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Editorial Board

Martens Clause in Customary International Humanitarian Law

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Abstract

The Martens Clause is found in several treaties relating to international humanitarian law. The main purpose of this paper is to disseminate the fundamental principles of humanity and its significance. Martens Clause is not only the general statement for humanitarian principles but also the guideline for the existing rules of international law. This Clause is widely considered to have the status of Customary International Law, including by the International Court of Justice. In modern period, the Martens Clause is the authority for the relevance of customary law as an essential source of International Humanitarian Law. The Martens Clause should be used as an interpretative tool, in conjunction with other general principles of International Humanitarian Law.

Key words: Additional Protocols, Customary International Law, Geneva Conventions, Hague Conference, Hague Conventions, ICJ, International Humanitarian Law

Introduction

The Martens Clause appeared from the Hague Conference with regard to the status of resistance fighters who took up arms against an occupying authority. It was first incorporated in the Preamble to the 1899 and 1907 Hague Conventions. The Martens clause which was reaffirmed in the Geneva Conventions of 1949. In 1977, a modern version of that clause is to be found in Article 1 (2) of Additional Protocol I and in the Preamble to Additional Protocol II. Moreover, it can be seen in paragraph 5 of the Conventional Weapons Convention, 1980 and in a number of State military manuals.

The Martens Clause is widely considered to have the status of customary international law, including by the International Court of Justice. The clause raises a number of legal issues relating to its scope and interpretation. The central issue is whether the clause is a mere restatement of the continuing importance of customary law for cases not dealt with by conventional humanitarian law or a pronouncement of a distinct and autonomous source of obligations. The clause is also often invoked in connection with the regulation of the use of new technologies and weapons by international humanitarian law. The debate over the clause has been reinvigorated by the advisory opinion handed down in 1996 by the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons. One of the humanitarian characters in the Law of armed conflict also known as International Humanitarian Law, the Martens Clause stipulates that in cases not covered by international humanitarian law conventions, neither combatants nor civilians find themselves completely deprived of protection.

Materials and Methods

In this research paper, the material uses for all of data from the principles of International Humanitarian Law, Customary International Law, Books, Articles and International Conventions.

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Findings

Relating to Marten Clause it can be seen that the absence of a specific treaty provision prohibiting the use of nuclear weapons does not standing alone, compel the conclusion that use is or is not unlawful. At the same time, the Clause does not independently establish the illegality of nuclear weapons but also transform public opinion into rules of Customary International Law. The Martens Clause should be used as an interpretative tool, in conjunction with other general principles of International Humanitarian Law.

The Martens Clauses a Source of International Humanitarian Law

There are two main sources of International Humanitarian Law, such as customary international law and treaty law. One of the humanitarian characters in the Law of armed conflict also known as International Humanitarian Law, the Martens Clause stipulates that in cases not covered by international humanitarian law conventions, neither combatants nor civilians find themselves completely deprived of protection. The Martens Clause was first included in the Hague Convention II with Respect to the Laws and Customs of War on Land of 1899 and which has proved to be an effective means of addressing the rapid evolution of military technology. The Martens Clause is the authority for the relevance of "customary law" as an important source of International Humanitarian Law.

The Concept of the Martens Clause

In the Preamble to the 1899 Hague Convention II, the Clause was expressed that "Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience."

According to this provision, the High Contracting Parties desired to diminish the evils of war, so far as military necessities permit, are intended to serve as general rules of conduct for belligerents in their relations with each other and with populations. But it has not been occurred in practice. The intent was to ensure that the exigencies of military engagement did not leave room for States to arbitrarily determine courses of action without some consideration given to the existing rules of international law.[1]This Clause was suggested by Friedrich Martens for a compromise position which decreed that, until a more complete set of laws of armed conflict could be decided upon, the community of nations was not to assume that the law was silent on matters that were not codified in treaty form.[2]

The Clause appears in a slightly modified form in the 1907 Hague convention that; "until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.

Martens Clause was reaffirmed that regarding the right of denunciation in the Articles of the Geneva Convention, 1949.[3] A modern version of that clause is to be found in Article 1(2) of Additional Protocol I of 1977, which; " in cases not covered by this Protocol or by other

[1]Kalshoven and Zegveld, "Constraints on the Waging of War", 2nd edition, ICRC, Geneva, 2000, p-22.
[2]ICRC, "International Review of the Red Cross", 1966, p.312.
[3]Art 63,GCI ; Art 62,GCII ; Art 142,GC III ; Art 158, GC IV , 1949.

international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience."

In the paragraph 5 of the Preamble to 1980 Conventional Weapons Convention, Martens Clause that " in cases not covered by this Convention and its annexed Protocol or by any other international agreements, civilian population and the combatants shall at all times remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience."

In the advisory opinion of the International Court of Justice ,the relating to the Legality of the Threat or Use of Nuclear Weapons issued on 8 July 1996, had to consider the general laws of armed conflict before they could consider the specific laws relating to nuclear weapons. Several different interpretations of this clause were presented in oral and written submissions to the ICJ. Although the ICJ advisory opinion did not provide a clear understanding of the Clause, several of submissions to the court provided an insight into its meaning.[1]

In 1987, the ICRC states that although the Martens Clause is considered to be part of customary international law, the plenipotentiaries considered its inclusion appropriate because: First, despite the considerable increase in the number of subjects covered by the law of armed conflicts, and despite the detail of its codification, it is not possible for any codification to be complete at any given moment; thus the Martens clause prevents the assumption that anything which is not explicitly prohibited by the relevant treaties is therefore permitted. Secondly, it should be seen as a dynamic factor proclaiming the applicability of the principles mentioned regardless of subsequent developments of types of situation or technology.[2]

The Essence of the Martens Clause

In all the versions of the Martens Clause which has three consistent elements such as: "the principles of the law of nations", "the principles of humanity" and "the dictates of public conscience". With regard to the principles of the law of nations as they result from the usages established among civilized people is fairly uncontroversial. This concept refers to customary international law. According to Additional Protocol I and The Conventional Weapons Convention, the enunciations of the Clause have established this idea to be correlated to Customary International Law.

The Principles of Humanity

The idea of "the principles of humanity" first received modern judicial attention in the war crime trials that followed after the World War I. In the case of Kinged (1946), the matter at issue was whether criminal laws could be given retroactive effect. In this case, a member of the Gestapo was convicted under the Norwegian Criminal Code of 1902, of the torture of Norwegian resistance fighters during the war. As a result of a Royal Decree issued in May 1945, the Norwegian courts had the power to impose the death penalty, rather than imprisonment, for acts such as those committed by Kinged. Kinged appealed his conviction and then the Supreme Court of Norway held that the acts of torture were a violation of Norwegian law and contrary to the "Law of Humanity".[3]Similarly, in the Dutch case of Router,

[1] ICRC,"International Review of the Red Cross", 1997,p.125-134.
[2] ICRC, "Commentary on the Additional Protocols to the Geneva Conventions", p. 39.
[3] Annual Digest and Reports of Public International Law Cases, vol.13, 1946.

the issue of retroactivity was addressed with reference again being made to the Martens Clause and its notion of "Law of Humanity". [1]

Following the Second World War, this principle again received judicial consideration from the International Court of Justice. In the Corfu Channel case, the court essayed the notion of "elementary considerations of humanity", which Merion has compared to the idea of "principle of humanity". In their decision, the Court noted that Albania's obligations in the case were based on certain general and well-recognized principles, namely: elementary considerations of humanity.[2]

