{Diplock, L.J. appears to have overlooked this point when he stated that “in my opinion, it is not permissible to decide this case on the basis that the parties were contracting in accordance with established and well-recognised legal duties and obligations of a confirming house to its clients...” Such business relationships may have been dear in the last century, but just as our commercial law and practice grew and became established so it can change or fall in whole or in part into disuse.” Id. at 616.}

In constructing a scheme of classification it must be made clear that no such scheme has as yet been laid down in any of the precedents which patently deal with confirming house operations as such. However, four distinct categories of transaction can be discerned from the precedents which either deal with the confirming house or associated transactions such as those involving buying agents, and all four are to a greater or lesser degree employed by the confirming house under present trading conditions.\footnote{No attempt to classify confirming house transactions was made prior to that of C.M. Schmitthoff, Confirming in Export Transactions, [1957] J.B.L. 17. More recently in The Merchant Shippers, January 1966, at 18, he has classified confirming house transactions into four categories: (a) of an agency character (b) of sales character (c) of mixed character (d) of financial character. This classification was however apparently based only upon the decided English cases in the light of trade practice. The present classification offered in this article has been constructed upon the wider basis of the whole Commonwealth in the light of trade practice both in the United Kingdom and abroad. Consequently, although the first two categories laid down by that eminent writer correspond with the third and fourth categories laid down in this article, there is a divergence in respect of the other categories of confirming house transaction.}

The first category is that which arises where a confirming house confirms a transaction on behalf of its principal, the overseas buyer, and thereby becomes liable as a principal to the home supplier in respect of either mere payment of the price or of the transaction as a whole, the extent of the obligation in the latter case depending upon the terms of the contract. However, in doing so privy to the contract will still be created between the overseas buyer and the home supplier. In other words, two separate contracts are entered into with the supplier by the buyer and the confirming house respectively.

This relationship is at present the most common one employed by London confirming houses, who endeavour to bring their client and the supplier into direct contractual relationship wherever possible. This does not limit their liability in any way to either party, but it does enable their client to sue the supplier direct if he so wishes, where there has been a breach of contract on the part of the latter.\footnote{Teheran-Europe Co. Ltd. v. S.T. Belton (Tractors) Ltd., [1968] 2 Lloyd Rep. 3.} Conversely, it will give the supplier a right of action against the buyer if the confirming house goes insolvent, or if for any other reason is unable to meet its commitments. Such a situation is comparatively rare however, and can be guarded against by insurance effected with Export Credits Guarantee Department.

This relationship will generally arise where the overseas buyer places his order for goods by means of an indent drawn up by the supplier’s local agent, if he possesses one. The latter will forward one copy to his principal, the supplier, following a procedure similar to that described by Rudd J. in Parker’s Music & Sports House v. Motorex Ltd. quoted above. Further copies will be handed over to the buyer who will dispatch one or more to the London confirming house which has agreed to act for him in confirming the transaction. The latter will in turn place a confirming order with the supplier in its own name and on its own behalf, confirming the buyer’s indent. A copy of the indent may also be forwarded with the confirming house order to the supplier, if one is available, but this is not essential.

An example of this category of transaction occurred in Sobell Industries Ltd. v. Cory Bros & Co. Ltd.,\footnote{[1955] 2 Lloyds Rep. 82.} where a Turkish buyer ordered a supply of radio sets from the plaintiff manufacturer, the order being confirmed by the defendants, Cory Bros. On the failure of the buyer to accept the whole consignment, the defendants in turn refused to accept the balance of the goods. In an action for non-acceptance thereof, the defendants pleaded that they were in fact acting as agents for a disclosed principal in negotiating the contract, and were therefore under no liability themselves for non-performance. It was held however that as the defendants were acting in the capacity of a confirming house, and the particular method used was to place an order themselves in the plaintiff’s own name with the plaintiff, they had in fact assumed the position of a principal in the contract. As McNair J. stated “there is nothing unusual in one party being both principal in one capacity and an agent, he may have these functions arising out of the same transaction.”\footnote{Id. at 90.} In practice however, the copy of the indent may sometimes reach the confirming house through the supplier, instead of from the buyer direct. This does not affect the legal relationships created though, as the former is merely acting as a conduit pipe in the
matter. Equally, if there is no local supplier's agent involved, the buyer may send his order direct to the supplier with a copy to the confirming house with a request for confirmation. Alternatively, he may send it to the confirming house alone, with instructions that he is to place the order on his behalf, and to confirm it. The latter procedure is most common where the confirming house itself has a local office in the buyer's vicinity, in which case the supplier's agent may itself put the buyer in touch with a confirming house through the latter's local office. 

The next category of transaction is where a confirming house enters into a contract with a supplier on behalf of his client the buyer, but does not create privity of contract between them. This relationship has been clearly defined by Salmond J., of immortal fame, in the New Zealand Court of Appeal case of Bolus & Co. Ltd. v. Inglis in the following words:

[T]he relation may be that of agency, whereby the English agent is authorised to purchase the goods in his own name and on his own responsibility from the English manufacturer, and to send them to his principal, the New Zealand merchant, but is not authorised to make in the name of or on behalf of that principal any contract between him and the English Manufacturer, or to impose on the principal any contractual liability towards the manufacturer. In such a case the only contract of purchase and sale is that which is made between the English agent and the English Manufacturer, and the only liability of the New Zealand merchant is towards his own agent. The relation between the English agent and the New Zealand merchant in such a case is merely one of agency, and not one of vendor and purchaser, though in respect of the right of stoppage in transitu, and possibly in some other respects, it is analogous to contract of sale and purchase and possesses similar incidents.

Such a relationship is in fact a de facto equivalent of the contract of commission which the continental civil law has created to give legal status to the independent commercial agent, and to overcome the

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1926] N.Z.L.R. 175. A distinction was drawn between three out of four of the methods used in confirming house transactions, although ostensibly it was drawn in respect of the activities of a buying agent in the New Zealand import trade.

23 Jurisdictionally the distinction is accepted between a contract of perfect representation and one of representation imparfait. English law has not prepared to accept the latter category where privity of contract is not created between principal and third party. See Ripert, Traité élémentaire de droit commercial, § 2351 et seq. The contract of commission has been incorporated into the codes of virtually all civil law countries: arts. 94 et seq. C. com. (France); art. 407 et seq. HGB: Liv. 1, Tit. vii. C. com. (Belgium); art. 1731 C.C. (Italy); art. 425 et seq. C.O. (Swiss).

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Problem of retaining the concept of representation by an agent, while vesting sole personal responsibility to a third party in the intermediary. In such a contract, irrespective of whether the identity of the principal is disclosed or not, no privity of contract will be created between principal and third party. 

