



**A University of Sussex PhD thesis**

Available online via Sussex Research Online:

<http://sro.sussex.ac.uk/>

This thesis is protected by copyright which belongs to the author.

This thesis cannot be reproduced or quoted extensively from without first obtaining permission in writing from the Author

The content must not be changed in any way or sold commercially in any format or medium without the formal permission of the Author

When referring to this work, full bibliographic details including the author, title, awarding institution and date of the thesis must be given

Please visit Sussex Research Online for more information and further details

**Withholding Payment in Documentary Credit:  
Discrepancies, Fraud and Nullity**

by

**Zaid Mahmoud Aladwan**

Submitted for the degree of Doctor of Philosophy

**University of Sussex**

**August 2019**



### **Student declaration**

I hereby declare that this thesis has not been and will not be, submitted in whole or in part to another University for the award of any other degree.

Signature: ..... Z.Aladwan .....

Date: ..... 15<sup>th</sup> August 2019 .....

## **Abstract**

The two fundamental principles of documentary credit, namely the doctrine of compliance and the principle of autonomy, are unclear and vague, which has led to confusion in their application. The doctrine of compliance deals with a bank's primary duty to examine the documents in order to determine that they are compliant with the terms of the letter of credit. Where there are discrepancies, an analysis of the case law in different jurisdictions reveals that judgments often conflict with previous rulings. This is due in part to the vague and confusing language used in the legal instruments that govern the use of documentary credit. This point indicates that it is necessary to re-evaluate the UCP 600 rules in order to determine more clearly when a discrepancy will be viewed as a genuine ground for withholding payment. In turn, the principle of autonomy is concerned with the mechanism of securing payment in a letter of credit transaction and thereby protecting the rights of the parties. This principle isolates the documentary credit from the underlying contract of sale. However, there are issues with this cornerstone principle as the case law reveals that in certain circumstances payment may be postponed because of some dispute in the underlying contract. This is the case where there exists either fraud or a nullity. This thesis critically evaluates the three controversial grounds for withholding payment: discrepancies, fraud and nullity.

# Table of contents

<b>Abstract</b>	<b>ii</b>
<b>Acknowledgements</b>	<b>1</b>
<b>Dedication</b>	<b>2</b>
<b>Chapter One: Introduction</b>	<b>3</b>
1.1 Legal nature of letters of credit	4
1.2 The problem	7
1.3 The aim of the research	13
1.4 Methodology	13
1.5 The structure of the thesis	14
 <b>Part One: Discrepancies as a Ground for Refusing to Pay</b>	 <b>17</b>
<b>Chapter Two: Non-Complying Documents: How and Why</b>	<b>18</b>
2.1 Standard of examination	20
2.1.1 <i>The ‘strict’ standard</i>	22
2.1.2 <i>The ‘substantial’ standard</i>	24
2.1.3 <i>UCP 600 position: is there no guidance?</i>	26
2.1.4 <i>The proper compliance standard: mix of both</i>	29
2.2 Meaning of ‘discrepancy’?	30
2.2.1 <i>Temporal defect</i>	34
2.2.2 <i>Defective documents</i>	38
2.2.3 <i>Other discrepancies</i>	47
2.3 Conclusion	52
<b>Chapter Three: The Puzzle of Discrepancy</b>	<b>55</b>
3.1 Error in number	59
3.1.1 <i>Missing whole number</i>	59
3.1.2 <i>Missing digit</i>	61

3.1.3 <i>Different digit</i>	64
3.1.4 <i>Extra digit</i>	65
3.2 Error in date	71
3.3 Error in party's address	77
3.4 Error in name	81
3.4.1 <i>Error in name regarded as typographical error or misspelling</i>	82
3.4.2 <i>Error in name regraded as a discrepancy</i>	91
3.5 Error in description of the goods	102
3.5.1 <i>Differences in the description</i>	102
3.5.2 <i>Missing description</i>	110
3.5.3 <i>Extra description</i>	112
3.6 Conclusion	120
<b>Chapter Four: Notice of Refusal – Blessing or Curse?</b>	<b>125</b>
4.1 The 'refusal' condition	127
4.1.1 <i>What is a 'refusal'?</i>	127
4.1.2 <i>Language of refusal</i>	129
4.1.3 <i>Right of waiver</i>	132
4.2 The 'all discrepancies' condition	136
4.2.1 <i>State the discrepancies</i>	136
4.2.2 <i>Single notice</i>	138
4.3 The 'status of the documents' condition	143
4.3.1 <i>Returning the documents</i>	144
4.3.2 <i>Holding the documents until receiving waiver</i>	146
4.3.3 <i>Holding the documents pending further instructions or in accordance with instructions previously received</i>	147
4.4 Delivery of the notice	148
4.5 Conclusion	152

<b>Part Two: Other Grounds for Refusing to Pay</b>	<b>155</b>
<b>Chapter Five: Fraud Defence</b>	<b>156</b>
5.1 The autonomy principle: is it necessary?	158
5.2 Fraud in the documents or the underlying contract of sale?	161
5.2.1 <i>The alternative approaches in the UK and the USA</i>	164
5.2.2 <i>Concluding remarks: fraud only in the documents</i>	171
5.3 Third party fraud and the knowledge of the beneficiary	173
5.3.1 <i>The position in the UK</i>	173
5.3.2 <i>The position in the USA</i>	176
5.3.3 <i>Concluding remarks</i>	177
5.4 Conclusion	178
<b>Chapter Six: The Nullity Exception</b>	<b>181</b>
6.1 The definition of nullity	184
6.2 Evaluating the nullity exception	189
6.2.1 <i>Should the nullity exception be recognised?</i>	190
6.2.2 <i>Will the nullity exception undermine the autonomy principle?</i>	193
6.2.3 <i>UCP 600: visualising the nullity exception</i>	195
6.3 Lessons from Singapore	197
6.4 Scope and application of the proposed nullity exception	199
6.4.1 <i>Nullity exception from the bank's perspective</i>	200
6.4.2 <i>Should the nullity exception require knowledge on the part of the beneficiary?</i>	203
6.5 Conclusion	207
<b>Chapter Seven: Conclusion</b>	<b>210</b>
7.1 Chapter Two	210
7.2 Chapter Three	212
7.3 Chapter Four	215

7.4 Chapter Five	217
7.5 Chapter Six	218
<b>Bibliography</b>	<b>221</b>
<b>Appendix 1: Banks Questionnaire</b>	<b>240</b>
<b>Appendix 2: Discrepancies Survey</b>	<b>241</b>



## **Acknowledgements**

I would like to take the opportunity to thank those who made this thesis a possibility.

I am grateful to my supervisors, Dr Joanna Wilson and Dr Sirko Harder, who had been supportive and encouraging during the period of this PhD. I would like to express my sincere gratitude for their patience and their encouragement throughout my studies.

My sincere thanks also go to Mr Paul Eden for the supportive advices provided in completing this work and for his insightful comments which incanted me to widen my research from various perspectives.

## **Dedication**

The one who taught me that 'knowledge has no age'; my father.

The one who enjoyed the utmost strength and determination, my mother.

The one and only who is not replaceable, ROLLO, my brother.

How fortunate I have been to have one like you.

## Chapter One: Introduction

These days, we are witnessing increasing rates of selling goods internationally between different parties. However, there are many obstacles that could confront any of the parties involved in international transactions. For instance, the buyer is always concerned about the seller's credibility, while in contrast, the seller is concerned about the buyer's creditworthiness. Therefore, there is a need to secure the rights of each party. Over time, letters of credit have become the preferred method of payment for international commercial transactions,<sup>1</sup> which is the 'lifeblood of international commerce'.<sup>2</sup> In this respect, letters of credit are considered one of the greatest achievements of uniformity in international commercial law.<sup>3</sup>

This method of payment is defined as 'a commitment given by the bank to pay the seller (beneficiary) upon the timely presentation by the latter of documents conforming to the terms and conditions of the credit'.<sup>4</sup> The significance of this payment method is that they are unique commercial devices which are neither negotiable instruments nor suretyship undertakings; they are not contracts.<sup>5</sup> Generally speaking, the purpose of a letter of credit was described by Lord Diplock in this way: 'The whole commercial purpose for which the system of confirmed irrevocable documentary credits has been developed in international trade is to give to the seller an assured right to be paid before he parts with control of the goods'.<sup>6</sup>

---

<sup>1</sup> Michael Bridge, *Benjamin's Sale of Goods* (10<sup>th</sup> edition, Sweet & Maxwell 2017) [23-002]-[23-004]; Alan Davidson, 'Fraud; The Prime Exception to the Autonomy Principle in Letters of Credit' (2003) 8 *International Trade and Business Law* 23, 23.

<sup>2</sup> *Intraco Ltd v Notis Shipping Corp of Liberia (The Bhoja Trader)* [1981] 2 Lloyd's Rep 256, 257; *RD Harbottle (Mercantile) Ltd v National Westminster Bank Ltd* [1978] QB 146, 155; *Power Curber International Ltd v National Bank of Kuwait S.A.K.* [1981] 2 Lloyd's Rep. 394; Bridge (n 1) [24-028].

<sup>3</sup> Bridge (n 1) [23-004].

<sup>4</sup> *ibid* [23-002]; Dominique Doise, 'The 2007 Revision of the Uniform Customs and Practice for Documentary Credits (UCP 600)' [2007] *International Business Law Journal* 106, 107.

<sup>5</sup> John Dolan, 'Letter of Credit Litigation under UCC Article 5: A Case of Statutory Preemption' (2011) 57 *The Wayne Law Review* 1269, 1286.

<sup>6</sup> *United City Merchants (Investments) Ltd v Royal Bank of Canada* [1979] 1 Lloyd's Rep 267; [1982] QB 208; [1983] 1 AC 168, 183.

## 1.1 Legal nature of letters of credit

The genesis of any credit will lie in an underlying contract in which it is agreed that payment will be made through a documentary credit. Assuming that the underlying contract is one of sale of goods, the buyer will have the obligation to procure the opening of a credit in compliance with the terms of the sale contract. Those terms may identify one or more banks to be involved; in particular the seller may stipulate a bank to which it wishes to look for payment. The buyer will then apply to a bank, which is usually in its own country, to request the opening of a credit in favour of the seller.<sup>7</sup> The bank will generally ask the buyer to complete an application form, setting out the details of the credit to be opened. Assuming that the bank agrees to open the requested credit, the form will constitute the basis of the contract between the buyer and the bank.

The credit is opened by the bank issuing a notification of the credit and its terms to the seller. In this context, the bank that opens the credit is known as the ‘issuer’, while the seller in whose favour the credit is opened is known as the ‘beneficiary’.<sup>8</sup> The buyer pursuant to whose mandate the issuing bank acts is known as the ‘applicant’.<sup>9</sup> The issuing bank may notify the beneficiary directly. However, in most cases, it will employ the services of a second bank that operates in the country of the beneficiary, known as ‘correspondent bank’.<sup>10</sup>

In order to realise the credit, the beneficiary must assemble the documents stipulated in the credit and present those documents within the time limits. The bank will then examine the documents to determine whether they are as required by the credit. If the documents are indeed as required, the bank is obliged to honour the credit to the beneficiary. The correspondent bank will then remit the documents to the issuing bank and claim payment from that bank. The issuing bank will examine the documents again. Assuming again that the documents are as

---

<sup>7</sup> Bridge (n 1) [23-002].