The concept of principles of humanity was given in the work of the United Nations Special Reporter on the situation of human rights in Kuwait under Iraqi occupation. In this document, the Special Reporter specifically noted the importance of the Martens Clause and further determined that "elementary considerations of humanity" can be understood as comprising three basic elements: (i) that the right of parties to choose the means and methods of warfare is not unlimited; (ii) that a distinction must be made between persons participating in military operations and those belonging to the civilian population to the effect that the latter be spared as much as possible; and (iii) that it is prohibited to launch attacks against the civilian population as such.[3]

With regard to the nature of principles of humanity, the Trial Chamber of the ICTY in Matrices case clarified that; the prohibition against attacking the civilian population as well as individual civilians and the general principle limited the means and methods of warfare emanate from elementary considerations of humanity which constitute the foundation of the entire body of international humanitarian law applicable to all armed conflicts.[4] The ICTY drew upon this concept again in the *Prosecutor v Kupreskice* case that the Martens Clause was used as the basis for the argument that the prohibition of torture is a part of customary law.[5]

It can be seen that the Martens Clause extends protection under the principles of humanity, in so far as the doctrine of military necessity allows. The principles of humanity reaffirm the basic humanitarian understanding "that no more force than is strictly necessary be used to obtain legitimate military objectives".

In July 1996, there was one significant case that the Legality of the Threat or Use of Nuclear Weapons. In this case the Martens Clause was drawn by ICJ Advisory Opinion on Nuclear Weapons. Pursuant to Article 96(1), of the Charter of the United Nations, the International Court of Justice urgently rendered its advisory opinion on the following question: ' Is the threat or use of nuclear weapons in any circumstance permitted under international law?" 'The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinions from Article 65(1) of its Statue, while Article 96 (1) of the Charter provided that: "The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question."

The Court notes that in order correctly to apply to the present case the Charter law on the use of force and the law applicable in armed conflict, in particular humanitarian law, it is imperative for it to take account of the unique characteristics of nuclear weapons, and in particular their destructive capacity, their capacity to cause untold human suffering, and their

[1] Annual Digest and Reports of Public International Law Cases, vol.16, 1946.
[2] UK v Albania (Merit), 1949, ICJ Reports 4 (April 9), p-22.
[3] Report on the situation of human rights in Kuwait under Iraqi occupation, Para 36, UN Doc E/CN.4/1992/26.
[4]. Prosecutor v. Martice, Review of the Indictment Pursuant to Rule 61, No.IT-95-11-R61, para.13, 1996.
[5].Judgment, No.IT-95-16-T, 14 Ja.nuary-2000, on the place of the Martens Clause as interpretative tool.

ability to cause damage to generations to come. The provisions of Article 2(4), 51 and 42 do not refer to specific weapons.[1] They apply to any use of force, regardless of the weapons employed. The Charter neither expressly prohibits, nor permits, the use of any specific weapon, including nuclear weapons.

The Court observes that the cardinal principles contained in the texts constituting the fabric of humanitarian law are the following. The first is aimed at the protection of the civilian population and civilian objects and establishes the distinctions between combatants and non-combatants; States must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets. According to the second principle, it is prohibited to cause unnecessary suffering to combatants: it is accordingly prohibited to use weapons causing them such harm or uselessly aggravating their suffering. In application of that second principle, States do not have unlimited freedom of choice of means in the weapons they use.

The Court finds that, as in the case of the principles of humanitarian law applicable in armed conflict, international law leaves no doubt that the principle of neutrality, whatever its content, which is of a fundamental character similar to that of the humanitarian principles and rules, is applicable to all international armed conflict, whatever type of weapons might be used.[2]

The Court observed that, although the applicability of the principles and rules of humanitarian law and of the principle of neutrality to nuclear weapons is hardly disputed, the conclusions to be drawn from this applicability are, on the other hand, controversial. In application of these principles and rules, the Court concluded that "the threat or nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law."[3]

According to one point of view, the fact that recourse to nuclear weapons is subject to a regulated by the law of armed conflict does not necessarily mean that such recourse is as such prohibited. Another view holds that recourse to nuclear weapons, in view of the necessarily indiscriminate consequences of their use, could never be compatible with the principles and rules of their use, could never be compatible with the principles and rules of humanitarian law and is therefore prohibited. A similar view has been expressed with respected to the effects of the principle of neutrality. Like the principles and rules of humanitarian law, that principle has therefore been considered by some to rule out the use of a weapon the effects of which simply cannot be contained within the territories of the contending States.

Furthermore, the Court cannot lose sight of the fundamental right of every State to survival, and thus its right to resort to self-defense when its survival is at stake.[4] Nor can it ignore the practice referred to as "policy of deterrence", to which an appreciable section of the international community adhered for many years.

In the long run, international law, and with it the stability of the international order which it is intended to govern, bound to suffer from the continuing difference of views with regard to the legal status of weapons as deadly as nuclear weapons. It is consequently

[1].United Nations Charter, 1945.
[2].Subject to the relevant provisions of the Charter of the United Nations.
[3].International Review of the Red Cross, No.316, 1997, pp-118,119.
[4].Article 51 of the UN Charter, 1945.

important to put an end to this state of affairs: the long-promised complete nuclear disarmament appears to be the most appropriate means of achieving that result.

In these circumstances, the Court appreciates the full importance of the recognition by Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons of an obligation to negotiate in good faith a nuclear disarmament. The legal import of that obligation goes beyond that of a mere obligation of achieve a precise result – nuclear disarmament in all its aspects – by adopting a particular course of conduct, namely, the pursuit of negotiations on the matter in good faith. This twofold obligation to pursue and to conclude negotiations formally concerns the 182 States parties to the Treaty on the Non-Proliferation of Nuclear Weapons, or, in other words, the vast majority of the international community. Indeed, any realistic search for general and complete disarmament, especially nuclear disarmament, necessitates the cooperation of all States.

The Dictates of Public Conscience

Conscience is an aptitude, faulty, intuition or judgment that assists indistinguishing right from wrong. Public Conscience means a personal awareness of right and wrong that any one use to guide his or her actions to do right. Although humanity has no generally accepted, definition of conscience or universal agreement about its role is ethical decision-making. Conscience also features prominently in Buddhism. In the Pali scriptures, for example, Buddha links the positive aspect of *conscience* to a pure heart and a calm, well-directed mind. It is regarded as a spiritual power, and one of the "Guardians of the World". The Buddha also associated conscience with compassion for those who must endure cravings and suffering in the world until right conduct culminates in right mindfulness and right contemplation.[1]

According to the statement of the Italian delegate, the concept of public conscience can be approached either as the reflection of opinion or as the reflection of the feelings of society which adopted the Additional Protocols of 1977: There was a need to reaffirm the Martens Clause to recognize that humanitarian laws and the demands of world opinion still have a great role to play as the sources of principles of international law applicable when written rules proved to be inadequate.[2]

In the 16th and 17th centuries, English humanist lawyers interpreted conscience as a collection of universal principles given to man by god at creation to be applied by reason; this gradually reforming the medieval Roman law-based system with forms of action, written pleadings, use of juries and patterns of litigation such as Demurrer and Assumpsit that displayed an increased concern for elements of right and wrong on the actual facts.[3]

The United Nations Universal Declaration on Human Rights (UDHR) which is part of international customary law specifically refers to *conscience* in Articles 1 and 18. Likewise, the United Nations International Covenant on Civil and Political Rights (ICCPR) mentions *conscience* in Article 18(1).[4] All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood**.** Under the United Nations, Universal Declaration on Human Rights, *Article* 1**, "**Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance".