Regrettably, the English Courts have failed to recognise this relationship as being one generally accepted at common law. However, a series of precedents defining this class of confirming house transaction can be traced, mainly in Commonwealth jurisdictions owing to the fact that the majority of disputes have involved the foreign buyer in whose jurisdiction litigation will normally take place.

Returning however to the definition given above by Salmond J., much of the difficulty that has arisen in concretising this category of transaction has resulted from the problem of providing for the passing of ownership where such a relationship is created. Juristic opinion could not conceive of any means whereby ownership could pass from the home seller to the foreign buyer if the confirming house was to be treated as a principal in relation to the seller, except by converting the relationship between the confirming house and the buyer from one of agency into one of vendor and purchaser. In other words, the courts have been forced to create an artificial contract of sale between them to transfer ownership to the buyer.

This originated largely from a misunderstanding of a dictum by Blackburn J. in the celebrated case of Ireland v. Livingston to the following effect:

The legal effect of the transaction between the commission merchant and the consignee, who has given him the order, is a contract of sale passing the property from the one to the other, and consequently the commission merchant is a vendor, and has the right of one as to stoppage in transitu.

However, he emphasised that this did not prevent a contract of agency existing between the parties, as the contract of sale was merely "super-added" to the agency relationship of which it was but a technical
part, as a method of combining the personal responsibility of the commission merchant to the seller under the contract with the transference of the property to the buyer of the goods in question.

The relationship was clarified however in the later case of Cassaboglou v. Gibb by Fry J. L. J. who explained how property in goods would pass in such circumstances to the buyer without the need to introduce a second contract of sale at all:

[W]as the contract of principal and agent merged into that of vendor and purchaser? This must be a question of fact, and as a question of fact there was no such contract. It is said, however, that there must be such a contract inferred for two reasons, first because otherwise the property in the goods would not pass to the English merchant for whom the agent abroad bought them. In my judgment the property would pass. If the article was specific it would pass by the purchase, and if not specific, but was appropriated by the agent for his principal, it would pass by virtue of the appropriation. The other reason for inferring the relation of vendor and purchaser was said to be because the foreign agent who has bought for his principal has the right of stoppage in transitu, but that in my opinion, is no reason for such inference. Since . . . Lickbarrow v. Mason 1 Sm. L.C. 8th ed. 753, the person who stops goods in transitu must be a consignor, but there are numerous cases in which the right has been allowed of stopping in transitu without the relationship existing of vendor and purchaser.14

13 Subsequently, in Robinson v. Mollett, (1875) L.R. 7, H.L. 802, when considering the custom of the tallow trade, Blackburn J. reaffirmed his earlier dicta in Ireland v. Livingston. He stated that, "any person, if he chooses, may give an order to an agent to buy as his agent, not only with an express dispensation from any obligation to establish privity of contract between him and the person from whom the agent buys, but even expressly refusing authority to the agent to establish such privity. This is the ordinary authority given to a foreign commission merchant, who is not allowed (far less required) to establish privity of contract between them . . . This however, in no way interferes with the existence of a fiduciary relation, or the consequent obligation on the agent not to put his own interest in conflict with that of his principals." Id. at 809-810.

14 [1883] 11 Q.B. 797, 804. The facts were that a London merchant ordered the defendant, a Hong Kong commission agent, to buy certain opium. This was unobtainable, but by a mistake the defendant informed the plaintiff that it was, and bought and shipped inferior opium by mistake to the plaintiff, believing it to be the correct quality. The court held that the relationship between the parties was that of principal and agent, and not vendor and purchaser, and therefore only the actual loss was recoverable, and not the difference between the value as ordered and supplied. Fry J. L. J. explained that although Blackburn J. had said that "the legal effect of the transaction . . . is a contract of sale passing property from the one to the other, and consequently the commission merchant is a vendor and has the right of one as to stoppage in transitu; but by the legal effect of that transaction he means the legal effect of an analogous contract to that of a contract of purchase and sale." Id. at 807. It was because the dictum was not interpreted in the correct sense in later precedents that Salmond J. emphasised in his judgment that "the dictum of Blackburn J. in Ireland v. Livingston (1872) 5 H.L. 395, 409, to the effect that the relationship between a commission merchant and his principal is that of vendor and purchaser is explained in this sense by the Court of Appeal in the subsequent case of Cassaboglou v. Gibb." A similar interpretation of Ireland v. Livingston was given in Down Bros v. Henry Oakley & Sons, [1921] N.Z.L.R. 743. See also Butters (London) Ltd. v. Roux & Co., [1922] N.Z.L.R. 549.

The courts have recently applied the dictum of Salmond, J. in the New Zealand case of Witt & Scott Ltd. v. Blumenreid. The interesting point in this case is that although it concerned a confirming house, the actual litigation was between the buyer in New Zealand and the supplier in Australia. The latter, the defendants, wrote to Tozer Kemsley & Millburn, the confirming house in Melbourne, offering 150 pieces of Cameltex heavy coating in accordance with sample "submitted to you . . . goods will be delivered to you and paid for by your firm." The plaintiff buyer gave a signed order in Wellington to Tozer "goods to be bought and shipped by Tozer Kemsley and Millburn, Melbourne, as buying agents merely, ship to Wellington as soon as possible." Tozer ordered from the defendants "for and on account of" the plaintiff f.o.b. Melbourne, in Australian currency together with a covering letter. The goods were invoiced by the defendants to Tozer, "sold to" Tozer. An account was sent to Tozer who paid the defendants. The goods arrived in Wellington and did not comply with the contract.

In the ensuing action, it was necessary to prove that the contract was either made, performed, or broken in New Zealand to obtain service out of jurisdiction. The plaintiff argued that the contract was made in Wellington by Tozer as the defendants' agents. The court however rejected this argument and held that the contract of sale was in fact made in Melbourne by the defendant with Tozer. No order was therefore made for service out of the jurisdiction.