<sup>8</sup> UCP 600, Article 2.

<sup>9</sup> *ibid*

<sup>10</sup> Bridge (n 1) [23-002].

required by the credit, it will duly reimburse the correspondent bank in accordance with the terms of the credit. Having reimbursed the confirming bank, the issuing bank will then in turn look to the applicant for reimbursement in accordance with the terms of the contract.<sup>11</sup> The credit may, therefore, be seen to regulate three distinct relationships: that between the issuing bank and beneficiary, that between the correspondent bank and beneficiary, and that between the issuing and correspondent bank.

The law of letters of credit has developed mainly through customs.<sup>12</sup> Today, these customs are embodied in a code drafted by the International Chamber of Commerce (ICC) under the title 'Uniform Customs and Practice for Documentary Credits' (UCP).<sup>13</sup> Currently, they are operated under the latest version of the UCP; namely, UCP 600, issued in 2007, which is globally recognised as a codification of banking customs and practices.<sup>14</sup> These rules have, without doubt, become the cornerstone of the law pertaining to letters of credit. They were developed due to the need for the recognition of uniform procedures which could harmonise the practice of letters of credit at a global level.<sup>15</sup>

Although the UCP is widely accepted and used, it is technically not law.<sup>16</sup> These rules have no independent force of their own where they take effect by incorporation into contracts.<sup>17</sup> They will be applied if the parties agree to their application or, in other words, when they are incorporated in the credit.<sup>18</sup> For instance, in *Royal Bank of Scotland plc v Cassa di Risparmio delle Provincie Lombarde SA*,<sup>19</sup> the court affirmed the need for incorporating the application of the UCP rules, stating: 'Nevertheless, whilst not belittling the utility of the UCP, it must be

---

<sup>11</sup> Bridge (n 1) [23-002].

<sup>12</sup> *ibid* [23-004]; Dan Taylor, *The Complete UCP* (ICC Publication No 683, 2008) 208; Roberto Bergami, 'UCP 600 Rules—Changing Letter of Credit Business for International Traders?' (2009) 1 *International Journal of Economics and Business Research* 191, 193.

<sup>13</sup> Bridge (n 1) [23-004]; Taylor (n 7) 208.

<sup>14</sup> Introduction UCP 600 rules; Article 1 states: 'The Uniform Customs and Practice for Documentary Credits, 2007 Revision, ICC Publication no. 600 ("UCP") are rules that apply to any documentary credit ("credit") (including, to the extent to which they may be applicable, any standby letter of credit) when the text of the credit expressly indicates that it is subject to these rules.' Bridge (n 1) [23-004].

<sup>15</sup> Introduction UCP 600.

<sup>16</sup> Bridge (n 1) [23-006]; Agasha Mugasha, *The Law of Letters of Credit and Bank Guarantees* (Federation Press 2003) 50.

<sup>17</sup> Article 1; Bridge (n 1) [23-008]; Roy Goode, 'Abstract Payment Undertakings and the Rules of the International Chamber of Commerce' (1995) 39 *Saint Louis University Law Journal* 725, 726; Ramandeep Chhina, 'The Uniform Customs and Practice for Documentary Credit (the UCP): Are They Merely a Set of Contractual Terms?' (2015) 30 *Banking & Finance Law Review* 245, 247.

<sup>18</sup> Jason Chuah, *Law of International Trade* (5<sup>th</sup> revised edition, Sweet & Maxwell 2013) 575; Bridge (n 1) [23-008].

<sup>19</sup> [1992] 1 *Bank L.R.* 251.

recognized that their terms do not constitute a statutory code, as their title makes clear they contain a formulation of customs and practice, which the parties to a letter of credit can incorporate into their contract by reference'.<sup>20</sup>

In fact, two distinct principles uphold the sanctity of the letter of credit as they secure the right to payment, thus promoting the efficiency of the credit transaction.<sup>21</sup> These two principles, namely 'autonomy' and 'compliance', are stipulated under the UCP rules: the autonomy principle in Article 4<sup>22</sup> and the 'compliance' principle in Article 14.<sup>23</sup> Accordingly, the autonomy principle is regarded as the most fundamental concept in letters of credit transactions or, as it is known, the 'engine room behind letters of credit'.<sup>24</sup> This principle stipulates that a letter of credit is separate and independent from the underlying contract of sale between the seller and the buyer. In this respect, the right of payment is an independent contract between the seller (beneficiary) and the issuing bank.<sup>25</sup> Therefore, the ultimate aim of this principle is to preserve the main function of the letter of credit, which is to guarantee quick and reliable payment to the seller, so that his or her right of payment will not be interrupted due to any disputes arising out of the underlying contract.<sup>26</sup>

The compliance principle stipulates that, in order to honour the credit, the required documents need to be in compliance with the credit's terms.<sup>27</sup> This principle is important to the extent that

---

<sup>20</sup> *Royal Bank of Scotland plc v Cassa di Risparmio delle Provincie Lombarde* [1992] 1 Bank L.R. 251. The court held that the UCP were incorporated as its provisions were consistent with the terms of the credit.

<sup>21</sup> *Bridge* (n 1) [23-065]; *Simic v NSW Land and Housing Corp* [2016] HCA 47, (2016) 260 CLR 85 [6] (French CJ).

<sup>22</sup> 'A credit by its nature is a separate transaction from the sale or other contract on which it may be based. Banks are in no way concerned with or bound by such contract, even if any reference whatsoever to it is included in the credit. Consequently, the undertaking of a bank to honour, to negotiate or to fulfil any other obligation under the credit is not subject to claims or defences by the applicant resulting from its relationships with the issuing bank or the beneficiary'.

<sup>23</sup> (a) 'A nominated bank acting on its nomination, a confirming bank, if any, and the issuing bank must examine a presentation to determine, on the basis of the documents alone, whether or not the documents appear on their face to constitute a complying presentation.'

<sup>24</sup> *Hamzeh Malas & Sons v British Imex Industries Ltd* [1958] 2 QB 127 (CA); *Urquhart Lindsay & Co Ltd v Eastern Bank Ltd* [1922] 1 KB 318; *Edward Owen Engineering Ltd v Barclays Bank International Ltd* [1978] QB 159, [1978] 1 All ER 976.

<sup>25</sup> *ibid*; *Urquhart Lindsay* (n 24); *Edward Owen Engineering* (n 24); *Mugasha* (n 16) 136, Roy Goode, *Goode on Commercial Law* (5<sup>th</sup> edition, Penguin 2017) [35.52]; Christopher Hare, 'Not So Black and White: The Limits of the Autonomy Principle' (2004) 63 *The Cambridge Law Journal* 288, 290; Hang Yen Low, 'Confusion and Difficulties Surrounding the Fraud Rule in Letters of Credit: An English Perspective' (2011) 17 *the Journal of International Maritime Law* 462, 462.

<sup>26</sup> Jan H Dalhuisen, *Dalhuisen on Transnational Comparative, Commercial, Financial and Trade Law: Volume 3: Financial Products, Financial Services and Financial Regulation* (6<sup>th</sup> revised, Hart Publishing 2016) 358; Deborah Horowitz, *Letters of Credit and Demand Guarantees 'Defences to Payment'* (OUP 2010) [2.18]; Gerard McMeel, 'Pay Now, Argue Later' [1999] *Lloyd's Maritime and Commercial Law Quarterly* 5; Lei Shen, 'Effective Notice of Refusal in Letter of Credit Transaction' (2005) Research Paper, University of Southampton, 2 <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1335800](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1335800)> accessed at 21th March 2019.

<sup>27</sup> Article 14 UCP 600.

the purpose of the documentary credit is to undertake to the seller that payment will be completed if presentation of the documents complies with the terms of the credit.<sup>28</sup> However, this principle is evidently designed to protect the applicant. In this respect, working hand in hand with the autonomy principle, the compliance principle is the other cornerstone of the commercial success of letters of credit and will ensure that the duty of payment is efficient and quick.<sup>29</sup>

Furthermore, in addition to applying the UCP rules, at its meeting in Rome in 2002, the Commission approved that 'International Standard Banking Practice', hereinafter ISBP, is a 'practical complement to UCP 500'.<sup>30</sup> These rules will be applied in addition to the documentary rules in order to determine the criteria of conformity of the required documents.<sup>31</sup> Yet, there is no need for the parties to incorporate the ISBP rules separately because the UCP rules mention their effects explicitly.<sup>32</sup> With the approval of UCP 600 in October 2006, it has become necessary to provide an updated version of the ISBP, which is currently the 2013 version.<sup>33</sup>

## 1.2 The problem

Despite the fact that documentary credit is the preferred method of payment in international commercial transactions, it is not a perfect method due to some issues surrounding its mechanism. The right of payment is not inevitable because sometimes it might be postponed as a result of some defences that may arise to justify refusal. These defences include fraud,

---

<sup>28</sup> *New Braunfels Nat'l Bank v Odiome*, 780 S.W.2d 313, 317 (Tex. App.-Austin 1989); *Glencore International AG v Bank of China* [1996] CLC 95, [1996] 1 Lloyd's Rep. 135, 152.

<sup>29</sup> *United City Merchants* (n 6) 183.

<sup>30</sup> Introduction to the UCP 600; Hamed Alavi, 'Documentary Letters of Credit, Principle of Strict Compliance and Risk of Documentary Discrepancy' (2016) 19 Korea University Law Review 1, 10; Peter Ellinger, 'Use of Some ICC Guidelines' [2004] Journal of Business Law 704, 708.

<sup>31</sup> Article 2; Bridge (n 1) [23-097]; Ebenezer Adodo, 'Conformity of Presentation Documents and a Rejection Notice in Letters of Credit Litigation: A Tale of Two Doctrines' (2006) 36 Hong Kong Law Journal 309, 314.

<sup>32</sup> Article 2; Tom Pifer, 'The ICC Publication of International Standard Banking Practice (ISBP) and the Probable Effect on United States Letter of Credit Law' (2006) 12 Texas Wesleyan Law Review 631, 646.

<sup>33</sup> Introduction to UCP 600; Commission, 'International Standard Banking Practice for the Examination of Documents under Documentary Credits subject to UCP 600 (ISBP)' (2013) Introduction, 5.

illegality, public policy, nullity, unconscionability, and discrepancy.<sup>34</sup> On the other hand, a recent study conducted in England found that the UCP 600 rules in general ‘ought not to be regarded as innovative’ and missed some points with regard to clarifying a bank’s duty under letters of credit.<sup>35</sup>

This thesis focuses on three controversial grounds: discrepancies, fraud, and nullity. These are the most commonly heard defences in the courts in recent years and are, therefore, the subject of much comment.<sup>36</sup>

In some respects, discrepancies are connected with fraud and nullity, as grounds for refusal include misrepresenting the status of the shipment, either in the goods themselves or, most importantly, in the required documents. Further, without underestimating the compliance principle, there are also issues associated with the autonomy principle. Autonomy principle is more concerned with securing the mechanism of letters of credit and securing both parties’ rights in such a contract. As some cases demonstrate, the right of payment might be postponed due to a dispute with regard to the underlying contract. This is the case with regard to nullity, fraud.