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[1]. Ninian Smart, "The Religious Experience of Mankind", 1971, p-118.
[2].UN GAOR, 6th Committee, 28th Sess. 1452, Para 46.
[3]. Knafla LA. "Conscience in the English Common Law Tradition", University of Toronto Law Journal 1976.
[4].International Covenant on Civil and Political Rights, UNGA Resolution 2200A [XX1].

According to the United Nations, Universal Declaration on Human Rights , Article 18, **"**everyone shall have the right to freedom of thought, conscience and religion". This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching under the United Nations, International Covenant on Civil and Political Rights, Article 18(1).

The idea of public conscience is akin to notions of world opinion that can be seen in army manuals. The handbook of the Spanish Army noted that the rules of war and the law of nations were founded on "the noble and eternal ideas of humanity, justice and good faith" and others to whom such law relates to abide by such rules noting that the final arbiter in such matters, the principle authority, the most impartial and respectable judge, the organ and regulator is public opinion…it condemns irregular acts, creates usages and customs.[1]

In the current military manual emphasizes the same obedience to "the dictates of public conscience" and "public opinion". The UK military manual asserts that "no State can afford to be wholly regardless of public and world opinion"[2] and the Australian Defense Force (ADF) manual states that violations of the laws of war will have an adverse impact on public opinion that such violation could leave the ADF and Australia "vulnerable to adverse comments and the loss of domestic and international support"[3]. Indeed, the role of public conscience as a force in law was acknowledged by Judge Weeramantry in the Nuclear Weapons case.

It should be noted that the idea of public conscience and public opinion may not always be forces for good. Examples of this can be seen in the State-enforced doctrine of anti-Semitism in pre-war Nazi Germany and the anti-Kosovar policies of Milosevic' Serbia. This was noted by Australia in their submission to the ICJ for the Advisory Opinion on Nuclear Weapons, arguing that the "dictates of public conscience" are not static. Conduct which might have been considered acceptable by the international community earlier this century might be condemned as inhumane by the international community today.[4]

The laws of humanity and the dictates of public conscience were seen, therefore, to be given equivalent legal weighting as customary law.

The Significance of the Martens Clause

The Martens Clause is the authority for the relevance of "customary law" as an important source of International Humanitarian Law. International Humanitarian Law is a relatively new term in international law. In the early 1950s, the ICRC first used the phrase to denote the Law of the Geneva Conventions which were until then considered as a part of the law of war. In a wider sense, the law of war means to regulate hostilities and reduce their hardships. I H L consist of The Hague Law and the Geneva Law. The former determines the rights and duties of belligerents in the conduct of hostile operations and limits the choice of the means of doing harm to the enemy. The latter safeguards the civilians and military personnel placed *hors de combat*.

One of the interpretations of the Martens Clause positions it as a rule of international humanitarian law. That means the violation of the principles of humanity and the dictates of public conscience are a violation of the Martens Clause and therefore shall be prohibited. A broader interpretative position found the Clause as having actually created two new sources of

[1].American Journal of International Law, vol.94, 2000, pp.84-85.

[2].UK War Office, "The Law of War on Land", Part III of the Manual of Military Law, para.619, 1958.

[3]. Australian Defense Force, "Law of Armed Conflict Training", para.7, 1994.

[4] Australian Year Book of International Law, 1996, pp. 685-704.

international law, by elevating principles of humanity and the dictates of public conscience to the same level as treaty and custom as a source of international law.[1]This argument posits that the Clause puts the "laws of humanity" and the "dictates of public conscience" on the same level as the "usages of States" (State practice as a source of international law).

Relating to one argument of the Martens Clause the fact that particular conduct is not prescribed by any international treaty does not in itself enable the conclusion to be drawn that such conduct in consistent with general principles of international humanitarian law.[2]As noted by the Court, the clause indicates that Protocol II must not be interpreted in isolation but must be viewed at all times within the context of the entire body of humanitarian principles.

The Martens Clause maintains significance today precisely because there are circumstances where treaty law fails to address situations in need of legal regulation and guidance. In fact, the ICJ in nuclear weapons drew upon this very fact, noting that the interpretative flexibility of the Martens Clause makes it an effective means of addressing the rapid evolution of military technology, able to respond to the demands that changing military needs exert on the law, without having to resort to the creation of new treaties.[3]Where the gap exists between the codified law and the rules of custom, the Martens Clause may act to provide a much needed safety-net for means and methods of armed conflict.

The Martens Clause provides a link between positive norms of international law relating to armed conflicts and natural law. Besides, the Martens Clause established an objective means of determining natural law: the dictates of public conscience. This makes the laws of armed conflict much richer and permits the participation of all States in its development.[4]

According to Cassese, the requirements of humanity and the pressure of public opinion are duly taken into account when regulating armed conflict. If the clause had not struck a chord with the sentiments prevailing in the world community, one could not explain why it has been evoked or relied upon so often, both international lawmakers, by national and international courts and by diplomats.[5]

The Martens Clause clearly shows that principles of international humanitarian law may emerge through a customary process under the pressure of the demands of humanity or the dictates of public conscience, even where State practice is scant or inconsistent. It should always be noted that the Martens Clause is not a tool to be used in a vacuum. However, it cannot be used alone to outlaw certain methods or means of warfare especially in contested or problematic cases.

Conclusion

The concepts of humanity and public conscience have created an international obligation and the notion of the Martens Clause has never acted by the Court or Tribunal. This approach was clearly refused by the International Criminal Tribunal for the Former Yugoslavia (ICTY) in Kupreskic case. The notion of the Clause is as an interpretative tool, highlights another school of thought regarding the Clause in the Legality of Nuclear Weapons case. According to this case the certain matters are not regulated by the Hague Convention would

[1]Strebel, "Martens Clause, Encyclopedia of Public International Law", vol.3, New York, 1982, p.252

[2]Australian Statement, ICJ Request for Advisory Opinions on Nuclear Weapon Case, 1996, p.699.

[3]Legality of the Threat or Use of Nuclear Weapons, 1996, ICJ Report, p.257, para.78.

[4]Rupert Ticehurst, "The Martens Clause and the Laws of Armed Conflict", 1997, pp.133-134.

[5] Cassese, "The Martens Clause: Half a Loaf or Simply Pie in the Sky", 2000,p.212.

render belligerents free to behave as they please and to disregard any possible limitations flowing from other international rules, the Clause would serve to avert this dangerous inference. It was forwarded by the UK and US in Nuclear Weapons opinion.

Customary International Law may independently govern cases not explicitly addressed by the conventions. This is what gives content and meaning to the Martens Clause. Any law, but especially a law pertaining to armed conflict, should possess a significant measure of predictability in interpretation and application. Terrorism, internal tensions, grey-zone conflicts and the continuing refusal of States to recognize the applicability of even the most basic humanitarian principles in armed conflict, continues to challenge the effectiveness of International Humanitarian Law.

It can be seen that the efforts of United Nations in order to formulate a set of minimum humanitarian standards applicable in all armed conflicts. However, until the fundamental standards of humanity are accepted by the international community in treaty form, the Martens Clause maintains its primacy and significance, ensuring, at the very least, that decision-makers, both governmental and military are not wholly free to let political caprice determine their course of action.

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Patent Registration Procedure in Some Regions

Ei Phyu Chaw[1], Sandar Aung [2]

Abstract

A patent is an intellectual property right relation to inventions and is the grant of exclusive right, for limited period, provided by the Government to the patentee, in exchange of full disclosure of his invention, excluding others from making, using, selling, importing the patented product or from any process producing that product for those purposes. The purpose of this system is to encourage inventions by promoting their protection and utilization so as to contribute to the development of industries which, in turn, contributes to the promotion of technological innovation and to the transfer and dissemination of technology. If there were no patent protection, there would be little incentive to invent and innovate. In this research, it finds out the outcomes dealt with registration procedure of patent in comparing with some regional offices, such as European Patent Office (EPO) and the African Regional Industrial Property Organization (ARIPO).