O'Leary C.J. stated that "apart from one's view of the documents" there was authority for holding that an agency existed between the plaintiff and Tozer, and that the latter had authority to buy goods in their own name and on their own responsibility from the defendants and to send them to the plaintiff. Tozer were not however authorised to contract in the plaintiff's name, nor to enter into contractual relations which would impose contractual liability on the defendants direct.16

In similar circumstances the court reached the same decision in Rusholme & Bolton & Roberts Hadfield Ltd. v. S. G. Read & Co. Ltd. Here an Australia company ordered through the local manufacturer's agent goods from the plaintiffs who were textile manufacturers, upon "terms—confirmation and payment by" the defendants who were a
London confirming house. Here owing to a recession of trade in Australia, the order was cancelled by the importer. The confirming house therefore in turn refused to accept delivery of the goods. It was held on an action for non-acceptance of the goods that the defendants had assumed liability financially to the plaintiffs. In a judgment of some interest, Pearce J. stated that,

The fact that a person is an agent and is known so to be does not of itself prevent his incurring personal liability. Whether he does so is to be determined by the nature and terms of the contract and the surrounding circumstances.38

Although the relationship created appears on the face of it to be similar to that in Sobell Industries Ltd. v. Cory Bros., the difference lies in the fact that in Rusholme's case the court did not accept that the indent was in fact a contractual document at all, but was merely a statement of intention.39 The contract created was between the confirming house and the supplier. No privity appears to have been created between the foreign buyer and the supplier, although the court did not specifically say that the supplier had no right of action against the buyer. McNair J. merely contented himself with saying that “the defendants are assuming liability as between themselves and the plaintiffs,”40 while remaining an agent in relation to the foreign buyer.41 Consequently, although this case must be treated as falling under the second category of transaction, as it must be assumed that no privity was created between supplier and buyer, this situation is not really characteristic of such a confirming transaction, as it appears that in most cases the indent will be considered as a contractual document as in the Sobell Industries case, at least when it has been accepted and

confirmed by the manufacturer, a proviso which is found in most indent forms employed by local supplier's agents overseas.42

This category of relationship will generally arise where a foreign buyer does not send an indent direct to the supplier or through his local agent, or else where the indent is not accepted by the courts as a contractual document. Instead he will instruct the confirming house to order direct from the supplier, if it is a specific indent, or else if it is an open indent the confirming house will be free to order from whom he wishes. In the earlier cases relating to the commission merchant it can be seen that it was general practice for the order to be placed with the commission merchant either in the form of a specific or open indent.43 No direct order would be placed with the supplier by the buyer. In such a situation the commission merchant fulfilled two functions. Firstly, he acted as a buying agent in placing the order. Secondly, he acted as a financial confirmer in giving credit to the buyer and accepted financial liability to the supplier. However, the need for him to fulfil the first function has considerably lessened as a world wide network of supplier’s agents has grown up enabling the buyer to place an order direct with the supplier in his own country.44 As a result the modern confirming house may often only fulfil the second function, that is, of a financial confirmer, in which case the transaction will usually fall under the first category as privity will already have been created by the buyer with the supplier direct or through an agent.45 It appears therefore that confirming house transactions will only fall within the second category when the confirming house is fulfilling both function, and not necessarily so even then.46 It is for this reason that this category of relationship will not arise very frequently under current trading practice.

It is the failure of the courts to understand and separate the dual functions of the commission merchant that has prevented these early

The forms of documentation currently in use seem to point to the existence of a contractual document when accepted by the supplier. See note 18.

Ireland v. Livingston, supra note 32; Cassabougou v. Gabb, supra note 20.

As in Parker's Music and Sports House v. Motorex Ltd., supra.

I.e. in J.S. Robertson (Australia) Pty Ltd. v. Martin, supra note 41, at 48, Williams J. made it clear that, "The plaintiff [buyer] dealt with McDonald Scales & Co. Ltd. [confirming house] purely as shippers and financiers and the company had no authority to act as buying agents for the plaintiff. If the plaintiff desired to make any contracts of purchase in England it made them through its subsidiary company."

Where a confirming house does fulfil both functions the courts appear to have found considerable difficulty in analysing the relationships created. Anglo-African Shipping Company of New York Inc. v. J. Mortner Ltd., supra note 20. For, an example of where a confirming house did fulfill both functions and the transaction fell within the second category, see Witt & Scott Ltd. v. Blumenreich, supra note 35.

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38Id. at 150.
39Id. at 151.
40Id. at 152.
41Id. at 150. Similarly in the Australian case of J.S. Robertson (Australia) Pty Ltd. v. Martin (1956) 94 C.L.R. 30, a London confirming house was used. The contract was held to be a sale by the supplier to the confirming house, though the agency relationship between the latter and the buyer emerged in the judgment. The buyer’s argument that he never authorised the confirming house to become a buyer in its own right was rejected, on the grounds that any excess of authority by the confirming house only affected its relationship with its principal, the buyer, but not with the supplier. The procedure described is typical of that of a confirming house throughout the Commonwealth. The London confirming house (who is actually described as a financier and shipper-McDonald Scales) paid the United Kingdom supplier for the goods, took care of the shipment, paid the freight, insurance and other charges, and drew a 60 day bill on the plaintiff in Australia for the total, plus 3% commission. The documents were then transmitted through a bank with the draft for acceptance. It should be noted that the complexities of this case are further enhanced by the multiplicity of overlapping judgments.

42As in Parker’s Music and Sports House v. Motorex Ltd., supra.
43I.e. in J.S. Robertson (Australia) Pty Ltd. v. Martin, supra note 41, at 48, Williams J. made it clear that, "The plaintiff [buyer] dealt with McDonald Scales & Co. Ltd. [confirming house] purely as shippers and financiers and the company had no authority to act as buying agents for the plaintiff. If the plaintiff desired to make any contracts of purchase in England it made them through its subsidiary company."

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cases from being linked as a continuous series of precedents with the more recent cases on confirming houses. Being thus deprived of a logical basis upon which to adjudicate upon such relationships the courts have instead resorted to other devices.

In some cases they have invoked the doctrine of the foreign principal, whereby an agent for a foreign buyer is presumed not to be authorised to pledge his foreign principal’s credit, but instead accepts personal liability on any contract of sale which he enters into with the home seller. Alternatively, the courts have on occasion invoked the doctrine of the undisclosed principal, as in the case of Teheran-Europe Co. Ltd. v. S.T. Belton (Tractors) Ltd., to decide the respective liability of the parties in a confirming house transaction. This doctrine does not need to be invoked in this field of relationships, as like the foreign principal doctrine, it does not really fit in with the trading pattern of confirming house transactions. In virtually all cases either the name or existence of the foreign buyer is revealed in the confirming house order. The question is not therefore whether there is an undisclosed principal or not, but whether there is an intention to create privity of contract between the supplier and the buyer. In other words, does the transaction fall within the first or second categories of transaction? Generally speaking if the confirming house does fail to reveal the existence of its principal, this will be intentional, and the transaction will therefore fall within the third category, where all three parties are principals in relation to each other.