One of the merits that has positioned documentary credit as a preferred payment method is that it is based upon presenting compliant documents. Accordingly, the bank is the responsible party to verify compliance with the terms of the credit through examination of the documents pursuant to this compliance principle. The importance of the required documents in this method is that they provide evidence of the underlying transaction and, more importantly, they are required to guarantee payment. Consequently, the need for these documents to be compliant with what is called for in the credit is of utmost importance in letter of credit law and practice.

---

<sup>34</sup> Horowitz (n 26); Matti Kurkela, *Letters of Credit and Bank Guarantees Under International Trade Law* (2<sup>nd</sup> edition, OUP 2007).

<sup>35</sup> Jingbo Zhang, ‘Document Examination and Rejection under UCP 600’ (PhD Thesis, University of Southampton 2015).

<sup>36</sup> See Paul Todd, *Cases and Materials on International Trade Law* (Sweet & Maxwell 2003) 423; Goode (n 25); Horowitz (n 26); Kurkela (n 34); Mugasha (n 16); Nelson Enonchong, ‘The Autonomy Principle of Letters of Credit: An Illegality Exception?’ [2006] *Lloyd’s Maritime and Commercial Law Quarterly* 404.



However, international traders often experience difficulties in achieving the high level of documentary compliance required by banks.<sup>37</sup> Therefore, it puts the trader's payment at risk.

Many cases have revealed that banks appear to misunderstand the compliance principle as there have been occasions where courts have reversed their decisions.<sup>38</sup> Courts apply the compliance principle according to different standards. This has led to the criticism that such a variety of standards leads to uncertain judgments.<sup>39</sup> For instance, a court found that the simple misspelling of the buyer's name on transport documents ('Soran' instead of 'Sofan') was sufficient to justify the rejection of the seller's demand for payment under the credit.<sup>40</sup> In contrast, another court found that the apparent misspelling of the seller's name on all export documents ('Voest-Alpine Trading USA' instead of 'Voest-Alpine USA Trading' as shown on the credit) was not sufficient to justify the rejection of the seller's demand for payment.<sup>41</sup>

As a result, compliance condition has always been a sensitive issue for courts and banks as sometimes they overlap with their decisions. Therefore, there is a need to determine an appropriate standard of compliance.

On the other hand, sole dependency on compliant tender of documents creates additional risk of dishonouring a presentation by a bank due to documentary discrepancy.<sup>42</sup> In fact, 70% of documents presented under documentary credit were rejected on presentation because of discrepancies.<sup>43</sup> However, banks' and courts' ability to discern which discrepancies constitute grounds for dishonouring the credit is an issue of the utmost importance in letter of credit law.<sup>44</sup>

That is to say, banks often fail to make the right judgment when it comes to determining

---

<sup>37</sup> *Hanil Bank v PT Bank Negara Indonesia*, No 96 Civ 3201, 2000 WL 254007 (SD NY, 2000); see also *Bank of Cochín Ltd v Manufacturers Hanover Trust Co*, 612 F Supp 1533 (SD NY, 1985).

<sup>38</sup> *Hanil Bank* (n 37); *Bank of Cochín* (n 37); *NEC Hong Kong Ltd v Industrial and Commercial Bank of China* [2006] 2 HKLRD 645 (Court of First Instance).

<sup>39</sup> *ibid*; *Voest-Alpine Trading USA Corp v Bank of China*, 142 F 3d 887 (5<sup>th</sup> Cir, 1998); 167 F Supp 2d 940 (SD Tex, 2000); *Beyene v Irving Trust Co*, 762 F 2d 4 (2<sup>nd</sup> Cir, 1985)

<sup>40</sup> *ibid*.

<sup>41</sup> *Voest-Alpine* (n 39).

<sup>42</sup> Kurkela (n 34) 235; Ronald Mann, 'The Role of Letters of Credit in Payment Transactions' [2000] Michigan Law Review 2494, 2504; Roberto Bergami, 'Risk Management in Australian Manufacturing Exports: The Case of Letters of Credit to ASEAN' (DPhil thesis, Victoria University 2011) 119.

<sup>43</sup> Introduction to UCP 600, ICC 2007 p.11.

<sup>44</sup> Kurkela (n 34) 235; Todd Conley, '*Hanil Bank v. Pt. Bank Negara Indonesia*: The Problem with Form over Substance in Documentary Compliance Rules' (2001) 50 Catholic University Law Review 977, 977.

whether such typographical errors are discrepancies or not and, as a result, they are placed in a difficult legal position against the other parties.<sup>45</sup>

These discrepancies include missing documents, later presentation, originality, expiry of the credit, and defective documents.<sup>46</sup> However, in a report on ‘the Use of Export Letters of Credit’ by the Simplification of International Trade Procedures Board (SITPRO), which was an independent organisation sponsored by the British Overseas Trade Board (BOTB), the controversial nature of these discrepancies as a ground for rejection in practice is the ‘inconsistent data’, which is considered a common source for discrepancies.<sup>47</sup> These data, in particular, are date, description of the goods, names, address and numbers. Notably, these defects in documents were sometimes considered discrepancies by banks while in contrast, courts disagreed and considered them typographical errors, and vice versa.<sup>48</sup>

An example of such an inconsistency is where one court found that the failure of the beneficiary to include the credit number on the presented documents was sufficient to justify non-payment under the credit.<sup>49</sup> In contrast, another court found a seemingly comparable seller's error in providing a letter of credit number on the tendered documents (showing ‘86-122-5’ instead of ‘86-122-S’) was not justification for non-payment.<sup>50</sup> Consequently, this case of overlapping in judgments raises the necessity of distinguishing between genuine discrepancies and typographical errors. Therefore, there is a need to draw a line to determine when these ‘inconsistent data’ are eligible grounds for rejecting payment as the difference between discrepancies and typographical errors is unclear in documentary credits.

---

<sup>45</sup> *Guaranty Trust of New York v Van Den Berghs Ltd* [1925] 22 Ll L Rep. 447; *Bank Melli Iran v Barclays Bank* [1951] 2 Lloyd's Rep. 367; *Bank of Cochín* (n 37); *All-American Semiconductor Inc v Wells Fargo Bank, Minnesota N.A.*, 105 Fed. Appx. 886 (8<sup>th</sup> Cir, 2004).

<sup>46</sup> Richard Schaffer and Others, *International Business Law and Its Environment* (9<sup>th</sup> edition, Stamford, CT : Cengage Learning 2015) 195; Mann (n 42) 2504; Nicholas Manganaro, ‘About-Face: The New Rules of Strict Compliance under the Uniform Customs and Practice for Documentary Credits (UCP 600)’ (2011) 14 *International Trade and Business Law Review* 273, 274.

<sup>47</sup> Simplification of International Trade Procedures Board (SITPRO), Report on the Use of Export Letters of Credit 2001/2002 <<https://www.scribd.com/document/43959409/letteredr>> accessed 6 March 2019, 2-13.

<sup>48</sup> *Voest-Alpine* (n 39); *Oei v Citibank, NA*, 957 F Supp 492 (SD NY, 1997); *Bank Melli Iran* (n 45); *Bank of Cochín* (n 37); *Hanil Bank* (n 37); *Beyene* (n 39); *Seaconsar Far East Ltd v Bank Markazi Jomhouri Islami Iran* [1997] 2 Lloyd's Rep 89; *Glencore International* (n 28).

<sup>49</sup> *Wood v State Bank of Long Island*, 203 AD 2d 278 (NY, 1994).

<sup>50</sup> *New Braunfels* (n 28).

With regard to the issue of fraud, under UCP rules, the autonomy principle dictates that a bank's relationship with the seller and the buyer should be independent. Moreover, by virtue of the autonomy principle, the beneficiary is not bound to prove the fulfilment of his obligation to the issuer. Yet, while the autonomy principle facilitates the function of this instrument, it is possible that, in some cases, it may well place one of the parties at the mercy of other unscrupulous parties. According to many cases,<sup>51</sup> it has been demonstrated that sellers with bad intentions have manipulated the system in many ways, including fraud. Thus, in order to protect parties from fraud, many legal jurisdictions have recognised the fraud exception rule.<sup>52</sup> These jurisdictions recognise this rule due to the lack of proper provisions dealing with the fraud issue under the UCP rules.<sup>53</sup>

Nevertheless, such an exception did not resolve the problem properly as different legal jurisdictions have interpreted the rule in different ways, which has led to a variety of court outcomes. For instance, under English law, the fraud exception will only be applied if the fraud appears in the documents,<sup>54</sup> whereas US law applies the exception also where the fraud appears in the underlying transaction.<sup>55</sup>

Furthermore, the identity of the party carrying out the fraud is also under debate between these jurisdictions. For example, under US law the identity of the party perpetrating the fraud is not material, whereas under English law the fraud exception will only be applied if the seller-beneficiary was aware of the fraud.<sup>56</sup>

Turning to nullity, on the one hand, with the development of technology and printers, sellers

---

<sup>51</sup> *Edward Owen Engineering* (n 24); *Equitable Trust Co of New York v Dawson Partners Ltd* [1927] 27 Ll L Rep 49; *United Bank Ltd v Cambridge Sporting Goods Corp*, 392 N.Y.S. 2d 265 (NY, 1976).

<sup>52</sup> *Sztejn v Henry Schroeder Banking Corp*, 31 NYS 2d 631 (NY, 1941).

<sup>53</sup> Xiang Gao, *The Fraud Rule in the Law of Letters of Credit: A Comparative Study* (Kluwer Law International, 2003) 56.

<sup>54</sup> *United City Merchants* (n 6) 183; *Discount Records Ltd v Barclays Bank Ltd* [1975] 1 Lloyd's Rep. 444, 448; Gao (n 53) 56.

<sup>55</sup> *Itek Corp v First National Bank*, 730 F 2d 19 (1st Cir, 1984); *Rockwell International Systems Inc v Citibank NA*, 719 F 2d 583 (2nd Cir, 1983); *United Bank* (n 51); Gao (n 53) 110; Horowitz (n 26) [2.14].

<sup>56</sup> *United City Merchants* (n 6); *Edward Owen Engineering* (n 24) 984; see in general *cf Standard Chartered Bank v Pakistan National Shipping Corp (No 1)* [1998] 1 Lloyd's Rep 684, where the beneficiary was party to an agreement with the carrier and its brokers to antedated the bill of lading. See Low (n 25) 469.

can design any documents and duplicate them to claim payment under the credit,<sup>57</sup> while on the other hand, banks are responsible for examining the presented documents, but in some cases cannot distinguish between genuine documents and those that are forged.<sup>58</sup> Consequently, due to the increase in illegitimate demand for payment by presenting a suspicious document, the applicant might sue the issuer bank for honouring the credit wrongfully and refuse to reimburse them, alleging that documents were null.<sup>59</sup>

Taking the above observations into consideration, there is a demand for a solution for such an issue or, in other words, a need for another exception besides the only recognised one, namely, the fraud exception. The alternative solution is known as the 'nullity exception'.<sup>60</sup> In this respect, the ground for rejection of payment has been appraised in some cases.<sup>61</sup> Nevertheless, some jurisdictions disregard the need for this exception, such as English law<sup>62</sup> while others support it, most notably Singaporean law.<sup>63</sup> Based on this point, the researcher questions whether there is a need for such an exception under the documentary credit system. Moreover, this research seeks to illustrate that there is a relationship between nullity and fraud, or in other words, what part this proposed exception plays in regard to the fraud exception rule.