Key words: Patentee, European Patent Office, African Regional Industrial Property Organization, Disclosure, Inventions

Introduction

All patent offices have their particular statute. Differences can be in substantive patent law or in the procedures. To grant a patent, the national and regional patent application and examination procedures are not identical across patent offices. A regional patent application is one which may have effect in a range of countries. The European Patent Office (EPO) is an example of a Regional patent office. The EPO grants patents which can take effect in some or all countries contracting to the European Patent Convention (EPC), following a single application process. Filing and prosecuting an application at a regional granting office is advantageous as it allows patents in a number of countries to be obtained without having to prosecute applications in all of those countries. The cost and complexity of obtaining protection is therefore reduced. Some regional Patent application procedures, except EPO, are the African regional Industrial Property Organization (ARIPO).

Filing Procedure for Patent Application

In order to obtain the grant of a patent, a person, either legal or natural, must file an application at a patent office with the jurisdiction to grant a patent in the geographic area over which coverage is required. This will often be a national patent office but may be a regional body.

European Patent

A European patent application may be filed by any natural or legal person, or anybody equivalent to a legal person by virtue of the law governing it.[3] An application may also be filed either by joint applicants or by two or more applicants designating different Contracting States.[4]

Requirements of a European patent application are (a) a request for the grant of a European patent, (b) a description of the invention, (c) one or more claims, (d) any drawings referred to in the description or the claims; (e) an abstract.[5] European patent applications may

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[3] Article 58 of the European Patent Convention, 1973.
[4] EPO, Case Law of the Board of Appeal of the European Patent Office, Seventh Edition , Published by European Patent Office, 2013, p. 727.
[5] Article 78 of the European Patent Convention, 1973.

be filed in writing, directly or by post, at the EPO's filing offices in Munich, The Hague or Berlin.

The EPO's sub office in Vienna is not a filing office.[1] European patent applications must relate to a single invention only, or to a group of inventions so linked as to form a single general inventive concept, so-called unity of the invention. European patent applications can be filed in one of the three official languages of the EPO (English, French or German). Filing in another language is possible, but a translation has then to be filed into one of the official languages of EPO within two months of filing the application.[2]

Under Art. 78(2) EPC, a European patent application is subject to the payment of the filing fee and the search fee. If the filing fee or the search fee is not paid in due time, the application shall be deemed to be withdrawn.[3] The European Patent System becomes complex and costly just after the grant, as a patent must then be validated, put in force, and renewed in each national patent system, with its own legislation and its own fees structure.[4] When a European patent application is made, it will claim priority from an earlier patent application for the same invention. In order to claim priority, the European patent application must be filed no later than 12 months after the earlier application with certain limited exceptions. The claim to priority must be made within 16 months of the filing of the earlier application.[5]

Article 93 EPC concerns the publication of the European patent application. The European patent application is published in electronic form in the language of the proceedings 18 months after the date of filing or priority. The publication contains the description, the claims and any drawings, all as filed, plus the abstract. If the European search report is available in time, it is annexed; if not, it is published separately. The European patent application is not published if it has been finally refused or withdrawn or deemed withdrawn up to the end of 5 weeks before the end of 18 months after the date of filing or priority.[6]

There is an advantage for filing at the EPO. The European Patent Office offers a very simplified way to apply for several national patents through a unique "European" patent application.

African Regional Patent

The African Regional Intellectual Property Organization (ARIPO) is empowered to grant patents and to register utility models and industrial designs and to administer such patents, utility models and industrial designs on behalf of Contracting States in accordance with the provisions of the Protocol.[7] The Harare Protocol provides for a simplified procedure where an applicant can obtain protection in several designated states with a single patent application.[8] Applications for the grant of patents shall be filed by the authorized representative of the applicant or by the applicant with either the Office or, where the law of a Contracting

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[1] EPO, Guidelines For Examination in the European Patent Office, Published by the European Patent Office, p. II-1.

[2] Anette Kur and Thomas Dreier, European Intellectual Property Law: Text, Cases and Materials, Edward Elgar Publishing Limited, 2013, p. 99.

[3] Legal Research Service of the Boards of Appeal, Case Law of the Board of Appeal of the European Patent Office, Seventh Edition, Published by European Patent Office, 2013, p. 737.

[4] Dominique Guellec and Bruno van Pottelsberghe de la Potterie,The Economics of the European Patent System (IP Policy for Innovation and Competition), Oxford University Press, First Edition, 2007, p. 156.

[5] MeuburnEllis, European Patents,www.mewburn.com/upload/library/information-sheets/European-patents-the basics/EP Patents-the Basics-pdf.

[6] Bardehle Pagenberg,Grant Proceedings before the European Patent Office,2014,p. 12.

[7] Section 1(1) of Harare Protocol 1982.

[8] H. Jackson Knight, Patent Strategy for Researchers and Research managers, Third Edition, A John Willey & Sons, Ltd, Publication, 2013, p. 43.

State so permits, the industrial property office of a Contracting State.[1] An application filed with the industrial property office of a Contracting State shall have the same effect as if it had been filed on the same date at the Office.[2]

If two or more persons have made the same invention independent of each other, the right to an ARIPO patent there for shall belong to a person whose patent application has the earliest date of filing, provided that the first application has been published.[3] An ARIPO patent application shall be published as soon as possible after the expiry of a period of 18 months from the date of filing or, if priority has been claimed, from the date of priority.[4] The amount of fees paid for an ARIPO application is dependent on the number of member states designated. Also, A patent application is filed either with the industrial property office of a contracting state, or at the ARIPO office in Harare. The application must designate the contracting states in which the patent is sought. When a patent is granted, it extends automatically to those member countries that have been designated in the application, unless a designated country has made a written communication to the ARIPO office that the patent will have no effect in that country. The granted patent is then subject to the respective national laws.[5]

Upon receipt of an application by a contracting state, the industrial property office must, within a period of one month after the filing of the application, transmit the application to the ARIPO office. Applications for an ARIPO patent may be lodged in any language which must be translated into English within two months from the date of filing in accordance with Rule 5(2).[6]

The advantages for applicants are applications can be filed with either the National Office or directly with the ARIPO Office. One application is valid in all Designated States.

Examination Procedure of Patent Application

Examination is the process by which the Patent Office examines the application to determine the patentability of the invention. It is neither free nor automatic. A full examination conducted by a patent examiner to determine whether to grant or reject the patent application.