*This rule is a Victorian relic whereby there is a rebuttable presumption that an agent for a foreign buyer is not authorised “to pledge his credit . . . or to establish privity of contract between him and the home supplier.” Elbingr v. Claye, (1873) L.R. 8 Q.B. 313, 317, per Blackburn J. Such a doctrine has much to be said against it, as it is only a rebuttable presumption so that in any given circumstances there can be no certainty, without litigation, whether the presumption has been established or not. The law has therefore not attempted to classify the nature of the transaction and intermediary involved, but has provided a procedural solution in an endeavour to achieve the same result, an approach which can only create commercial uncertainty as to the actual result achieved. In doing so they have missed the true nature of the commercial transactions involved and have further confused this rather complex field of agency relationships. For a discussion of the conflicting Commonwealth precedents see (1968) 31 M. L.R. 623, 637-9. No such presumption is recognised by the American Restatement, Second Agency, 1958, §§ 320(d) and 328(a).

*1968* 1 Lloyds Rep. 211 (H.C.), 2 Lloyds Rep. 37 (C.A.) Although in the Court of Appeal a majority considered that the principal was merely unnamed and not undisclosed, Denning M.R. still held the latter view. At first instance Donaldson J. left the question open, as the court was agreed that an agency relationship existed between the confirming house and the foreign buyer. The sole question was whether the transaction fell within the first or second categories, that is, whether privity was created between the buyer and the supplier or not. In fact it quite clearly fell within the first category. Again the question of the foreign principal doctrine was discussed at length and unnecessarily confused with the doctrine of the undisclosed principal. Id. at 39 et seq. See also note 57.

The third category of confirming house transaction was described by Salmond J. in the following words:-

When a New Zealand merchant procures the goods of an English manufacturer through an intermediary in England, the relationship so established between the New Zealand merchant and the English intermediary may be . . . that of vendor and purchaser, that is to say, the intermediary may purchase the goods from an English manufacturer and resell them to the New Zealand Merchant.

In this category of transaction there is no contractual relationship between the overseas importer and the British supplier. In other words all parties to the transaction are principals. The question was discussed in the recent case of Anglo-African Shipping Company of New York Inc. v. J. Mortimer Ltd., referred to above. In an interesting dissenting judgment, Diplock J.L. stated that:

The essence of the contract between the client and the confirming house in such a case is that the client agrees to purchase from the confirming house goods which the confirming house has bought from the seller at the client’s request. The contractual relationship between the client and the confirming house is not one of principal and agent but of buyer and seller. Under such a contract the confirming house undertakes with the client: (a) to make an offer to the seller nominated by the client to purchase the relevant goods upon the terms specified by the client and to assume all the liabilities of a principal under the resulting contract of sale with the seller; (b) if the offer is accepted by the seller, to perform all the duties of the buyer under the contract so made including not merely the payment of the purchase price to the seller, but all other acts necessary on the part of the buyer to carry out the terms of sale; and (c) if the goods are delivered to the confirming house by the seller in accordance with the terms of the contract of sale, to transfer the property in and to deliver the goods to the client upon the terms as to delivery and payment agreed upon between the confirming house and the client the terms as to delivery being usually the same as those of the contract between the seller and the confirming house. The client in his turn undertakes with the confirming house to accept the goods so purchased by the confirming house in the manner so agreed upon and to pay to the confirming house the agreed payment which is usually calculated upon the price paid for the goods to the seller by the confirming house (together with any expenses incurred by the confirming house in carrying out its contract of sale with the seller) plus an agreed percentage described as commission.

This case perhaps exemplifies the problem that the judges have faced in classifying confirming house transactions on which they have been
required to adjudicate. Four differing interpretations of the particular transaction were given in this case.\(^5\) Firstly, on appeal Diplock L.J., as can be seen from his judgment quoted above, classified the transaction under the third category. Megaw J., at first instance, appears to have done likewise in the following words:

The plaintiffs were not making that contract as agents for the defendants, J. Mortimer Limited, they were making the contract as principals, but they were making the contract as principals on the basis that they were a confirming house, that they were making that contract at the request of the defendants, and that the defendants had undertaken to indemnify them against the price of the goods which they, the plaintiffs, would have to pay to the suppliers, when the goods were duly shipped, against the expenses which the plaintiffs would incur in shipping and cabling, and various other matters.\(^6\)

Sellers L.J., on the other hand, interpreting Megaw J. at first instance, concluded that the confirming house was in the position of a principal in relation to the suppliers, and an agent in relation to the buyers. He therefore disagreed with Diplock L.J. that the court could reconstruct the transaction and review it afresh in the light of the old authorities, which he considered were out of date.\(^7\) There was nothing in his opinion to indicate that the confirming house considered itself as a principal in relation to the buyer. He adds, however, that "It does not seem to me that either party considered and accepted a legal position, where there would be no privity of contract between the suppliers and the defendants as buyers."\(^8\) This points to the fact that he would have

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\(^5\) C.f. J.S. Robertson (Australia) Pty Ltd. v. Martin, supra note 41.
\(^7\) Id. at 617. C.f. in Rushmore & Bolton & Roberts Hadfield, Ltd. v. S.G. Read & Co. (London) Ltd., supra note 37, Pearce J. stated that "There is no authority that decides the position and liability of a confirming house." At 650. He then continued to re-state what in fact was the position of the commission merchant under the earlier cases, implicitly acknowledging the continuity of the precedents.

\(^8\) Id. at 616. Contra: Diplock L.J. who stated that "where a sale is transacted through a confirming house there are, in my view, two separate and distinct contracts: one between the seller and the confirming house; and that between the confirming house and the overseas buyer, . . . There is in the ordinary way no privity of contract between the seller and the client." Id. at 620. He rejected the idea that the client could also be severally liable to the supplier under a contract of sale "made on his behalf as disclosed or undisclosed principal by the confirming house as his agent." Id. at 620. He stated that for privity to be established was contrary to the long established authority of Blackburn J. in Armstrong v. Stokes, (1872) L.R. 7 Q.B. 598, laying down the foreign principal doctrine. He does however acknowledge that it does not affect the relationships between a foreign buyer and an ordinary buying agent acting as such with no element of confirmation therein, id. at 621. Unfortunately he fails to see that the foreign principal doctrine need not apply to all transactions with a confirming element and that privity is in fact commonly created thereunder as in the first category of confirming house transaction discussed above.

classified the transaction as falling within the first category rather than the second. Irrespective of the correctness of his conclusion though, it is difficult to see how he was able to interpret Megaw J. in such a light bearing in mind the dicta quoted above, as the mere fact that the confirming house was making the contract at the "request" of the buyers did not necessarily create an agency relationship between them.