---

<sup>57</sup> Recognised by the International Chamber of Commerce by formulating the e-UCP for electronic commerce; Paul Todd, *Bills of Lading and Bankers' Documentary Credits* (4<sup>th</sup> edition, Informa Law 2007) [9.162]; Anna Antoniou, 'Nullities in Letters of Credit: Extending the Fraud Exception' (2014) 29 *Journal of International Banking Law and Regulation* 229, 233; Koji Takahashi, 'Original Documents in Letters of Credit in the Era of High-Quality Photocopiers and Printers' (2004) 121 *Banking Law Journal* 613, 620.

<sup>58</sup> Antoniou (n 57) 229.

<sup>59</sup> See in general *United City Merchants* (n 6); *Montrod Ltd v Grundkötter Fleischvertriebs-GmbH* [2000] All ER (D) 2011; [2001] CLC 466; [2002] 1 WLR 1975; [2002] 1 All ER (Comm) 257 (CA); *Heskell v Continental Express Ltd* [1950] 83 LI 1 Rep 438; *Beam Technology (Manufacturing) Pte Ltd v Standard Chartered Bank* [2002] 2 SLR 155; [2003] 1 SLR 597; *Lambias (Importers and Exporters) Co PTE Ltd v Hong Kong & Shanghai Banking Corporation* [1993] 2 SLR 751. See in general Todd (n 57) [9.143-166]; John Ren, 'A Nullity Exception in Letter of Credit Law?' [2015] *Journal of Business Law* 1, 3.

<sup>60</sup> see Roy Goode, 'Abstract Payment Undertakings' in Peter Cane and Jane Stapleton, *Essays for Patrick Atiyah* (OUP 1991); Goode (n 25); Michael Bridge, *The International Sale of Goods* (4<sup>th</sup> edition, OUP 2017); Todd (n 57) [9.152-159]; Horowitz (n 26); Dora Neo, 'A Nullity Exception in Letter of Credit Transactions?' [2004] *Singapore Journal of Legal Studies* 46; L. Chin and Y. Wong, 'Autonomy-A Nullity Exception at Last?' [2004] *Lloyd's Maritime and Commercial Law Quarterly* 14; Richard Hooley, 'Fraud and Letters of Credit: Is There a Nullity Exception?' [2002] *The Cambridge Law Journal* 279; Kieran Donnelly, 'Nothing for Nothing: A Nullity Exception in Letters of Credit?' [2008] *Journal of Business Law* 316.

<sup>61</sup> See *United City Merchants* (n 6); *Lambias* (n 59); *Montrod* (n 59).

<sup>62</sup> *ibid.*

<sup>63</sup> *Lambias* (n 59); *Beam Technology* (n 59).

### 1.3 The aim of the research

This research focuses on each of the three defences that may arise to justify refusing a demand for payment under documentary credit, which are: discrepancies, fraud, and nullity. Then, it answers the research questions relating to discrepancies, particularly in data, by asking *'how can the examining bank distinguish between material and immaterial discrepancies?'*

The study will design a guideline that will enable courts to achieve consistent judgments regarding the compliance principle, particularly the proper standard of compliance that should be applied by both courts and banks when they examine the documents. To achieve this, some lessons from previous cases will be utilised to establish a duly legal reform that would alleviate both the legal and practical problems associated with the issue of defective documents that are currently experienced.

In addition, the paper will examine the application of the fraud exception rule from two perspectives and finally, will discuss these controversial questions: *'is there a need for another exception, known as the "nullity exception", to the autonomy principle?'* and, *'what part will it form in practice?'* This thesis investigates documentary credit rules regarding these three issues in conjunction with banking practice and taking account of case law. A comparison of the law and practice of different countries is not the primary aim of this thesis, although it will sometimes be done to illustrate certain points.

### 1.4 Methodology

In order to resolve the above matters, various research methodologies were adopted. The traditional analysis method is primarily used for describing the requirements of document examination and rejection. The doctrinal research method aims not only to analyse the UCP600 rules, but also to provide commentary on the emergence of the authoritative sources in which such rules are considered, in particular the latest ISBP revision, past versions of the UCP rules

and recent case law. Scholarly arguments and the ICC opinions are also involved in the process of interpreting the UCP600. The comparative analysis approach is also applied in this thesis.

In addition, an empirical study has been undertaken. It involved contacting several Jordanian banks with a view to gaining an understanding of how banks apply the rules in practice when determining whether a document is compliant or not. The study involved four Jordanian banks which were selected according to their banking reputation (internal and external) and their use of letters of credit. The study is in two parts, the first of which includes an interview with representatives of the participating banks. This involved a general discussion and questions about their experience of letters of credit, with particular emphasis on the examination of the presented documents. The second part involved a questionnaire comprising 16 questions relating to five types of linguistic errors that might appear in presented documents, namely: error in name, date, address, number and description of the goods. The outcome of this study will be explained more precisely in Chapter Three. Following the socio-legal research, the paper aims to provide guidelines for examiners when evaluating the documents and proposes a future change with the purpose of achieving business efficiency and transaction security.

Although the study contacted Jordanian banks, yet it can be viewed as reflective of overall practice on documentary credit globally where it focused on the banking practice and the banker methodical when analysing and applying the UCP rules. Regardless the different expertise and knowledge between national banks, yet the examination methodology is the same here, where the UCP rules is the centre of the examining criteria for different banks.

## **1.5 The structure of the thesis**

The thesis is divided into two parts. The first part deals with the first ground for postponing the right of payment, namely, discrepancies. It comprises three chapters, starting with chapter 2, which focuses on what Article 15 of UCP 600 means in regard to how the presentation comes

to be considered as ‘compliant’ through interpretation of the compliance principle in order to discover the proper standard of compliance that should be followed by both the courts and the banks. Moreover, it will explain why a presentation could be considered as a ‘non-complying’ by highlighting discrepancies as a first ground of rejection. Each type of discrepancy will be explained.

Chapter 3 will answer the research question with regard to distinguishing between material and immaterial discrepancies. This will include an empirical study with regard to the question. Chapter 4 deals with issues surrounding the notice of refusal stipulated in Article 16 of the UCP 600 rules and its relation to discrepancies. It will illustrate the weak points and common mistakes that some banks are confronted with in connection with the duty of issuing this notice according to Article 16.

The second part of the thesis, which comprises two chapters, deals with grounds for withholding payment other than discrepancy, namely fraud and nullity. Chapter 5 focuses on the issue of fraud in documentary credit, in addition to analysing the implementation of the fraud exception rule in such a payment method, from two perspectives. Firstly, the ambit of this rule; namely, *‘is it only in the documentary credit or in the whole underlying transaction?’* will be discussed. Secondly, taking into consideration the identity of those committing the fraud raises the question of *‘will the fraud exception rule apply if the fraud was committed by a third party without the knowledge of the beneficiary?’*

Furthermore, Chapter 6 will examine whether the nullity exception should be recognised as another exception in letters of credit. Initially, it will examine the issues surrounding this proposed exception, then it will deal with the question of recognition by asking: *‘if such an exception is recognised, will it be an exception in addition to the fraud exception or will the latter exception be extended to include the nullity exception?’*

Finally, Chapter 7 will reveal the outcomes of the thesis and summarise the main points from each chapter.



## **Part One: Discrepancies as a Ground for Refusing to Pay**

## Chapter Two: Non-Complying Documents: How and Why

Article 15 of UCP 600 provides that an issuing, confirming or nominated bank must honour the credit when it receives a ‘complying presentation’. This phrase is defined in Article 2 as a ‘presentation that is in accordance with the terms and conditions of the credit’. This requirement of a complying presentation is based on the compliance principle, which is stipulated in Article 14. Although UCP rules introduce this principle, it does not provide any guiding principles for how it can be achieved.<sup>64</sup> As a result, different courts apply the compliance principle differently, thereby producing undesirable uncertainty.<sup>65</sup> For example, an error in the presented documents—which cited ‘Sung Jun’ instead of ‘Sung Jin’—was sufficient justification for rejecting the seller’s demand for payment under the credit.<sup>66</sup> On the contrary, the misspelling of the seller’s name, ‘Voest-Alpine Trading USA’ instead of ‘Voest-Alpine USA Trading’, was not sufficient to justify the rejection of the seller’s demand for payment.<sup>67</sup> Conflict arises in international disputes when different courts, called upon to deliberate on a nearly identical set of facts, make opposite decisions. These controversial court decisions concerning the compliance principle indicate that the existing standard for document examination is creating a serious impediment in the consistent processing of letter of credit transactions.

This uncertainty regarding the meaning of the judicial standard of compliance has prompted courts and bankers to adopt highly defensive practices, which have added more confusion by creating a myriad of controversial judicial standards that are applied to similar mistakes in the presented documents.<sup>68</sup> For example, the approach of ‘strict’ compliance has often been

---

<sup>64</sup> Bridge (n 60) [6.51]; Ross Cranston and Others, *Principles of Banking Law* (3<sup>rd</sup> edition, OUP 2017) 532, see also Kyle Roane, ‘Hanil Bank v. Pt. Bank Negara Indonesia (Persero): Continuing the Quandary of Documentary Compliance under International Letters of Credit’ (2004) 41 *Houston Law Review* 1053, 1074.

<sup>65</sup> Pifer (n 32) 631.

<sup>66</sup> *Hanil Bank* (n 37).

<sup>67</sup> *Voest-Alpine* (n 39).

<sup>68</sup> Roane (n 64) 1064.

criticised because it allows banks and applicants to abuse the compliance standard and reject documents for insignificant errors.<sup>69</sup> In contrast, the ‘substantial’ standard allows bad faith behaviour, contrary to the expectations of the honest beneficiary.<sup>70</sup> Consequently, courts and banks do not have a common standard when checking the documents.

Evidently, this suggests that the governing rules require clearer explication of how exactly the compliance doctrine must be applied, as they do not explain the degree of compliance that must be met by the presented documents in order to be considered a ‘complying presentation’. It is unclear whether documents must be in the exact form required by the credit or if the details must be written in the same manner as in the credit. An important question thus arises regarding what exactly is meant by compliance with the credit’s terms and conditions.

Article 16(a) of the current rules state that ‘When a nominated bank acting on its nomination, a confirming bank, if any, or the issuing bank determines that a presentation does not comply, it may refuse to honour or negotiate’. This means that the bank can reject the documents if they do not comply with the credit. In such cases, the ground for rejection is known as a ‘discrepancy’.<sup>71</sup> Several studies have reported that approximately 70% of presentations in letter of credit transactions are rejected.<sup>72</sup> It is believed that most of these rejected presentations contained defects that can be described as ‘discrepancies’.<sup>73</sup> These discrepancies are varied, including errors in the documents themselves, in the data, and in the time limit stipulated under the credit.<sup>74</sup> According to Mann, however, discrepancies are not a critical issue, and buyers waive them in many cases,<sup>75</sup> because they are primarily concerned with the goods.<sup>76</sup>

---

<sup>69</sup> Boris Kozolchik, ‘Strict Compliance and the Reasonable Document Checker’ (1990) 56 Brooklyn Law Review 45, 53.

<sup>70</sup> Goode (n 25) [35.63]; Norman Mugarura, ‘The Letter of Credit, Its Resilience and Viability in Securing International Commercial Transactions’ (2014) 13 Journal of International Trade Law and Policy 246, 254; *Banco Espanol de Credit v State Street Bank & Trust Co*, 266 F Supp 106 (D Mass, 1967).