European Patent

When an application has been received, the Receiving Section at the EPO checks whether certain minimum requirements set out in the implementing regulations have been fulfilled, so that a filing date can be accorded. The filing date is crucial for the subsequent procedure, inter alia for establishing the date as of which the relevant state of the art has to be ascertained. After that, the Receiving Section continues to check whether the application is in compliance with formal requirements, including the translations, if required.[7]

Parallel to the formalities examination, the European search is performed by the search division on the basis of the claims, taking into consideration the description and drawings where necessary, in order to find the documents available to the EPO which may be taken into consideration in assessing novelty and inventive step. A search report will be issued listing

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[1] Section 2(1) of the Harare Protocol 1982.
[2] Section 2(2) of the Harare Protocol 1982.
[3] Section 3(14)(a) of the Harare Protocol 1982.
[4] Rule19bis(1) of the Regulations for Implementing the Protocol on Patents and Industrial designs within the Framework of the African Regional Intellectual Property Organization (1984).
[5] Adams & Adams, Practical Guide to Intellectual Property in Africa, Pretoria University Law Press, 2012, p. 7.
[6] Section 2(6) of the Harare Protocol 1982.
[7] Anette Kur and Thomas Dreier, European Intellectual Property Law: Text, Cases and Materials, Edward Elgar Publishing Limited, 2013, p. 100-101.

documents which may be relevant to the patentability of the invention to which your application relates. This will either be published with the application if issued in time or published later. The search report will be accompanied by a search opinion in which the EPO give a preliminary view on the patentability of the claims.[1] The search opinion should cover all objections to the application, thereby indicating the deficient part of the application, the requirement which is not met and the reason for the objection where this is not immediately apparent.[2]

The applicant will need to respond to the search opinion within 6 months of the publication of the search report, by commenting on the points raised or by correcting the deficiencies noted.[3] After the publication of the European search report, the applicant has six months to decide whether to file a request for a substantive examination, pay the examination fee and thus start the second phase. If no request for examination has been filed by the end of this period, the application is deemed to be withdrawn.[4]

Once the request is made for a substantive examination, the examiner analyses the application and is in charge of written communications to the applicant, as well of the analysis of the applicant's replies and amendments. The examiner ultimately recommends grant or refusal of the application. The examiner being in charge is called the 'first' examiner, a second examiner is charged with assuring the correctness of the formal requirements of the recommendation and the form of the final text of the granted patent.[5]

With the valid request for examination, responsibility passes from the receiving section to the examining division. The examining division consists of three examiners. However, the first examiner is entrusted to act on behalf of the division up to the point of a final decision. Oral proceedings have to take place before the full examining division.[6]

The European Patent Office then examines, in the light of the search report and applicant's response to it, whether the invention meets the requirements of the EPC, i.e. whether the invention concerns patentable subject matter and fulfils the patentability requirement of novelty, inventive step and of industrial applicability.[7] If the examiner responsible has objections, he sends a first examination report inviting the applicant to file his observations and, if appropriate, to submit amendments to the specification.[8]

If the Examining Division is of the opinion that a European patent cannot be granted, it will refuse the application. If the application and the invention to which it relates meet the requirements of the EPC, the Examining Division will grant a European patent provided that the requisite fees have been paid in due time and a translation of the claims into the other two official languages of the EPO than the language of proceedings has been filed in due time.[9]

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[1] Dominique Guellec and Bruno van Pottelsberghe de la Potterie,The Economics of the European Patent System (IP Policy for Innovation and Competition), Oxford University Press, First Edition, 2007, p. 171,172.

[2] Bardehle Pagenberg, Grant Proceedings before the European Patent Office, 2014, p. 11.

[3] MeuburnEllis, European Patents,www.mewburn.com/upload/library/information-sheets/European-patents-the basics/EP Patents-the Basics-pdf.

[4] Anette Kur and Thomas Dreier, European Intellectual Property Law: Text, Cases and Materials, Edward Elgar Publishing Limited, 2013, p. 101.

[5] Dominique Guellec and Bruno van Pottelsberghe de la Potterie,The Economics of the European Patent System (IP Policy for Innovation and Competition), First Edition, Oxford University Press, 2007, p. 172.

[6] Bardehle Pagenberg, Grant Proceedings before the European Patent Office, 2014, p. 13.

[7] Anette Kur and Thomas Dreier, European Intellectual Property Law: Text, Cases and Materials, Edward Elgar Publishing Limited, 2013, p. 102.

[8] Bardehle Pagenberg,Grant Proceedings before the European Patent Office, 2014, p. 13.

[9] Anette Kur and Thomas Dreier, European Intellectual Property Law: Text, Cases and Materials, Edward Elgar

To sum up, with regard to an examined patent, every European patent has undergone substantive examination and can be obtained also for countries in which national patents are granted by way of registration without substantive examination. Under current situation, claims drawn to computer programs or business methods are not regarded as claiming computer programs or business methods "as such" and can be allowable if the invention as a whole has a technical character.

African Regional Patent

The ARIPO office shall examine whether the formal requirements for applications as laid down in the Implementing Regulations and the Administrative Instructions have been complied with and, if so, shall accord the appropriate filing date to the application. If the applicant does not comply with the requirements within the prescribed period, the Office shall refuse the application. The Office shall notify each designated State of the fact that a patent application has been filed which complies with the prescribed formal requirements.[1]

The ARIPO office then undertakes, or arranges for, the substantive examination of the application. If it finds that the invention claimed in the application does not comply with the requirements of patentability, it shall refuse the application. The requirements for patentability are provided in section 3(10) of the Harare Protocol.[2]If the ARIPO office, on the basis of the examination, decides to grant the patent, an acceptance notice is issued and the applicant and the office of each designated state are notified. A designated state may, within six months of the notification, make a written communication to the ARIPO office that the patent will have no effect in that country, on the basis that –the invention is not patentable in terms of the provisions of the Harare Protocol, or that the invention, by reason of its nature, cannot be patented under the national law of that state. After the expiry of the six months period, the ARIPO office will grant the patent, which will have effect in those designated states which did not make a written communication.[3]

Procedure for Granting the Patent

A temporary right given by the authorized body for a limited time period (normally 20 years) to prevent unauthorized use of the technology outlined in the patent. A patent application does not automatically give the applicant a temporary right against infringement. A patent has to be granted for it to be effective and enforceable against infringement.

European Patent

If the examining division decides that a patent can be granted, it issues a decision to that effect. Under Article 64(1) EPC, a European patent automatically confers on its proprietor from the date on which the mention of the grant is published in the European Patent Bulletin, in each contracting state in respect of which it is granted, the same rights as would be conferred by a national patent granted in that state.[4] If the formal decision to grant European patent is published in the European Patent Bulletin, the applicant have three months from that publication date to validate patent in the individual European countries where the applicant wants protection.[5]

It is noted that once a patent is granted, European Patent renewal fees are no longer payable, but renewal fees are payable to national authorities in each of the designated states.

Publishing Limited, 2013, p. 102.

[1] Section 3(2) (a) (b) (c) of the Harare Protocol 1982.

[2] Section 3(3) (4) (5) of the Harare Protocol 1982.

[3] Adams & Adams, Practical Guide to Intellectual Property in Africa, Pretoria University Law Press, 2012,p-10.

[4] http://www.epo.org/law-practice/legal-texts/html/natlaw/en/iv/index.htm

[5] https://www.inovia.com/resources/european-validation/

African Regional Patent

Once a patent is granted by the ARIPO office, it will have effect in those designated states which have not communicated a rejection. The ARIPO office publishes all granted patents in the ARIPO Journal. Maintenance fees are payable annually on pending patent applications and granted patents. Payments are made to the ARIPO office and not in the individual member states. If the annual maintenance fee is not paid, the application is deemed to have been withdrawn, or the patent lapses. Once granted, national laws apply to a patent granted by ARIPO.[1] Once granted, the registration of the patent will have the same effect as a national registration in those member states designated in the application.[2]

The patents then granted under this system can be designated or registered as patents in the individual contracting states. However, member states have the right to refuse to grant a patent if it conflicts with their national law. An applicant can also get independent patents in many of the member states, separate from the procedures of ARIPO.

It is noted that, like EPO, the patents granted under ARIPO system can be designated or registered in the individual contracting states. The applicant pays fees in one currency. Local applicants can pay in their respective local currencies. The ARIPO patent registration procedure is simple, cost effective.