Danckwerts L.J. agreed with Seller L.J. on his general classification, adding a comment on the foreign principal doctrine, doubting its existence, and that it was merely one of the factors to be considered in any case.\(^9\) However, the fact that he was prepared to consider the question in this light points to the fact that he was not considering a relationship where privity was to be created between seller and buyer, as the precedents on the commission merchant, to which he referred, whether based upon the foreign principal doctrine or not, all treat the relationship as one where no privity is created between supplier and buyer. It is therefore possible that Danckwerts L.J. would have treated the transaction as falling within the second category rather than within the first, unlike Sellers L.J. Unfortunately, however, the learned judge further confused the issue by refusing to offer any opinion as to the exact relationship between the buyer and the confirming house on the grounds that this was immaterial:--

I have been careful in this judgment not to refer to the plaintiffs in respect of their obligations as a confirming house as the agents of the defendants. I do not think it makes the slightest difference whether in that respect the plaintiffs were agents or not. As confirming house, the plaintiffs assumed the obligation to pay the suppliers and they became entitled to be indemnified by the defendants and to be paid their commission unless they committed a breach of their contractual obligations.\(^5\)

Cumulatively, therefore the judgments made in the Anglo African Shipping Company case offer a very confusing perspective. This is partly due to the system of multiple judgments in appellate courts, but the main contributory factor is undoubtedly the reluctance of the judges to attempt to analyse the relationship in question any further than the bare minimum necessary to render judgment. Such an approach, it is submitted, merely produces conflicting and misleading precedents which are extremely difficult to apply in future disputes involving confirming house transactions and which do not offer a true reflection of the present state of the law.

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\(^9\) Id. at 617.
\(^9\) Id. at 519.
A confirming house will rarely enter into such a transaction in practice though, unless circumstances require it, as in such a case there is really no element of confirmation in the transaction. In essence it is really a merchanting transaction as there is an actual resale of the goods, which is not really part of the function of a confirming house. However, such a procedure may be necessary for example where the exchange regulations of the country of the foreign buyer will not permit payment of the confirming house's commission. The confirming house does not normally act as a merchant though unless there is a specific reason for doing so, as his function is not to buy and resell at a profit, but merely to act on behalf of the overseas buyer on a commission basis.

The fourth and final category of confirming transaction was described by Salmond J. in the following words:

[T]he relation may be that of agency in the strict sense, the agent being authorised not merely to buy goods from the English manufacturer, but to buy them in the name of the New Zealand principal, and make him responsible to the manufacturer for the price of the goods.5

In other words, in this category of transaction, the confirming house simply acts as an agent on behalf of a foreign importer, transmitting any order which it may receive from the latter to the home supplier. In this case the confirming house will not be personally liable upon the contract at all, providing it acts within the scope of its authority, and has clearly stated that it is merely acting in the capacity of an agent.

4 Supra. More recently in Teheran-Europe Co. Ltd. v. S.T. Bolton (Tractors) Ltd., [1968] 1 Lloyds Rep. 211, [1968] J.B.L. 243, note by D.J. Hill, Donaldson J. partially reiterated the classification discussed above. He distinguished three methods whereby an agent can conclude a contract on behalf of his principal: (a) by creating privity of contract between the third party and his principal without himself becoming a party to the contract; (b) by creating privity of contract between the third party and his principal, while also himself becoming a party to the contract. The consequence of this arrangement is that the third party has an option whether to sue the agent or the principal, although this is of little value if he does not know the principal’s existence. Equally the third party is liable to be sued either by the agent or by the principal. Where both agent and principal are privy to the contract, questions of election can arise but no such question arises in this case. (c) by creating privity of contract between himself and the third party, but no such privity between the third party and his principal. In other words, in relation to the third party he is a principal, but in relation to his principal he is an agent. The consequence of this arrangement is that the only person who can sue the third party or be sued by him is the agent.7 Id. at 216. The first category of Donaldson J. is identical to the fourth category of Salmond J. His third category also restates the second category of Salmond J. His second category, on the other hand, appears to be based upon the doctrine of the undisclosed principal. However he fails to distinguish very clearly the situation where both the buyer and the confirming house are liable upon the contract, without any question of election arising, as defined in the first category discussed in the text above.

irrespective of whether the principal is named or not. However, for a confirming house to act in such a fashion really defeats its true function in life, that is, to localise the transaction within the country of the seller, and to obviate litigation in the buyer’s country on default, together with any conflict of law problems that may arise.8 As in the third category the element of confirmation is not present, although again where circumstances dictate the confirming house will operate in such a manner.9

IV CONFIRMATION

Having considered the various categories of transaction under which a confirming house may operate, the question next arises as to exactly what obligations it undertakes when it “confirms” a transaction with a supplier. Excluding the fourth category where the confirming house does not accept any personal responsibility in the transaction in any way, merely acting as a buying agent in the simplest sense of the word, the relationship between the confirming house and the supplier will not vary as between the various categories of transaction discussed above, as in all cases the confirming house undertakes the obligations of a principal.80 From the precedents however, there appears to have been a noticeable lack of knowledge on the part of the judges as to the real nature of the confirming function. In African Commercial Corporation Ltd. v. Hussainali & Co.61 Buttrose J. discussed the responsibility of a confirming house and stated that the role of one is “purely financial” and that it is not concerned with the contract of sale of the goods shipped. Similarly in Sturzi & Sons Ltd. v. House of Youth Pte. Ltd.62 the court stated that “and so we are told a confirming agent for a buyer is one who guarantees to the seller that the buyer will pay the price.”

8 C.f. Witt & Scott Ltd. v. Blumenreich, supra note 35. See also the dictum of Diplock L.J. in note 4. This was also the purpose of the del credere agency and the foreign principal doctrine. The differences between the del credere agency and the other two methods is that the del credere agent guarantees the price to his own principal, the seller, whereas the confirming house does the reverse, confirming payment to the third party as it acts as the agent of the buyer.

9 In the reverse situation a confirming house may also act as an agent for a British supplier, attempting to obtain orders and/or concluding contracts with a foreign buyer on its principal’s behalf. This again would not be within the confirming house’s normal function as it would then be acting as a manufacturer’s export agent.

10 For attempts to avoid liability as such, see Rusholme & Bolton & Roberts Hadfield Ltd. v. Read & Co. (London) Ltd., supra note 37; Sobell Industries, Ltd. v. Cory Bros & Co. Ltd., [1955] 2 Lloyds Rep. 82.


opportunity to obtain redress from the latter direct. Any excess of authority on the part of the confirming house in its contractual relationships with a supplier will not affect its relationship with the latter. It will only affect its relationship with its principal, the buyer.