<sup>71</sup> Article 16.

<sup>72</sup> Introduction to UCP 600, ICC 2007 p 11.

<sup>73</sup> Kurkela (n 34) 235.

<sup>74</sup> Mann (n 42) 2504.

<sup>75</sup> *ibid* 2497.

<sup>76</sup> Ali Malek and David Quest, *Jack: Documentary Credits: The Law and Practice of Documentary Credits Including Standby Credits and Demand Guarantees* (4th revised edition, Bloomsbury Professional 2009) [8.32].

This issue of document rejection due to discrepancies and other problems related to the compliance principle render the compliance examination a very sensitive procedure that introduces a considerable amount of litigation. For these reasons, this chapter highlights the problem of the standard of examination and discrepancies, the latter of which is closely associated with the compliance principle. Through case analysis, the chapter evaluates the compliance principle in order to provide an efficient basis for developing an appropriate standard for examination.

This chapter discusses two main topics. First, it analyses the standard of examination and the different standards that have been applied by courts; it further evaluates the position under the current rules. Second, the chapter considers the reasons why a presentation can be deemed non-complying. It discusses each type of discrepancy discovered in the presented documents, which will be considered a ground to reject the presentation. The ultimate aim is to understand how a presentation can be considered ‘complying’ in accordance with Article 15. While this chapter looks at the standard of compliance and the classification of discrepancies in general, Chapter 3 will then go on to analyse in detail a particular type of discrepancy, namely discrepancies in data. This type of discrepancy has proven to be particularly challenging for the banks and courts alike and so an ethical study has been conducted to ascertain how a number of Jordanian banks deal with these issues when examining a letter of credit to determine compliance.

## **2.1 Standard of examination**

The compliance principle is the examination standard for letters of credit according to Article 14, which states in the first paragraph: ‘*A nominated bank acting on its nomination, a confirming bank, if any, and the issuing bank must examine a presentation to determine, on the basis of the documents alone, whether or not the documents appear on their face to constitute a complying presentation*’. In other words, banker is not bound to pay if the presented

documents do not conform to the standard. In practice, the compliance principle has become known as the ‘strict’ compliance principle,<sup>77</sup> although the term ‘strict’ is not expressly used in the UCP itself. Rather, it is the result of the judicial interpretation of the UCP, which has become the standard of examination.<sup>78</sup>

This UCP principle is implemented according to the examiner’s understanding alongside International Standard Banking Practice rules (ISBP) and the bank’s customary practice.<sup>79</sup> It entitles the bank to reject documents that do not comply with the terms of the credit pursuant to Article 14 of the current rules. By virtue of this principle, ‘there is no room for documents which are almost the same or which will do just as well’.<sup>80</sup> That is, a bill of lading referring to ‘raisins’ will be a non-complying document when the credit calls for documents covering ‘dried grapes’.<sup>81</sup>

Yet, in practice, many cases have demonstrated that it is quite difficult to meet the level of documentary compliance demanded.<sup>82</sup> It is justified given that the examination standard is ambiguous and that neither the UCP nor the ISBP rules clarify how to achieve compliance.<sup>83</sup> Due to this ambiguity, banks and courts have applied the rule according to their own understanding, which differs from country to country and from judge to judge.<sup>84</sup> This diversity of interpretation has led to the emergence of many standards for document examination, ranging from a ‘*strict*’ standard to a more relaxed ‘*substantial*’ standard.<sup>85</sup>

It has been argued that even these standards have failed to convey the ultimate aim of compliance, leading to different judgements even for the same type of errors.<sup>86</sup> The critical

---

<sup>77</sup> International Chamber of Commerce, Issues Papers\_ Notes on the Principle of Strict Compliance, prepared by the Executive Committee of the ICC Banking Commission 2016, 11; James Byrne, *UCP 600: An Analytical Commentary* (IIBLP 2010).

<sup>78</sup> Bridge (n 1) [23-105].

<sup>79</sup> Alavi (n 30) 10.

<sup>80</sup> *Equitable Trust* (n 51) 52.

<sup>81</sup> *Bank of Italy v. Merchants National Bank*, 236 N.Y. 106, 108 (NY, 1923), cited via John Dolan, ‘A Principled Exception to the Strict Compliance Rule in Trilateral Letter of Credit Transactions’ Papers posted in the Wayne State University Law School Legal Studies Research Paper Series (2003) <<http://www.ssrn.com/link/Wayne-State-U-LEG.html>> 6.

<sup>82</sup> *Hanil Bank* (n 37); *Bank of Cochin* (n 37).

<sup>83</sup> International Chamber of Commerce (n 77) 2.

<sup>84</sup> Pifer (n 32) 631.

<sup>85</sup> Rosmawani Hashim, ‘Principle of Strict Compliance in Letter of Credit (LC): Towards A Proper Standard of Compliance’ [2013] CLI Law: Legal Network Series 1, 4.

<sup>86</sup> *Hanil Bank* (n 37); *Bank of Cochin* (n 37); *Voest-Alpine* (n 39).

question that emerges from this situation is thus: what is meant by a ‘complying presentation’? Does it mean exact verbalisation as to the literal terms of the credit, or does it mean a tender that simply reflects the substance of the terms of the credit? The following section discusses the two commonly applied standards, namely strict and substantial, and analyses which should prevail as the universally applicable standard. It also analyses the approach in the UCP 600 in order to gauge whether the rules are clear on how to achieve the compliance standard.

### **2.1.1 The ‘strict’ standard**

In *English, Scottish and Australian Bank Ltd v Bank of South Africa*,<sup>87</sup> Bailhache J. illustrated the doctrine of strict compliance by the following comment: ‘It is elementary to say that a person who ships in reliance on a letter of credit must do in exact compliance with its terms. It is also elementary to say that a bank is not bound or indeed entitled to honour drafts presented to it under a letter of credit unless those drafts with the accompanying documents are in strict accord with the credit as open’.<sup>88</sup> This statement affirmed that a beneficiary has a duty of strict presentation. Accordingly, a bank will reject the documents if they do not strictly comply with the requirements of the credit.

Under this standard, any deviation from the credit terms will entitle the bank to reject the documents.<sup>89</sup> For example, bills describing the cargo as oranges and lemons do not satisfy a credit calling for bills of lading covering shipments of oranges.<sup>90</sup> Similarly, if the contract was for the sale of 5,000 bags, but the bill of lading tendered to the bank indicated that only 1000 bags had been shipped, the bank is entitled to reject the documents.<sup>91</sup> The bank merely verifies

---

<sup>87</sup> [1922] 13 LI L Rep 21.

<sup>88</sup> *ibid* 24.

<sup>89</sup> Kurkela (n 34) 122.

<sup>90</sup> *Manitoba Ltd v National Bank of Canada*, 33 A.C.W.S. (3d) 200 (Man. C.A., 1992) cited via Dolan (n 81) 6.

<sup>91</sup> However, Article 30(b) now allows a tolerance of plus or minus 5%, which states: ‘A tolerance not to exceed 5% more or 5% less than the quantity of the goods is allowed, provided the credit does not state the quantity in terms of a stipulated number of packing units or individual items and the total amount of the drawings does not exceed the amount of the credit’. See in general *Moralice (London) Ltd v E.D. & F. Man* [1954] 2 Lloyd’s Rep 526, 532.

if the presented documents contain the exact words included in the letter of credit. Accordingly, the language in the documents presented must be as stated in the letter of credit.<sup>92</sup> This ‘mirror image’ approach considers any insignificant error as a discrepancy and, therefore, non-complying.

The need for such an approach stems from the important role that banks have under letters of credit.<sup>93</sup> They are neither expert nor involved in these international transactions; they must, therefore, follow such a strict approach to determine the compliance of the documents with the letter of credit.<sup>94</sup> It is not the issuer’s duty to know the commercial impact of the presented documents; the only concern is related to the banking practice and adherence to the applicant’s instructions.<sup>95</sup> Consequently, it is not the bank’s duty to know whether ‘Machine shelled groundnuts kernels’ signifies the same thing as ‘Coromandel groundnuts’ in the trading arena.<sup>96</sup> The purpose of such a principle is to protect the bank from any dispute between the two parties, which will enable maximum transaction efficiency. Under the compliance principle, the bank’s duty is to examine the compliance of only the documents and not the goods.<sup>97</sup> Consequently, it has a duty to make the payment if the documents are in compliance, irrespective of whether the goods delivered correspond with the description.<sup>98</sup> This strict approach is critical in maintaining the integrity of the letters of the credit.<sup>99</sup> Moreover, it has been seen as an aspect of freedom of contract, necessitated by commercial realities.<sup>100</sup>

Since only this ‘literal’ compliant standard demands a high standard of compliance as a ‘mirror image’ with the credit requirements, any minor mistakes, such as typographical errors, can be

---

<sup>92</sup> *Hanil Bank* (n 37) 3.

<sup>93</sup> *New Braunfels* (n 28) 317.

<sup>94</sup> *Glencore International* (n 28) 152.

<sup>95</sup> *New Braunfels* (n 28) 317.

<sup>96</sup> *JH Rayner & Co Ltd v Hambros Bank Ltd* [1943] 1 KB 37, 41.

<sup>97</sup> *Maurice O'Meara Co v National Park Bank of New York*, 239 NY 386, 396 (NY, 1925).

<sup>98</sup> *ibid.*

<sup>99</sup> *New Braunfels* (n 28) 317.

<sup>100</sup> Mohd Hwaidi, ‘The Story of the English Strict Compliance Principle in Letters of Credit and Its Consistency with the UCP’ (2014) 29 *Journal of International Banking Law and Regulation* 71, 71.

considered a discrepancy, enabling the bank to reject the documents.<sup>101</sup> This standard has, therefore, been criticised because it yields unfair results in the reimbursement context.<sup>102</sup>

This standard has the potential to be abused by banks and used according to the applicant's interest regardless of whether the latter wants the goods or not.<sup>103</sup> Moreover, banks might apply the standard literally if they are concerned about the risk of loss, in cases where the applicant has become insolvent or the account party is on the verge of insolvency.<sup>104</sup> From the perspective of the applicant, this standard is preferred to prevent loss caused by price or market fall; this strict standard allows the applicant to reject the documents for any insignificant error.<sup>105</sup>

Judicial interpretations of the strict compliance standard that employ a mirror image approach potentially validates such bad-faith practices, creating distrust within the documentary credits community. It is criticised because the risk will be on the seller. In short, both the bank and the applicant could use any insignificant discrepancy as an excuse to reject payment to secure its interests by virtue of this principle, which harms the beneficiary.

### **2.1.2 The 'substantial' standard**

The second recognised standard is the 'substantial' compliance standard, which is more relaxed than the 'strict' standard.<sup>106</sup> 'Substantial' means that the credit terms must be substantially compliant but need not be fulfilled with absolute strictness.<sup>107</sup> By this standard, a statement of 'draft... was in conjunction with [the] letter Agreement dated May 23, 1972' is accepted as 'Letter of credit ... was in conjunction with [the] letter agreement dated May 23, 1972.'<sup>108</sup>

---

<sup>101</sup> W.G. Schulze, 'The UCP 600: A New Law Applicable to Documentary Letters of Credit: Analysis' (2009) 21 SA Mercantile Law Journal= SA Tydskrif vir Handelsreg 228, 240.

<sup>102</sup> Dolan (n 81) 17.