Conclusion

The advantages of European patent are firstly, patent protection for European member states can be obtained by filing several national applications or alternatively one EPO patent application designating the states for which patent protection is requested. Secondly, anyone can apply for a patent under the EPC, which makes no distinction between individuals, small and medium sized enterprises and large corporations. Lastly, the high-quality examination practice of the EPO, together with the rights of third parties to comment on and challenge the Office's decisions, ensures that only those applications which meet the requirements of the EPC are granted. With regard to the effects of the European patent**,** from the date of publication of its granting, a European patent confers upon its proprietor the same rights as would be conferred by a national patent granted in that State for each Contracting State for which it is granted. Any infringement of a European patent shall be dealt with under national law.

ARIPO operates a common patent office in Harare, Zimbabwe which examines patent applications on behalf of its member countries. The Protocol empowers the ARIPO Office to receive and process patent applications on behalf of states party to the Protocol. The protocol enables registration of patents by filing one single application either directly at the ARIPO office or at any one of the industrial property offices of the Contracting States with the applicant choosing and designating his choice of Contracting State where the patents are sought to be protected. Like the European system, national rights remain after grant and applicants can select the countries for which they wish protection. The ARIPO system coincides with the national systems of each member state such that an applicant may elect either system for patent protection.

Regional patent applications can be a good way to seek protection in a group of countries. The applicant can file a single application that has effect in all the countries within the region. The application is usually examined by one intellectual property office.

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[1] Adams & Adams, Practical Guide to Intellectual Property in Africa, Pretoria University Law Press, 2012, p. 10,11.

[2] Ibid, p. 7.

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Banker's Duty of Confidentiality

Kyaw Min Tun*

Abstract

The bank's duty of confidentiality covers all customers' information about themselves and their accounts obtained by the bank, irrespective of the information source and for as long as the banker-customer relationship exists. The duty of confidentiality of a bank extends to all information and transactions that go through the customer's account, including securities and guarantees. A bank must observe strict confidentiality about its customer's account. Confidentiality is a cornerstone of the bank-customer relationship. The duty of confidentiality is an implied term of the contract between a banker and his customers that the banker will not divulge to third persons, without the consent of the customer express or implied, either the state of the customer's account, or any of his transactions with the bank, or any information relating to the customer acquired through the keeping of his account, unless the banker is compelled to do so by order of a Court, or the circumstances give rise to a public duty of disclosure, or the protection of the banker's own interests requires it.

Key words: Confidentiality, Honour, Disclosure, Overdraw, Privacy, Subpoena, Compulsion

Introduction

The business of banking is pivotal for the economy of any country. Today, banks are perceived as indispensable institutions not only by the business community, but also by ordinary public. The concept of multi-functional banks in the globalized economy, providing various types of services, has radically changed the historical scope of banking business. Owing to this varied scope of banking business, the relationship of the bank and the customer too has undergone rational changes. The various services provided by banks impose number of important duties on themselves. Due to the extensive and varied nature of modern banking business, proper regulation over the duties of the banks has become vital.

The duty of confidentiality is an implied term of the contract between a banker and his customers that the banker will not divulge to third persons, without the consent of the customer express or implied, either the state of the customer's account, or any of his transactions with the bank, or any information relating to the customer acquired through the keeping of his account, unless the banker is compelled to do so by order of a Court, or the circumstances give rise to a public duty of disclosure, or the protection of the banker's own interests requires it.

The Duty of Confidentiality

Confidentiality is a cornerstone of the bank-customer relationship. The Code of Banking Practice says banks "have a strict duty to protect the confidentiality of all our Customers' and former Customers' affairs". This is known as a bank's duty of confidence.

A banker owes a duty to a customer to keep information concerning the affairs of the customer confidential.[1]The bank's duty of confidentiality arises because of the speciality of the bank-customer relationship as distinguishable from that of debtor-creditor. Apart from the legal requirement, the banking practice also jealously guards' confidentiality of the customer accounts. A customer may enforce this duty of confidentiality by suing his banker for breach of contract. In Singapore, a banker who breaches his duty of confidentiality will not only have to contend with a civil claim by his customer but he may also be committing a criminal offence.[2]

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[1] Poh Chu Chai, Law of Banker and Customer 4th edition, Butterworths, 1999, pg-557.

[2] Ibid.

Nature of the Duty of Confidentiality

One of the most important and well established rules of banking law is that a bank must observe strict confidentiality about its customer's account. It should be noted that in an ordinary debtor-creditor relationship, there is no duty of confidentiality imposed by law on either party.

In Boardman v. Phipps case[1], the banker-customer relationship is an agency contract and the element of privacy stems from this contract. Generally, an agent is under a duty of care and privacy to his principal. The bank's duty of confidentiality implies a legal obligation to maintain the customer's information securely.

A Duty of confidentiality is also generally attached to certain professional relations. Dr. Weerasooria observes:"Banking is a business not a profession and hence a banker's duty of confidentiality is a rare instance of a legal obligation arising in a business –not a profession. In the judgment in the Tournier case, Lord Justice Atkinfelt that a banker's duty of confidence stood by itself and need not be confused or equated with confidence to be exercised by lawyers and doctors".

The origin and the basis of the bank's duty of confidentiality are attributed to common law. The general principles governing the duty of confidentiality was laid down in the well-known case of Tournier v. National Provincial and Union Bank of England.[2] It was established that:

(1) The banker is under a duty not to disclose any information about the state of accounts of his customer or any transaction. This duty is a legal one and arises out of contract.

(2) The duty of secrecy is, however, subject to the following exceptions.

In this case, T was £9 8s 6d (£9. 43) overdrawn and signed an agreement with the bank to pay this off at £1 per week. T wrote on the agreement the name and address of a firm where he was about to start employment as a commercial traveler on a three-month contract. This repayment agreement was not honoured and the acting bank manager telephoned the firm to find out T's private address; he spoke to two directors. T alleged that during the telephone conversation the bank disclosed that his bank account was overdrawn and his repayment had been dishonoured. The acting bank manager also, it was said, had expressed the opinion that T was betting heavily as he had used cheques to pay a bookmaker. As a result of the conversation the firm did not renew T's contract when it expired. T brought an action for slander against the bank and for breach of an implied term in the contract that secrecy was to be maintained. Indeed the bank had in their passbooks 'The officers of the Bank are bound to secrecy as regards the transactions of its customers'. In the High court the bank had the judgment in its favour but T appealed.

In the Court of Appeal Atkins LJ said: To what information does the obligation of secrecy extend? It clearly goes beyond the state of the account… It must extend at least all the transactions that go through the account… It must, I think, extend beyond the period when the account is closed or ceases to be active… I further think that the obligation extends to information obtained from other sources than the customer's actual account.

Thus, bank's duty of confidentiality is a special doctrine of its own, which cannot be equated to a similar duty found in any other kind of professional relationship.

[1] (1967) 2 AC 46.
[2] (1924) 1K.B. 461.

Extension of the Duty of Confidentiality

Accordingly, the duty of confidentiality of a bank extends to all information and transactions that go through the customer's account, including securities and guarantees. It extends beyond the state of the customer's account irrespective of the funds available. And it extends to sources other than the customer's actual account, if the occasion upon which the information was obtained has arisen out of the bank-customer relationship.[1]

The duty also extends to information and knowledge acquired by the bank even before the bank-customer relationship was in contemplation or even when the account is dormant. The duty remains even after the closure of the account and the termination of the bank-customer relationship.