VI. THE RESPONSIBILITIES OF THE CONFIRMING HOUSE TO ITS CLIENT

Turning to the question of the relationship between the confirming house and its client the foreign buyer, firstly, where the confirming house acts as a mere agent, that is, under all categories of confirming transactions except the third one, it appears from the dicta that it will not be liable for the default of the supplier in the execution of any orders which it has confirmed. In other words the confirming house in its capacity of agent does not undertake any liability at common law in respect of the quality of the goods or any other breach of contract on the part of the original seller, unless there is a specific contractual agreement to the contrary. This was made clear in the New Zealand case of Downie Bros. v. Henry Oakley & Sons, which fell within the second category discussed above. There the plaintiff, a London buying agent, was instructed by the defendant, a New Zealand buyer, to purchase goods, which the plaintiff ordered in his own name and paid for. They were shipped to the defendant who refused them because the price was excessive. In an interesting judgment Adams J. stated that in such a transaction the agent's duty was to obtain the goods in accordance with the terms of his authority, to pay for them and arrange dispatch. He had no authority to pledge the defendant's credit, but was bound to check the goods as to their conformity with the contract, or else as they had been bought in the agent's name and paid for by him according to practice, the principal could neither reject the goods as against the seller nor assert any rights under the contract of sale. In other words, under the second category of transaction where no privity of contract is created between the buyer and the supplier, the former may find himself personally remediless, where the confirming house has fulfilled his obligations to him as an agent, as he has no contractual rights against the supplier himself. In practice however where there has been a genuine breach of contract by the supplier, the confirming house will obtain redress itself against the supplier, or perhaps more rarely

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(Emphasis added). From the preatory clause in the latter dictum it can be seen that the court seemed rather uncertain as to what a confirming house in fact does, and in both cases the court failed to realise that the essential function of a confirming house in relation to the supplier is often to guarantee the whole transaction and not merely payment of the price.

From the forms of contract currently in use among confirming houses it is not clear as to whether the confirming house actually undertakes more than mere confirmation of the price or not, as the exact extent of the obligation is not defined. However, in Sobell Industries Ltd. v. Cory Bros. & Co. Ltd. McNair J. appeared to take it for granted that a confirming house confirms the whole transaction:

It seems to me, using the word in its ordinary sense, “to confirm” means that the party confirming guarantees that the order will be carried out by the purchaser. In that sense he adds confirmation or assurance to the bargain which has been made by the primary contractor, just as a bank which confirms a credit has been opened by the buyer in favour of the seller guarantees that payment will be made against that credit if the proper documents are tendered. Those forms of confirmation would be valueless, or would at any rate lose much of their value, if the assurance given in the one case that the contract would be performed, and in the other case that the credit would be available when the documents were presented, that payment would be made against it, could be withdrawn by the confirming party on the instructions of the person for whom he had given the confirmation.

However, if a supplier has in fact carried out or is prepared to carry out his part of the contract as required, the confirming house will in practice both undertake payment of the price and accept delivery of the goods, even if his client the foreign buyer has refused to accept delivery, unless the latter has valid grounds for so doing. As a result the question rarely arises in law as to whether he is in fact bound to do so.

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There appears to be no uniformity in contract forms. Confirmation may be of “payment” of the price, of the “order”, or alternatively there may be no use of the word “confirmation” at all.

Cf. the dictum of Prince J. in Rusholme & Bolton & Roberts Hadfield Ltd. v. S.G. Rea & Co. (London) Ltd., supra note 37, at 152: “I see no reason why payment should be restricted to payment on delivery and should exclude payments such as payments due for breach of contract. Such a restriction would make the [confirming house] functions less onerous, but also far less valuable. It would leave the English merchant completely unprotected against cancellation at the last moment. It would be less than the protection given by a del credere agent.” See also Sobell Industries Ltd. v. Cory Bros & Co. Ltd., supra note 9.

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[1955] 2 Lloyds Rep. 82, 89.


assign such rights to the buyer himself. Under the first and fourth categories where privity does exist between buyer and supplier, there is nothing to prevent the former from suing the latter in respect of any breach of contract without involving the confirming house in any way. It is presumably for this reason that the first category of transaction is most popular among confirming houses under present day conditions, as with modern methods of rapid communication the buyer can litigate in the supplier's own country with the minimum of inconvenience.

Some doubt has been cast on the question of whether a confirming house should be liable for a breach of contract by the supplier in the dissenting judgment of Diplock L.J. in Anglo African Shipping Company of New York Inc. v. J. Mortner Ltd. The learned judge specifically left open the question of,

whether the confirming house warrants to the client that the seller will perform his obligations under the contract of sale between him and the confirming house so as to render the confirming house liable to the client for damages for any breach of contract by the seller. There is much to be said for the view that it does; for otherwise, in the absence of privity of contract between the seller and the client, the latter would be without remedy against anyone although the confirming house would itself have a remedy over against the seller.

This dictum must however be considered in its particular context. Diplock L.J. was discussing the confirming house in the light of those transactions which fell within the third category, that is, where the confirming house acts as an intermediate principal in the transaction. It is difficult to see in such a situation how a confirming house can avoid complete liability under the transaction unless it has specifically restricted its liability under its contract with the buyer. As mentioned above, such a transaction is virtually akin to a merchanting transaction under which the intermediary would invariably accept responsibility for the complete performance of the contract. Admittedly, a distinction could be drawn between the situations on the grounds that under a confirming house transaction remuneration is by way of commission paid by the buyer, whereas under a merchanting transaction the intermediary will mark up the price instead. This however, does not

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44 Supra note 4 at 622. This question of the buyer's remedy is avoided where transaction can be brought within the first category. See also note 17.

45 However, in an old case even where the commission merchant was remunerated at commission it was held liable. In the early Malayan case of Behr & Co. v. Lee See Tin, (1899) 3 S.L.R. 48, the plaintiffs were merchants and commission agents in Singapore, and in the latter capacity ordered cigars from Manila on behalf of the defendants, who were cigar merchants in Singapore. The order or indent was entered in the plaintiff's order book and signed by the

really assist in formulating any conclusion, because as mentioned above, a confirming house may itself obtain its remuneration by way of mark up where the import regulations of the country concerned preclude the addition of a confirming commission on the price.

The question therefore arises as to what extent a confirming house may be liable in practice in its capacity as an agent. Obviously, if it is in any way in breach of its duty of care to its principal it will be liable under the ordinary rules of agency. For instance, the confirming house must take particular care that the confirming order is ad idem on all points with the original indent or order received from the buyer. This problem arose in Anglo-African where the confirming order did not include the printed conditions in the buyer's original order. In the event however, the court was prepared to treat the two contracts as not being inconsistent with each other on the grounds that the contrary had not been suggested by either party.