<sup>103</sup> *ibid* 17.

<sup>104</sup> Malclom Clarke and Others, *Commercial Law: Text, Cases, and Materials* (5<sup>th</sup> edition, OUP 2017) 861.

<sup>105</sup> Boris Kozolchyk, 'Drafting Commercial Practices and the Growth of Commercial Contract Law' (2013) 30 Arizona Journal of International & Comparative Law 423, 467.

<sup>106</sup> *Bank of Nova Scotia v Angelica-Whitewear Ltd* [1987] 1 SCR 59, 36.

<sup>107</sup> Jiin Kang, 'What Should Be the Limitations of the Doctrine of Strict Compliance' (2008) 1 Asian Business Law 91, 98.

<sup>108</sup> *Flagship Cruises, Ltd v New England Merchants Nat'l Bank of Boston*, 569 F.2d 699, 705 (1<sup>st</sup> Cir, 1978).



This standard was established to promote a more equitable standard of examination, providing more flexibility for banks and courts when determining the compliance of the presentation.<sup>109</sup> For example, in *Crocker Commercial Services, Inc v Countryside Bank*,<sup>110</sup> the company name was changed to ‘Crocker United Factors’ from ‘Crocker Commercial Services’ after the credit was issued.<sup>111</sup> The court found that the minor differences in the names that appeared in the documents did not mislead a reasonable examiner and pointed to the same entity; the documents were, therefore, found to be in compliance.<sup>112</sup>

This standard allows deviations from the literal terms of the letter of credit and permits courts to consider whether the deviation creates an uncertainty or could mislead the examiner.<sup>113</sup> That is, documents that are substantially in compliance with the letter of credit can be accepted as a good presentation. Accordingly, any trivial or non-significant discrepancies can be accepted.<sup>114</sup> For example, in *Glencore International*,<sup>115</sup> the court applied this standard and accepted the description of goods in the presented documents, which indicated ‘any western brand – Indonesia (Inalum Brand)’ instead of ‘any western brand’ as required.<sup>116</sup> The court considered that these extra words were simply provided to determine the origin of the goods, and because they fell within the broad generic nature of the description in the credit, they were compliant.<sup>117</sup> Similarly, in *Marino Industries, Inc v Chase Manhattan Bank*,<sup>118</sup> the beneficiary was required to present a certificate of receipt signed by a Mdica representative, a Saudi Arabian entity responsible for signing documents that confirmed the arrival of materials at the job site. The beneficiary presented the signed receipt, but the Mdica representative’s signature was not one of the signatures on file at the issuing bank.<sup>119</sup> The issuing bank subsequently rejected the

---

<sup>109</sup> Roane (n 64) 1065.

<sup>110</sup> 538 F Supp 1360 (ND Ill, 1981).

<sup>111</sup> *ibid* 1361.

<sup>112</sup> *ibid* 1362-1363.

<sup>113</sup> Conley (n 44) 989.

<sup>114</sup> Hashim (n 85) 4.

<sup>115</sup> *Glencore International* (n 28).

<sup>116</sup> *ibid* 154.

<sup>117</sup> *ibid* 155.

<sup>118</sup> 686 F.2d 112 (2<sup>nd</sup> Cir, 1982)

<sup>119</sup> *ibid* 116.

presentation. However, the court reversed the issuing bank's decision to dishonour and held that 'because there was ambiguity as to who at Mdica was authorised to sign the receipts, the letter of credit should be interpreted against its drafter, the issuing bank'.<sup>120</sup>

This standard releases the risk from the seller and shifts it to the bank, whereas the 'strict' compliance shifts the risk to the seller. Arguably, this standard might lead to unjustifiable outcomes by significantly reducing the buyer's security while providing no security to the banker who is required to ignore any deviations in the presented documents, and higher costs.<sup>121</sup> Moreover, the standard threatens the integrity of letters of credit by requiring banks to evaluate deviations and thereby perform functions beyond their fundamental role in letters of credit.<sup>122</sup>

On the other hand, because international transactions involve many parties and can involve different languages, it may be permissible in some circumstances to apply a more relaxed standard, in consideration of the deviations that may exist in the documents. However, the fundamental issue is that it is very difficult to assess the discrepancies by this standard. If the documents contain discrepancies, how can the bank determine if they are significant or do not according to the substantial compliance? Will the implementation of this standard constitute a breach of duty under the UCP by requiring banks to go beyond the examination of the documents? This dilemma indicates that there is need for a universally applicable standardised approach.

### ***2.1.3 UCP 600 position: is there no guidance?***

The approach of compliance under the UCP rules has changed from one version to the next. Admittedly, the approach of the new rules is softer than the previous rules, especially with

---

<sup>120</sup> *Marino Industries* (n 118) 117.

<sup>121</sup> *Mugasha* (n 16) 129; John Dolan, *The Law of Letters of Credit* (Arlington, VA: AS Pratt & Sons 2001) [6.05]; *Kurkela* (n 34) 27.

<sup>122</sup> *Roane* (n 64) 1065.

regard to the compliance principle.<sup>123</sup> For example, the ‘Definition’ section under sub-Article 2 states that a *‘complying presentation means a presentation that is in accordance with the terms and conditions of the credit, the applicable provisions of these rules and international standard banking practice.’* This definition omits ‘as reflected in these article’, which was stipulated in UCP 500. This suggests that a more flexible approach can be applied.<sup>124</sup>

Further, in the UCP 500, the draft commission stipulated a wide duty of examination, as stated in Article 13(a): *‘Banks must examine all documents stipulated in the Credit with reasonable care, to ascertain whether or not they appear, on their face, to be in compliance with the terms and conditions of the Credit’*. This implicitly suggests that the examiner is required to apply a strict standard. By referring to ‘ascertain whether or not they appear ... with the terms and conditions of the Credit’ indicates that data on the face of the presented documents must comply exactly in all respects, such as the substance of the data, the written form of the documents, and the type and number of the documents required in the presentation. Similar language is employed in UCP 600 which states in Article 14(a), that ‘A nominated bank acting on its nomination, a confirming bank, if any, and the issuing bank must examine a presentation to determine, on the basis of the documents alone, whether or not the documents appear on their face to constitute a complying presentation.’ However, the duty to take *reasonable care* and the reference to ‘*all documents*’ were omitted in the new rules. This omission is logical because it is implicit that an examiner must examine all the presented documents with reasonable care and skill; there is no need to impose an explicit duty upon them.

Further, UCP 600 introduce a number of tolerances when it comes to determining compliance. For example, Article 14(d) stipulates that: *‘Data in a document, when read in context with the credit, the document itself and international standard banking practice, need not be identical*

---

<sup>123</sup> Jin Chae, ‘The Reality and Practical Application of a Compliance Standard for Examination of Documents’, from the Selected Works of Jin Ik Chae (2011), 18.

<sup>124</sup> *ibid* 10.

*to, but must not conflict with, data in that document, any other stipulated document or the credit*'. The different language employed in the UCP 500 and 600 rules clearly indicates different standards of examination. 'Need not to be identical' seems to suggest a relaxed standard of examination, although undoubtedly requiring equivalency in meaning or substance required under the credit but through a different manner. According to the new rules, it is not necessary for the data to be written in the exact language of the letter of credit; the documents are considered compliant as long as they show similarity. The compliance of the documents thus hinges on a comparison with the document as a whole and not of isolated data; compliance requires that the general meaning of the words is not in conflict.<sup>125</sup>

Article 14(e), on the other hand, allows a certain amount of leeway in the description of the goods in most of the documents. It does not require the description of the goods to be given exactly as in the description in the letter of credit, except in the commercial invoice, due to its importance and by legal rule.<sup>126</sup> The compliance standard was also softened with regard to the address. Article 14(j) states that the address of the beneficiary and the applicant need not be the same as long they are within the same country. Finally, Article 30(b) also evidences a more relaxed approach by introducing a tolerance of plus or minus 5% in regard to the quantity of goods.

Notably, UCP 600 widened the scope of the approach so that standard banking practice is now considered part of the test of compliance. This broader scope leaves more room for discretion than did UCP 500's strict compliance approach; that is, the examiner is required to examine the documents according to the banking meaning and not according to their commercial meaning. This unquestionably eases the examiner's task of distinguishing between commercial and banking discrepancy; this is discussed later in the chapter.

---

<sup>125</sup> Chae (n 123) 11.

<sup>126</sup> Stefano Ferrero, 'Some Considerations on the Doctrine of Strict Compliance and the Autonomy Principle in Documentary Credit' (2013) 4 Business JUS 25, 3.

The overall effect of such relaxation in the new articles is to reduce the high percentage of rejection payments due to discrepancies.<sup>127</sup> The language of the new rules, compared with that of the previous rules, is more straightforward, which implicitly suggests that banks might accept minor discrepancies. However, despite the fact that the language of the new rules permits the acceptance of minor discrepancies, these rules do not stipulate the criteria for compliance. The new rules undoubtedly imply a wider approach than the previous rules, yet the absence of clearly defined criteria opens up room for potential disputes. There is no clear statement of how to achieve compliance, nor the degree of identity required in the documents.

#### ***2.1.4 The proper compliance standard: mix of both***

The lack of guidance related to the bank in this regard and the UCP rules' limited guidance with respect to the best standard of examination has resulted in the determination of the proper standard of examination being left to the courts.<sup>128</sup> Logically, the compliance principle should entail what a knowledgeable, diligent document checker would accept as being, on its face, compliant with the terms of the credit. That is, the courts' determinations of compliance should be based upon practices of those best qualified to evaluate reasonable document checkers.

In my judgment, document examination must, generally speaking, follow a substantial standard, as affirmed in Article 14(d). There are, however, certain exceptions to that approach where a strict approach must be taken. For example, it is necessary to apply the 'strict' standard when the case involves certain key documents, such as the bill of lading or the insurance certificate. Therefore, the need for this exception is necessary due to legal value of these documents provided to both parties. Moreover, a 'strict' approach is required if the applicant insists on the fulfilment of certain requirements; for example, presentation before a specific date, or a document issue from a nominated entity or a specific number of presented documents.

---

<sup>127</sup> Bergami (n 12) 199.

<sup>128</sup> International Chamber of Commerce (n 77) 11.

Generally, any requirements stipulated in the credit must be treated strictly by the bank and, of course, the beneficiary.

Accordingly, the proper standard that should be applied to determine the compliance of the presentation is *a mix of both compliance standards*. Banks and courts need to apply both the ‘strict’ and ‘substantial’ standard depending on the context and not prefer one over the other. This proposed approach takes into consideration the legal value of the required documents in international trade as well as the enforceability of the UCP and banking standards. By following this approach, all involved parties will enjoy the same degree of security, as their interests will be secured and not abused. In regard to bank, this approach of mix standard will guarantee the main duty of bank, namely not going beyond the documents once they are confronted with any error. Moreover, it will assure on interpreting the current UCP rules in properly in accordance with the banking practice, which will maintain the utility of letters of credit.

This approach will ensure that the risk to the seller of losing payment because of trivial mistakes is reduced, and it will ensure that the standards applied by banks in examining the compliance of the presented documents will not vary from country to country, thereby promoting certainty. If banks and courts are able to implement both common standards, as applicable to each case and its facts, the possibility of conflict between opinions will decrease to a large degree.