In the case of Ritzert Co., Inc. v. United Fid Bank[2], under both common law and various statutes and regulations, a bank may be precluded from disclosing sensitive financial information entrusted to it by customers.[3]

In Buxcel v First Fid Bank[4]case, pointed out that numerous courts, have concluded that a bank's obligation to maintain the confidentiality of a customer's financial information may not always be absolute and, in some cases, may be outweighed by a bank's duty of disclosure to a private third party where "special circumstances".[5]

The bank's duty of confidentiality covers all customers' information about themselves and their accounts obtained by the bank, irrespective of the information source and for as long as the banker-customer relationship exists. There are many logical reasons for obliging the banks to keep customers' confidential data private before, during, and after their relationship.

First of all, information provided to the bank before the beginning of the contractual agreement is possibly the same information that is provided by the customer after that agreement has been instigated; consequently such information falls under the duty of confidentiality.

Secondly, information provided to the bank at any period during the banker-customer relationship does indeed fall under the bank's duty of confidentiality according to the common law definition of confidence.

Thirdly, in practice, there is nothing to prevent banks from submitting an explicit duty to the customer to inhibit the disclosure of specific information, even if such information theoretically is not within the ambit of the bank's duty of confidentiality.

Fourthly, the customer's right of privacy must certainly be respected and a most important aspect of a person's rights is the right to keep his/her information private. There is the further possibility that disclosure of any confidential information after the termination of the banker-customer relationship may cause loss or damage to the person.

Finally, a customer's confidential information could be of a commercially sensitive nature, and disclosure might adversely affect his/her subsequent business or commercial activities. Given the above factors, it seems that the bank's duty of confidentiality should be

[1] http://webjcli.org.
[2] 935 N.E.2d 756, 762 (Ind. Ct. App. 2010).
[3] Commercial & Business Litigation Winter 2013, Vol. 14 No. 2.
[4] 601 N.W.2d 593, 596–97 (S.D. 1999).
[5] Commercial & Business Litigation Winter 2013, Vol. 14 No. 2.

maintained indefinitely, even after the customer's death, as long as the law does not indicate a specific time for the termination of the duty.[1]

Exceptions to Duty of Disclosure

The duty of confidentiality on a bank is not an absolute concept. The common law recognizes certain exceptions to the duty of confidentiality. These exceptions are mainly aimed at preserving both the public interest and interests of the banks.

As to what may be disclosed by a bank Bankes LJ said:

1 Where disclosure is under compulsion by law.

2 Where there is a duty to the public to disclose.

3. Where the interests of the bank require disclosure.

4. Where the disclosure is made with the express or implied consent of the customer.

Disclosure under Compulsion by Law

A banker who is served with a lawful order to disclose information about a customer account is obliged by law to obey the order. As against a customer, such a disclosure comes within one of the exceptions enumerated in Tournier's case, namely, disclosure made under compulsion of law. A question which may arise in connection with such a disclosure is whether a banker who is served with the order is under a duty to inform the customer about the proceedings.

In Marice Robertson v. Canadian Impertial Bank of Commerce[2], it was contended that a banker who had been served with a subpoena to produce information about a customer's account was under a duty to inform the customer of the proceedings before he was entitled to make the disclosure. Accepting the existence of such a duty it was decide by the Privy Council that the duty was not absolute but a qualified duty. If a bank had made reasonable attempts to contact a customer even though without success, it would have discharged its duty towards the customer. The plaintiff was a customer of the defendant bank. Legal proceedings were instituted by Mr.OlinDennie against Mr. Emery Robertson, the brother of the plaintiff, to recover a loan of $ 1,000. Mr.Dennie alleged that the loan was given to Mr. Robertson to help him repay a debt owed to the plaintiff. The existence of the loan was denied by Mr. Robertson. In order to establish that the money was paid to the plaintiff, Mr. Dennie obtained a subpoena against the defendant bank requiring the bank to furnish details of the plaintiff's bank account for the months of August and September. The bank attempted to contact the customer but was unable to get in touch with him. Statements of account for the months of August and September were duly proceduced by the bank to the Court. The plaintiff contended that the bank had acted in breach of its contract when it failed to consult him before it made the disclosure and in failing to inform the Court that it had not consulted the customer about the disclosure. It was also alleged b the plaintiff that as a result of the disclosure, an anonymous person had called him mentioning the details of his account and the fact that his account was overdrawn. It was decided, inter alia, by their Lordship that it had received a subpoena calling for disclosure of the customer's account. This duty was, however, not an absolute but a qualified duty and it required the bank to use its best endeavours to inform the customer about the receipt of the subpoena. Lord Nolan, delivering the opinion of the Board, said:

It was common ground that a contractual duty of secrecy is implied in the relationship between banker and customer.

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[1] http://www.finicial-ombudsman.org.uk.
[2] (1994) 1 W.L.R 1493.

The Companies Act 1985, the Insolvency Act 1986 and the Drug Trafficking offences Act 1986 of the UK are statutes which impinge on the bank's duty of confidentiality. By the Companies Act, the bank may be required to disclose information relating to an investigation of a company's affairs; the Insolvency Act gives an administrator of a company powers to obtain information from a bank; and the Drug Trafficking offences Act gives power to the police and Customs and Excise officials to obtain an order prohibiting any person (including a bank) from dealing with the defendant's property when proceedings have been commenced against him and the court believes that he has profited from drug trafficking.

Bankers can be compelled to produce copies of banking accounts in court. A bank may receive a subpoena which is again an order of the court requiring the bank to appear as a witness and possibly bring into court certain documents and records.

In Barclays Bank Plc v. Taylor[1], it was contended that a bank's duty of confidentiality was not confined to merely keeping the affairs of a customer confidential; but that the bank was under a further duty to resist any order made by a lawful authority to look into the affairs of the customer. In addition, the customer was also entitled to be informed by the bank of the order to look into his affairs. In rejecting these contentions, it was decided by the English Court of Appeal that the additional duties contended for by the customer relationship. Legal proceedings were brought by Barclalys Bank Plc, and Trustee Savings Bank of Wales and Border Counties against the defendants, a Mr. and Mrs. Taylor. Prior to the actions, the two banks were served with orders made under Section 9 of the English Police and Criminal Evidence Act 1984 authorizing the police to inspect Mr. Taylor's bank account. The police had indicated in their notice to the bank that the proceedings were "strictly confidential, and no contact should be made with the account holder regarding the pending application". The defendants counterclaimed against the bank contending that the bank had breached its duty of confidentiality in making was under an implied duty to its customer to oppose the police orders. It was decided by their LordShiips that no such duties could be implied into the banker and customer relationship Lord Donaldson M.R. said:

It is common ground that the banks did not oppose the making of the orders or informs Mr. and Mrs Taylor that the police were applying for them. The issue is thus purely one of law: were the banks under any obligation to do so? The banker-customer relationship imposes on a bank a duty of confidentiality in relation to information concerning its customer and is affairs which it acquires in the character of his banker. But it is not an absolute duty. It is subject to four well-known qualifications. These entitle the bank to make disclosure where (a) disclosure is under compulsion by law, (b) there is a duty to the public to disclose, (c) the interests of the bank require disclosure and (d) the disclosure is made by the express or implied consent of the customer……

It was decided by Croom-Johnson L.J. that no such term as contended for by the defendants could be implied into the banker and customer relationship. His Lordship said:

There is no need to imply such a term in order to give the contract business efficacy, nor would the officious bystander say "of course". There is another argument against implying such a term, even in the very limited circumstance of an application for an order under Section 9. This position of the banks to do anything at all, save to preserve the confidential material once the notice is served and obey the order for access once it has been made. Otherwise, take part in the inter parties hearing. There is nothing in the schedule which indicates any need to imply the suggested term.