In making payment to the supplier the confirming house is justified in using its discretion, and in the absence of negligence is entitled to be indemnified against all payments and costs incurred. The confirming house will therefore not be liable if it honestly interprets ambiguous instructions wrongly, nor in using its discretion in accepting goods in respect of which a slight discrepancy may exist, for instance, if a few items of a large order are out of stock, the confirming house may be justified in accepting and paying for the balance.

A defendant, "I indent with B & Co. Terms 5% commission on C.I.F. price in Singapore". The order was forwarded to the plaintiffs' agents and the goods were shipped to Singapore in the name and on account of the plaintiffs. Part delivery and acceptance by the defendants took place and then on arrival the goods were paid for by the plaintiffs through a bank. It was held that the plaintiffs were themselves liable to the defendants for unmerchantable goods, and would not avoid liability by claiming to be merely agents acting on behalf of the defendants, as the privity of contract existed between the defendants and the original supplier. This case does not however fit into the regular pattern of precedents and would probably not be so decided today.

46 Cassaboglou v. Gibb, supra note 20. Note that in that case as the relationship was only that of principal and agent, only the actual loss was recoverable and not the difference between the value as ordered and supplied. Presumably if the transaction and fallen within the third category the latter would have been recoverable.

47 Supra note 4 at 88.

48 Id. The confirmation did not include the printed conditions in the buyer's original order—no provision that time was of the essence of the contract was included. The problem was to establish when time was to begin to run—the date of the original contract or the date when the order was received by the supplier. Here the original buyer's order was not sent by the confirming house to the supplier, although it was addressed to him. Only a confirming order was sent by the confirming house, incorporating most of the terms.

49 Isaac Gundel v. Mohanlal Sunderji, (1939) 18 K.L.R. 137. The defendant, a Mombasa merchant, forwarded a pro forma indent through a local firm to the plaintiff confirming house in London for a consignment of mixed goods. The indent was subject to acceptance by the
The method of payment employed in a confirming house transaction will be as follows. On receipt of invoices by the confirming house from the suppliers, payment will be made promptly in cash, or in accordance with any other agreed terms. The confirming house will then draw a bill of exchange on his overseas client, the buyer, which will be forwarded with the documents of title through the London office of the latter's banker for acceptance or payment by the buyer in exchange for supplier and "to be confirmed by Messrs. I. Gundlie and Co., 32 London Wall, London". The defendant appointed the plaintiff as agent for the purpose of taking delivery and payments for the goods. A few items were not stocked by the supervisor, the plaintiff informing the defendant to this effect. On arrival of the goods the defendant refused to take delivery or to meet the sight draft drawn on him on the grounds that the goods were not according to the order. The court held that in the absence of fraud or negligence the plaintiff was justified in using his discretion and paying for the goods as supplied, and that he was therefore entitled to be indemnified—he could ignore the slight discrepancy in the items supplied.

Quoting Morgan v. Livingston, supra note 32, Lucie Smith J. stated that where a merchant sends an order to a confirming house which is ambiguous, if the agent acts fairly and honestly in assuming that one particular interpretation is correct, his principal will be liable on that interpretation. See also Brown & Gracie Ltd. v. G.W. Green & Co. Pty. Ltd., [1960] 1 Lloyds Rep. 289, 303, per Denning L.J.

7 Anglo African Shipping Company of New York Inc. v. J. Mortner Ltd., supra note 4, at 93. However, in that case the seller did acknowledge that if part of an order was delivered while the rest had not been shipped, then if the buyer was able to reject the first shipment validly, the confirming house might be entitled to recover the price in respect of a second shipment of the same content per McNair J., at 91. However, as McNair J. pointed out, interesting questions might arise supposing the supplier in fact did not have the goods ready (on the due date), but the confirming house were led to believe that the goods were indeed ready, as to what was the duty of . . . a confirming house and whether they would be liable to the [buyers] supposing that, in ignorance, they failed to take a point which they could have taken, enabling them to reject the goods, and the [buyers] wished them to reject." Id. at 92.

74 Id. at 94-96, following the decision in White and Carter (Councils) Ltd. v. McGregory, [1962] 2 W.L.R. 17 (H.L.).

documents of title, etc., on a collection basis. The bill will either be drawn at sight or for a term of 60, 90, 120 or 180 days. The confirming house however, will not generally wish to carry the cost of financing the transaction itself and will therefore generally deal with the bill in one of three ways. Firstly, it may obtain an advance against collection from the London office of the buyer's banker at the same time as the draft is presented in London. Secondly, the latter may be prepared to negotiate the bill with recourse against the confirming house as drawer of the bill. Thirdly, an acceptance credit may be utilised. The bill of exchange providing for payment by the buyer on sight or maturity is the accepted method of payment employed in confirming house transactions, although occasionally a letter of credit may be opened in favour of the confirming house instead. The procedure discussed above is only customary in Commonwealth business. There is normally no negotiation of such bills outside the Commonwealth, although in some European countries this practice is beginning to be introduced by British confirming houses.

Irrespective of the method of financing used, the confirming house is carrying a considerable financial risk until the buyer ultimately honours the bill of exchange when duly presented for payment. This is the essence of the confirming house function, so that careful and accurate assessment of a client's financial standing is an important part of its work, upon which success or failure in the business will ultimately depend. However to enable the continued expansion of confirming house business, use has increasingly been made of Export Credit Guarantee Department facilities, under which for a small premium governmental insurance is available to cover most of the costs incurred where a foreign buyer defaults. Many confirming houses avail themselves of these facilities, but some still find that by prudent trading the cost of bad debts is, on average, less than the cost of insurance cover under the Export Credit Guarantee Department's scheme.

Of recent years British confirming houses have expanded their trading to cover exports from foreign countries to Commonwealth or other countries. This has been necessary with the gradual change in traditional trading patterns within the Commonwealth. At first this business was still financed through London in sterling, but of recent years finance has increasingly been arranged in the currency of the supplier or some other strong currency which is generally convertible in the international money markets. Such a procedure requires special expertise and the acceptance by suppliers and buyers of payments effected in currencies other than sterling through the London
market. In respect of such transactions, most European countries have schemes of government insurance available which are similar to the British Export Credit Guarantee Department scheme. However, these are generally rather more costly than the British one, which is the oldest in existence and has therefore acquired considerable expertise in keeping the cost of cover to a minimum. As a result, these are not in general use among confirming houses at present.