## **2.2 Meaning of ‘discrepancy’?**

A bank’s duty of examination is based on three important elements: the applicant’s instructions or the credit terms, the UCP rules and the ISBP.<sup>129</sup> The second and third elements, which are

---

<sup>129</sup> Ebenezer Adodo, ‘A Presentee Bank’s Duty When Examining a Tender of Documents Under the UCP 600’ (2009) 24 Journal of International Banking Law & Regulation 566, 573.

sources of banking practice, will determine the compliance of the presented documents. In contrast, the applicant's instructions are central to the examination, which relates to the required documents, how the goods should be specified in them and the consistency of the data in these documents with the credit terms. Therefore, the bank will refuse to honour the credit if the presented documents do not comply with the credit terms.<sup>130</sup> For example, letters of credit may include clauses, and if they are not fulfilled, the examiner will consider the presentation as non-complying. In one decision, the Australian courts held that presentation of a 'certificate of inspection' implied a minimum requirement only that the goods be visually inspected and if any particular method of inspection is required, it had to be stated in the credit.<sup>131</sup> This ground of rejection is known as a 'discrepancy'.<sup>132</sup>

'Discrepancy' is a banking term that is used for errors in presented documents that lead to the presentation's inconsistency or failure to correspond with the credit conditions.<sup>133</sup> However, not every error in the presented documents can be considered as a discrepancy, and errors can be classified as either a minor error or a major error.<sup>134</sup> A minor variation is, for example, when the presented documents use singular rather than plural nouns, superfluous adjectives in descriptions of the goods and numbers in sets rather than in totals.<sup>135</sup> In contrast, major variations are when the required documents are missing, if the name is incorrect in the presented documents, or a required number is wrongfully stipulated.<sup>136</sup>

There are several reasons why these errors emerge. One cause is the fact that the character of documentary credits is not well understood by banks or beneficiaries.<sup>137</sup> A further cause is that the required documents are prepared by different parties, who are not familiar with the letter

---

<sup>130</sup> *Donald H Scott & Co Ltd v Barclays Bank Ltd* [1923] 2 KB 1.

<sup>131</sup> *The Commercial Banking Co of Sydney Ltd v Jalsard Pty Ltd* [1973] AC 279, 287.

<sup>132</sup> Article 16.

<sup>133</sup> Valbona Sotiri and Others, 'Documentary Credits and the Necessity of Recognition of Some Legal and Financial Aspects in Their Use of the Albanian Traders' (2013) 1 International Journal of Interdisciplinary Research SIPARUNTON 536, 540.

<sup>134</sup> *New Braunfels* (n 28) 317; *Tosco Corp v Federal Deposit Insurance Corp*, 723 F.2d 1242 (6<sup>th</sup> Cir, 1983).

<sup>135</sup> *ibid*; *ibid*; *Astro Exito Navegacion S.A. v Chase Manhattan Bank N.A. (the Messiniaki Tolmi)* [1988] 1 Lloyd's Rep. 455, [1988] 2 Lloyd's Rep. 217.

<sup>136</sup> *Bank of Cochín* (n 37); *Beyene* (n 39).

<sup>137</sup> *Goode* (n 25) [35.63].

of credit process and, therefore, very often prepare documents that lack conformity with the letter of credit terms.<sup>138</sup> For example, the shipping department may be unaware that the goods must be shipped, at the latest, by the date specified in the letter of credit, and may inadvertently create a late shipment discrepancy.<sup>139</sup>

Sakchutchawarn, on the other hand, believes that the excessive requirements stipulated in the credit on top of the UCP rules' ambiguous context have led to the emergence of discrepant documents.<sup>140</sup> However, the issue here is when these errors result in difficult problems for the bank, which must decide in a short period of time whether to reject or accept the documents. Moreover, the advising bank's acceptance of non-conforming documents – either because it does not notice the discrepancy or because, having noticed it, it considers it irrelevant – can also cause problems: serious legal difficulties might ensue if the advising bank passes on the documents, which are then rejected by the issuing bank or the applicant for the credit.

In regard to the advising bank, in some instances, the issuing bank will nominate a different bank, usually the advising bank, as the bank to which presentation should be made, authorising that bank to receive, examine and determine the compliance of a presentation on behalf of the issuing bank. Therefore, relationship and obligations of the issuing bank and intermediary bank depend on the role which intermediary bank assumes in the credit.<sup>141</sup> The minimum involvement of intermediary bank in credit will be only acting as agent for issuing bank by playing the role of advising bank and informing beneficiary about opening terms of credit in his favour. The only responsibility of advising bank towards issuing bank is taking reasonable care in checking the complying of documents with terms of credit on their face.<sup>142</sup>

---

<sup>138</sup> Bergami (n 42) 112.

<sup>139</sup> Charmian Corne, 'Rethinking the Law of Letters of Credit' (DPhil thesis, University of Sydney 2003) 150.

<sup>140</sup> Sut Sakchutchawarn, 'The Problem of Presentation of Discrepant Export and Import Documents against Letter of Credit for Payment and Financing' (DPhil thesis, Union Institute and University Cincinnati, 2005) vii.

<sup>141</sup> Hamad Alavi, 'Exceptions to the Principle of Independence in Documentary Letters of Credits' (DPhil thesis, University of Autonomia de Barcelona 2018) 34.

<sup>142</sup> *ibid* 34.



Under English law at least, a nominated bank which does checking, accepting and payment is regarded as the agent of the issuing bank.<sup>143</sup> The responsibility of advising bank is only informing beneficiary about issuing credit in his favour and it does not have any obligation of payment towards beneficiary.<sup>144</sup> As a result, the legal nature of relationship between issuing bank and advising bank is considered as relationship between agent and principle.<sup>145</sup>

In such a case, it is clear that the issuing bank will be bound as against the presenter by the actions of the examining bank. Should it fail to give the presenter a notice of refusal<sup>146</sup> in accordance with UCP 600 Art.16, the issuing bank will incur preclusion under Art.16(f).

If the nominated bank fails to comply with the provisions under Article 16, 'the effect may be to bar the issuing bank from contending against the beneficiary that the documents do not comply.'<sup>147</sup> Therefore, the issuing bank may incur preclusion under Article 16 (f) resulting from the failure of the non-confirming nominated bank. Although the issuing bank will be bound as against the presenter by the actions of the nominated bank, it is entitled to recover its ultimate loss from the nominated bank, which breaches the duty as the issuing bank's agent. In other words, if a nominated bank acting on its nomination (but not confirming bank) fails to act as per article 16, for instance not advising discrepancies properly to beneficiary, will not be precluded from claiming that docs were not complying.

A growing number of issuing banks have, as a consequence, inserted invalid clauses in their application agreements that authorise payment and reimbursement regardless of discrepancies.<sup>148</sup> Moreover, issuing banks have, in some cases, persuaded buyers to waive and accept the documents.<sup>149</sup> This indicates that discrepancy is a sensitive issue for banks and the

---

<sup>143</sup> *Bank of Baroda v Vysya Bank Ltd* [1994] 2 Lloyd's Rep 87 (QB) 91.

<sup>144</sup> Article 9 (a) UCP 600: 'A credit and any amendment may be advised to a beneficiary through an advising bank. An advising bank that is not a confirming bank advises the credit and any amendment without any undertaking to honour or negotiate'.

<sup>145</sup> *Gian Singh and Co Ltd v Banque de l'Indochine* [1974] 2 Lloyd's Rep. 1.

<sup>146</sup> This topic will be discussed in more precise in chapter four.

<sup>147</sup> *Malek* (n 76) [5.44], also supported by Peter Ellinger and Dora Neo, *The Law and Practice of Documentary Letters of Credit* (Hart Publishing 2010) 120.

<sup>148</sup> *Kozolchik* (n 69) 47.

<sup>149</sup> *Bergami* (n 42) 119.

main parties. Therefore, it is necessary for the examiner to distinguish between commercial discrepancy and banking discrepancy; this is explained in more detail in the following section. There are a number of common types of discrepancies in presented documents such as late presentation, missing documents, document originality, late shipment, partial shipment and defective documents, among others.<sup>150</sup> Most studies classify these discrepancies separately, without grouping them together in categories.<sup>151</sup> For the purposes of this study the different types of discrepancies will be divided into three groups: temporal defects, defective documents and other types of discrepancies. This particular classification has been used because it enables discrepancies with common elements to be grouped and discussed together. However, this arrangement is adopted only for convenience and cannot be considered a definitive classification of all discrepancies.

### ***2.2.1 Temporal defect***

This category includes three types of discrepancies that arise due to errors in a specific time stipulated in the credit: late presentation of the required documents, late shipment and expiry of the credit.

***a) Late presentation and late shipment:*** The issuing bank opens the credit according to the applicant's instructions, who determines the different types of documents that need to be presented by the seller. Under the 'Period of Presentation' section, the applicant must state when the beneficiary must present the required documents to the issuing bank.<sup>152</sup> As soon as the required documents are issued, the beneficiary presents them to the bank in order to gain the payment. If the beneficiary fails to comply with this duty, the right of payment may be lost due to this discrepancy, even if the beneficiary conforms to the credit terms. In every situation,

---

<sup>150</sup> see Schaffer (n 46) 195; Mann (n 42) 2504; Manganaro (n 46) 274.

<sup>151</sup> *ibid.*

<sup>152</sup> Ömer Özkan, Oğuzhan Özçelik and Serpil Kılıç 'Important and Critical Issues of Complying Presentation Based Upon Letter of Credit (L/C) Payment' (2016) 2 Journal of International Trade, Logistics and Law 73, 76.

the document presentation must be made before the due date given in the letter of credit, as stipulated by Article 6(e).

Banks are not obligated to accept any presentation outside banking hours, according to Article 33. If the credit does not stipulate a presentation date, Article 14(c) provides that ‘A presentation including one or more original transport documents subject to Articles 19, 20, 21, 22, 23, 24 or 25, **must** be made by or on behalf of the beneficiary **not later than 21 calendar days after the date of shipment** as described in these rules, but in any event not later than the expiry date of the credit’. According to this article, presentation must be within 21 days after the date of shipment. That is, the presentation period ‘is the period from the date of shipment until the expiry date of the credit’, unless there is a different period stated under the credit.<sup>153</sup>

The reason that 21 days from the date of shipment is given is to provide the beneficiary an opportunity to cure any discrepancies before the expiry date, which secures the beneficiary’s right of payment.<sup>154</sup> If the presentation period in the letter of credit is less than 21 days, for example, 10 days from the shipment date, and if the documents are negotiated and sent to the issuing bank after the beneficiary has shipped them, the issuing bank may send a refusal notice based on a number of discrepancies; this is explained below. The period of document examination under UCP 600 is five banking days after receipt of documents by the issuing bank. Thus, in this example, when the issuing bank sends the refusal notice to the negotiating bank and the beneficiary cures the documents and re-presents them to the negotiating bank, the short period of presentation, ten days in this example, may be over by that time and a new discrepancy (i.e., late presentation) would apply to the transaction. If the presentation period is 21 days after the shipment date, then in the same scenario, the documents can be cured by the beneficiary and re-presented to the negotiating bank within the presentation period allowed. It

---

<sup>153</sup> *Deutsche Bank AG, London Branch v CIMB Bank Berhad* [2017] EWHC 3380 (Comm) 48.