[1] (1989) 3 All E.R.563.

Disclosure under Duty to the Public Interest

Disclosure under the public interest has been described as 'the difficult and comprehensive meaning of the Tournier qualification. These difficulties could be due to a lack of clarity regarding the circumstances which would create exceptions in the public interest. In practice this will seldom happen.

One of the four exceptions mentioned by Bankes L.J. in Tournier v. National Provincial and Union Bank of England[1], allowing a bank to make disclosure is, namely. Where there is a duty to the public to disclose the information.

In Pharaon and Ors v. Bank of Credit and Commerce International S.A.[2]case, it was decided, inter alia, by Rattrr J that public interest in making documents relating to an alleged fraud available to a litigant could outweigh a banker's duty of confidentiality towards its own customers. After the collapse of the Bank of Credit and Commerce International S.A. (BCCI) in 1991,an action was commenced in the US District Court by the First American Corp. an the First American Bankshares Inc. against BCCI alleging that BCCI had in breach of US banking rules acquired control of the companies through BCCI's nominees. The US companies obtained an order for discovery against BCCI's auditors, Price, Waterhouse, for the disclosure of documents relating to the acquisition of the companies. Price Waterhouse sought the sanction of the Court in the United Kingdom to make the disclosure acknowledging that the disclosure would breach BCCI's duty of confidentiality towards its customers as well as the duty of confidentiality owed by the auditors to BCCI. It was decided, *inter alia*, by Rattee J. state that the disclosure was warranted by public interest provided it was of a limited nature, Rattee J. said:

However, on, balance, I am satisfied that the public interest in making the documents relating to the alleged fraud in the acquisition of CCAH shares by BCCI available in the US proceedings does outweigh the public interest in preserving confidentiality as to those documents, provided that disclosure goes no further than is reasonably necessary to achieve the purpose of that public interest in disclosure. This means, in my judgment, that on the undertaking proffered by First American to make an application to the US court for a particular order, to which I have referred, being given to this court, Price Waterhouse UK should be at liberty to disclose, pursuant to the US subpoena, documents relating to purported loans made by BCCI companies to the record shareholders named in a list to be annexed to my order, which will be the list produced by Mr Rubin in the course of the hearing, and secured by share in CCAH.

Disclosure under the Bank's Own Interest

This is potentially the most controversial ground in that it authorizes the bank to provide information to its own measure in certain events like for argument sake a default by a client on an overdraft which will enable the bank to take action against that party. For example, where the bank is suing a guarantor on his liability under a guarantee, the bank must of necessity disclose the customer's overdrawn balance.

Disclosure under the Customer's Approval

An intending guarantor may ask the manager pertinent questions relating to the customer's account prior to signing the guarantee. In such a case the consent of the customer must be obtained. Express consent should seldom cause a problem. Implied consent is dependent on the circumstances.

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[1] (1942) 1.K.B.461.
[2] (1998) 4 All E.R. 454.

In the case of Suriyab & Douglas v. Midland Bank PLC[1]stated that a customer's consent this may be obtained either tacitly or express, the express this would emanate from a written instruction that contains specific instructions to the bank. In the case of the tacit consent this can be assumed by conduct where the customer for argument sake requests the bank to provide a reference of good standing.

In the case of Sunderland v. Barclays Bank[2] *(1938)* Mrs. S was a customer of BB. She draws a cheque which was dishonoured for lack of funds. The real reason for the cheque's non-payment was that Mrs. S had drawn a number of cheques in favour of bookmakers and BB felt that it was not the type of account on which to allow an overdraft. Mrs. S complained to Mr. S who advises her to contact the bank. This Mrs. S did by telephone with Mr. S later interrupting to add his own protests; the bank then told Mr. S of the cheques drawn on the bookmakers. Mrs. S sued BB for breach of their duty to maintain secrecy. She lost. The circumstances were such that an implied authorization to disclose had been given to the bank.

A banker need not inquire into the sources of a customer's money. But, in practice where necessary, bankers do make such enquiries.

The Court of Appeal in Turner v. Royal Bank of Scotland[3]case held that a bank could not depend on banking practice to justify the assumption of its customer's implied approval for the use of private details in providing other banks with references. Therefore, the theory that the bank could pass on its customer's confidential information on the grounds that the bank has its customer's implied consent was rejected. A court held that a bank was a breach of confidentiality.

Hooley[4]case argues that Turner's decision presents a clear explanation in the area of implied consent theory. In this regard, the best recommendation is that the principles governing the bank's duty of confidentiality should be regulated by statute in order to avoid any ambiguities. Given the above position, it seems that the law has been changed, since the Court of Appeal in Turner held that the bank has no right to disclose or exchange customer's confidential information depending on the customer's implied consent.[5]

Recovery of Damages

A breach of the duty of confidentiality through wrongful disclosure of information could result in breach of contract and the bank may also be liable for damages for any resulting defamation.

The amount of damages the customer is entitled to recover will depend on whether he is able to establish the actual extent of the damage he has suffered as a result of the disclosure when a customer successfully sues a banker for breach of his duty of confidentiality.[6]

In the case of Tan Eng Song v. Malayan Banking Bhd.,[7] the plaintiff had a current account with the defendant bank. On September 26, 1985, the plaintiff orally instructed the bank to close his account and at the same time he transferred the balance in the account to his wife's account by means of a cheque drawn on his account. The bank informed the plaintiff that instruction to close the bank account had to be given in writing. No such written

[1] [1999] LSG 33.
[2] (1938).
[3] (1999) CA 6.
[4] (2000) CLJ 21, 22.
[5] E.P. Ellinger, E. Lomnicka, C.Hare,Ellinger's Modern Banking Law, 2011, pg-196.
[6] Poh Chu Chai, Law of Banker and Customer, 4th edition, Butterworths, 1999, pg-570.
[7] [1997] 2 C.L.J. Supp.552, (Poh Chu Chai, Law of Banker and Customer, 4th edition, Butterworths, 1999, pg-570-571.

instructions were in fact given by the plaintiff to the bank. The plaintiff was the chairman and director of a company in Penang known as the Segamant Store & Agency (Penang). The company also kept an account with the defendant bank. In the course of reviewing the overdraft facilities granted to the company, an office of the bank noticed that a sum of RM15 in bank charges was still outstanding on the plaintiff's current account. The bank officer contacted the plaintiff's brother who was the managing director of the company in an attempt to locate the plaintiff. The officer mentioned to the plaintiff's brother that the plaintiff might have overlooked a debt of RM15 owing on the plaintiff's current account. The plaintiff brought an action against the bank for slander and breach of the bank's duty of confidentiality in connection with the disclosure about his bank account.

In this case, it was decided by Abdul Aziz Mohamad J. that a customer was entitled to nominal damages from a banker for breach of the banker's duty of confidentiality unless the customer was able to prove the actual extent of the damage he had suffered. And for breach of confidence the plaintiff is not entitled to more than nominal damages that which is RM15.

Conclusion

It is an implied term of the contract between customers and their banks and building societies that these firms will keep their customers' information confidential. This confidentiality is not just confined to account transactions it extends to all the information that the bank has about the customer.

But from time to time, mistakes happen and for whatever reason banks end up releasing information that they should have kept secret. But, the duty of confidentiality on a bank is not an absolute concept. In common law recognizes certain exceptions to the duty of confidentiality. Sometimes, the resulting breach of confidentiality is little more than technical (in other words, nothing really flows from it), but occasionally it can have major consequences.

Therefore, the customer's approval is an essential key to the transmission of confidential credit data and such approval enables the bank to avoid breaching its duty of confidentiality.

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