Finally, the question arises of whether a confirming house can protect itself by any other means against loss in the case of a defaulting buyer. Generally speaking the confirming house will not do so, as such action is likely to restrict the buyer's opportunity to obtain local financial backing for his operations, which would be self-defeating from the viewpoint of the confirming house. However in certain circumstances the need may arise for the confirming house to protect itself in this way, particularly where it is in doubt as to the financial strength of a client, or else the client is developing a new business. The most common method in such a case will be for the confirming house to take a charge on its client's assets. This will be satisfactory if the latter's banker does not have any form of charge or debenture on the assets of the client in respect of any overdraft. Then the confirming house will only obtain a second charge, which would not be satisfactory unless the bank can be persuaded to limit the extent of their first charge. The procedure however must differ from country to country, so that no generalisations are possible in this respect. 

VIII. CONCLUSIONS

In conclusion it can be seen from the above discussion that the position of the confirming house, although fairly clear in commercial terms, is extremely difficult to analyse and define within the framework of the common law. The civil law systems have to some extent avoided the problem by giving the intermediary in commerce a separate category, that is the contract of commission. However, the confirming house as such is not found in civil law countries, but is restricted to those countries with whom the United Kingdom has had some direct economic relationship in the past. To the extent that it does exist outside this area of influence, it is invariably an offshoot of a British company. Much of the difficulty that has arisen in defining the confirming house has resulted from three prime causes. Firstly, the courts have not been prepared to look to other jurisdictions within the common law to find precedents upon which to base their decisions, and have consequently been forced to adjudicate in a judicial vacuum, generally restricting their discussions to the problem before them, rather than indulging in a wider analysis of the problem as a whole. In this respect they have failed to realise that whereas much litigation between supplier and confirming house and supplier will take place in the United Kingdom, disputes between the confirming house and the overseas buyer will usually take place where the latter's place of business is situated, as the place where a remedy can most conveniently be obtained.

Secondly, the courts have constantly suffered from a confusion of terminology in this field of trade operation, which neither the trade nor the courts have ever attempted to cure. Sometimes an earlier precedent may be rejected purely, it seems, because the name used there is no longer current in the trade, on the wrong assumption that the practice has also disappeared. This is far from the truth, as, although trading patterns may change from generation to generation, and traders may prefer to operate under a more up-to-date name, the sum total of trading methods does not seem to alter much, although some may be more favoured at one point in time than another. This situation has been much accentuated by the total aversion of the trade to any concretisation of their true legal position unless economic or fiscal pressures require it. 

Thirdly, and finally, the failure of the courts to accept the existence of a contractual relationship analogous to the contract of commission, even though the trade has constantly resorted to such devices, has further confused the issue. The steady resistance of the courts to any concept of agency under which privity of contract is not created 

\[E.g. the Export Houses Association were forced to consider their legal position in respect of the now discontinued 2% Export Rebate formerly payable under section 7 Finance (No. 2) Act, 1964, as to whether the confirming house or the manufacturer was entitled to the rebate in the "exporter".\]

\[E.g. in West Africa it is not uncommon to obtain a private guarantee from the principal shareholders of the company in question. In New Zealand, on the other hand, where a confirming house had drawn bills of exchange on a local buyer, discounted them after acceptance with the latter's banker, and then on dishonour required to honour them by the banker, it was held that the confirming house can benefit from debentures held by the banker over the buyer's assets after the latter has satisfied its own claims. The confirming house can therefore benefit from the banker's receivership before the remaining assets are handed over to the buyer's liquidator. Re Casey Fanyon Ltd., (1963) M. 395/63, Supreme Court of New Zealand, per Richmond J., quoting Duncan Fox & Co. v. North and South Wales Bank, (1880) 6 App. Cas. 1 (H.L.) (Chalmers' Bills of Exchange, 13th edn., 377). This rule will generally only benefit the confirming house where the buyer (acceptor) is also a customer of the discounting banker, as only then is the latter likely to hold any form of security from the buyer over which the confirming house can exercise its rights. This right appears to be of general application where the English common law rule relating to bills of exchange applies.\]
between principal and third party has been at the expense of commercial reality. Instead the courts have resorted to such devices as the foreign principal doctrine, which has produced widely conflicting precedents, or else the doctrine of the undisclosed principal has been invoked unnecessarily, in circumstances where it is not appropriate, inasmuch as the latter’s existence is often clearly known to the third party. As a last resort, the courts have been forced to reject the whole concept of agency altogether, and treat all parties as principals and thus force the commercial relationship into a legal strait jacket, into which it does not really fit at all.

In conclusion therefore, it is to be hoped that the courts will realise that commercial transactions are no respecter of legal jurisdictions and national boundaries, and that it is often only possible to find the exact nature of a commercial transaction from a study of practice and law relating to more than one country. To overcome such problems as confirmation in international sales may create, a classification of combined precedents of the commercial law of those Commonwealth countries subject to the common law is long overdue. It is to be hoped that as international trade continues to grow with the increasing speed of transportation, a more objective approach to the study of such problems may be possible.

Shorter Articles and Comment:

Tax Adjustments in International Trade: the Border Tax Dispute

JAMES A. McNAMARA

INTRODUCTION

Two sharply differing views of the trade effects of border tax adjustments¹ have been recently expressed:

Nontariff barriers abound in the present world. A leading case in point is the trade consequences inherent in the international rules for border taxes and subsidies integrated with domestic turnover or value-added taxes. Countries without these domestic taxes, such as the United States, are placed at a relative disadvantage—a disadvantage that becomes more pronounced as value-added tax systems become more widely adopted and levels of rates rise.²

and

It is incorrect to look upon the added value tax (TVA) which is imposed equally on domestic and foreign products consumed in a country as a ‘border

¹ Vice Chairman, interagency Trade Staff Committee, Office of the President’s Special Representative for Trade Negotiations. The author wishes to thank Mr. Morris Feinberg, Office of the Assistant Secretary of the Treasury for Tax Policy, and Mr. Lawrence J. Brennan, Director, Office of Monetary Affairs, Department of State, for their valuable criticisms. The views expressed in this article are those of the author alone and do not necessarily reflect those of the Office or of the United States Government.

² The term border tax adjustments is defined in the OECD as any fiscal measures which enable exported products to be relieved of some or all of the tax charged in the exporting country on similar domestic products sold to consumers on the domestic market and which enable imported products sold to consumers to be charged with some or all of the tax charged in the importing country on similar domestic products. It includes not only tax adjustments made at the time of export and import, but all prior or subsequent taxes on products in the country applying the tax. See Organization for Economic Cooperation and Development, Border Tax Adjustments and Tax Structures in OECD Member Countries (1968) at 16.