<sup>154</sup> Chang-Soon Thomas Song, ‘Sectoral Dispute Resolution in International Banking (Documentary Credit Dispute Expertise: DOCDEX)’ (2013) 30 *Arizona Journal of International and Comparative Law* 529, 553.

is worth noting that this period could be shortened with a statement such as ‘after 10 days after shipment’ or could be prolonged with a statement such as ‘stale document acceptable.’<sup>155</sup>

The ‘shipping date’ is the date on which the shipping or boarding documents are issued.<sup>156</sup> The purpose of the shipment date is to be able to verify if goods are shipped in a timely manner as expressed in the credit or if the documents are presented within the period allowed for presentation.<sup>157</sup> Nonetheless, if the credit indicates that the date of presentation should be according to the date of issuing the transport document and not according to the date of shipment, as Article 14(c) stipulates, such condition will prevail with nothing in UCP 600 to displace that clear provision.<sup>158</sup> In *Fortis Bank SA/NV v Indian Overseas Bank*,<sup>159</sup> a dispute arose in regard to the date of presentation among other alleged discrepancies. The relevant letter of credit stipulated: ‘Period of presentation: within 21 days from B/L date...’.<sup>160</sup> In contrast, the document tendered stated: ‘Place and date of Issue: . . . Ipswich 14 November 2008’ and ‘Shipped on Board Date: 31 October 2008’.<sup>161</sup>

The dispute was centred on the date of presentation, referred to in the document as the date of the bill of lading or the date of shipment.<sup>162</sup> The Singapore court of appeal held that, in such a case, the express provision of the letter of credit takes precedence over a term found in an auxiliary document, such as the UCP, which is incorporated into the letter of credit by reference.<sup>163</sup> In this case, sub-Article 14(c), which requires presentation to be 21 days from the date of shipment, makes a different provision, thus the express term of the credit prevails.

---

<sup>155</sup> Özkan (n 152) 76.

<sup>156</sup> Doise (n 4) 119.

<sup>157</sup> ICC Banking Commission, Collected DOCDEX Decisions 2009-2012, (Publication (International Chamber of Commerce) No. 739E. Edited by Gary Collyer & Ron Katz, 2012, DOCDEX Decision No.281, 19

<sup>158</sup> *Fortis Bank SA/NV v Indian Overseas Bank* [2011] EWCA Civ 58, 77.

<sup>159</sup> *ibid.*

<sup>160</sup> *ibid* 71.

<sup>161</sup> *ibid* 73.

<sup>162</sup> *ibid* 7.

<sup>163</sup> *ibid* 77.

**b) Expiry of the credit:** Each credit must state an expiry date, as dictated by Article 6(d)(ii), meaning that the required documents must be presented before the expiration date. The expiry date is the latest day on which documents can be presented; any presentation after this date will be rejected. In *MRM Security Systems Inc v Citibank NA*,<sup>164</sup> the court upheld the bank's decision to reject the presented documents on the ground that the presentation was after the stipulated expiry date and, furthermore, contained other discrepancies.<sup>165</sup>

The current rules do not stipulate how long the credit will be available if there is no expiry date mentioned in the credit. However, if no maturity date is stipulated in the credit, the date of honour or negotiation will be the date of expiry.<sup>166</sup> In one case with such a circumstance, the court ruled that the credit will 'remain open for a reasonable time'.<sup>167</sup> In contrast, Section 5-106(c) of the Uniform Commercial Code (UCC) stipulates that, in such circumstances, the credit will be valid for one year from the issuing date.

In *Old Republic Surety Co v Quad City Bank & Trust Co*,<sup>168</sup> a debate arose regarding the issuer's attempts to notify the beneficiary of non-extension of a letter of credit.<sup>169</sup> The credit was issued for expiry after one year and then for automatic extension for additional one-year periods if the beneficiary has 'not received by certified mail notification of our intention not to renew 30 days prior to the [next] expiry date'.<sup>170</sup> Exactly 30 days before the expiry date, the beneficiary received a fax stating that the issuer would duly honour presentations for an additional six months and that this new expiry date 'is not automatically renewable without notification from [the issuer]'.<sup>171</sup> The court ruled that sending notification by fax, rather than by certified mail as required by the letter of credit, was sufficient and cited precedent based on

---

<sup>164</sup> No.96 Civ. 3721 (KMW), 1997 U.S Dist. LEXIS 5360 (S.D.N.Y. 1997); cited by Brooke Wunnick et al, *Standby and Commercial Letters of Credit* (3<sup>rd</sup> Updated edition, Aspen Publishers 2000) 16-18.

<sup>165</sup> *ibid* 16-19.

<sup>166</sup> Article 6(d)(i).

<sup>167</sup> *Lamborn v National Park Bank of New York*, 240 NY 520, 527 (NY, 1925).

<sup>168</sup> 681 F Supp 2d 970 (CD Ill, 2009).

<sup>169</sup> *ibid* 972.

<sup>170</sup> *ibid* 973.

<sup>171</sup> *ibid* 974.

UCC Article 1, dealing with notices actually received by an organisation.<sup>172</sup> However, the court held that the text of the fax, which indicated merely that the credit would not automatically be renewed, did not ‘clearly and unequivocally’ convey that the issuer did not intend to extend the credit, as required by precedent.<sup>173</sup>

Although ‘late presentation’ and ‘presentation after the expiry date’ are both types of discrepancy, they are distinct. A ‘late presentation’ is when the presentation accords after the specific period required under the credit (e.g., ‘after 30 days of opening the credit’) or not in accordance with Article 14(c). ‘Presentation after the expiry date’ is when the presentation accords after the expiry date. That is, presentation can be done more than once according to the length of the credit. If the first presentation was rejected due to discrepancies, the beneficiary still has the right to present the documents again, after curing the alleged discrepancies, if the credit is still available.

### ***2.2.2 Defective documents***

The second category includes three types of discrepancies related to errors in the documents required in the credit, such as absence of documents, originality and error in data.

- a) ***Absence of documents:*** In order to receive payment, the beneficiary must present the required documents, which are specified in the credit terms according to the buyer’s instructions.<sup>174</sup> This basic condition in the credit is necessary, due to the importance of these documents in international transactions.<sup>175</sup> In general, there are three types of presented documents in documentary credits.<sup>176</sup> The first type is required by a condition in the credit against which the honour of the credit is to be made. In common practice, the credit requires the presentation of

---

<sup>172</sup> *Old Republic Surety* (n 168) 975.

<sup>173</sup> *ibid.*

<sup>174</sup> Collected DOCDEX Decisions 1997-2003, Decision No 209.

<sup>175</sup> Kurkela (n 34) 166-167.

<sup>176</sup> *Credit Agricole Indosuez v Muslim Commercial Bank Ltd* [2000] 1 Lloyd’s Rep. 275, 282.

at least three core documents, including the commercial invoice, insurance policy and bill of lading.<sup>177</sup> The second type is mentioned in the credit without being based on a condition in the credit against which the honour of the credit is to be made.<sup>178</sup> The third type is documents not mentioned in the credit; these need not be examined, which are referred to in Article 14(g), and are known as ‘additional documents’.<sup>179</sup>

Initially, the examiner performs a general check to determine whether the whole set of presented documents is complete before precise examination on their face. A missing documents discrepancy covers situations in which the credit calls for certain documents to be tendered and the beneficiary has not completely fulfilled the requirements. If a required document is missing, the bank has the right to reject the presentation on this ground. For example, in *City of Coachella v Harbor Real Asset Fund, LP*, a specific document was missing and the bank rejected the presentation and consequently dishonoured the credit on this ground.<sup>180</sup>

This type of discrepancy also covers the number and type of documents tendered. If a number of documents are required to be presented, the beneficiary must follow this condition; otherwise, the bank has the right of dishonour. In *Donald H Scott*,<sup>181</sup> the bank rejected the presented documents, which was upheld by the court, on the ground of a missing bill of lading; the credit required a full set of bills of lading, but only two bills out three were tendered.<sup>182</sup> However, if part of document is missing (e.g., a missing page from the document), will this be treated as a missing document? Will this be considered a discrepancy? Assuming that important

---

<sup>177</sup> Xiang (n 15) 96.

<sup>178</sup> *Credit Agricole Indosuez* (n 176) 282.

<sup>179</sup> Article 14(g): ‘A document presented but not required by the credit will be disregarded and may be returned to the presenter’. See also *Credit Agricole Indosuez* (n 176) 282.

<sup>180</sup> 359 F App’x 713, 714 (9<sup>th</sup> Cir, 2009), cited by James Barnes and James Byrne, ‘Letters of Credit’ (2010) 65 *The Business Lawyer* 1267, 1268.

<sup>181</sup> *Donald H Scott* (n 130).

<sup>182</sup> *ibid* 12-13.

data might be contained in the missing paper, the bank must reject the document and consider such presentation as non-complying.

In contrast, Article 14(g) states that if a presentation includes non-required documents, the bank will disregard them. This means that extra documents will not be accepted, and they are not relevant in the determination of compliance with respect to the presented documents and, therefore, will not affect the right of payment. However, the status of the second category of presented documents is not expressly regulated in the UCP.<sup>183</sup>

If the seller presents two required documents as a single document, the document is accepted.<sup>184</sup> This kind of presentation is known as ‘combined’ documents.<sup>185</sup> In one case, two required documents were presented on the same sheet of paper; this was accepted by the court, which upheld the bank’s decision of honour.<sup>186</sup> The UCP itself does not make any reference to the acceptability of separate<sup>187</sup> or combined documents as a presentation. However, referring to paragraph 42 of the ISBP, the UCP clarifies that ‘documents listed in a credit should be presented as separate documents’. That is, UCP 600 does not forbid combined documents; this is in contrast to the UCP 500, which prohibited combined documents.<sup>188</sup>

It can be concluded that with the presentation of required documents, it does not matter how the documents in a set are presented. What is important is their existence, regardless of whether they are presented separately or in the same document, as accepted in *Richard v Royal Bank of Canada*.<sup>189</sup> Nevertheless, presenting a combined document might not be preferred in some circumstances. If the applicant has a reason for requesting separate documents (e.g., a certificate of weight and a separate invoice), presenting these documents separately will be

---

<sup>183</sup> Hwaidi (n 100) 77.

<sup>184</sup> Bridge (n 1) [23-116].

<sup>185</sup> *ibid*; International Standard Banking Practice 2013 edition, International Chamber of Commerce Publication No. 745.

<sup>186</sup> *Richard v Royal Bank of Canada*, 23 F. 2d 430,434 (2<sup>nd</sup> Cir, 1928).

<sup>187</sup> Bridge (n 1) [23-103].

<sup>188</sup> Anna - Mari Antoniou, ‘Complying Shipping Documents Under UCP 600’ (DPhil thesis, Southampton University 2011) 53.

<sup>189</sup> 23 F. 2d 430 (2<sup>nd</sup> Cir, 1928).



treated as a condition of the credit, and failure to fulfil this condition will be considered a discrepancy.

**b) *Originality*:** Article 17(a) of the new rules lay down a straightforward duty of presenting at least one original document for each document required.<sup>190</sup> If the beneficiary does not adhere to this condition, the bank has the right to reject the documents and to dishonour the credit on this ground.<sup>191</sup> However, it is necessary to consider why original documents are called for in the first place.

First, some documents enjoy a privileged and legal value, such as bills of lading; copies of these documents do not embody the relevant rights and, hence, do not have equal worth.<sup>192</sup> Secondly, errors can be introduced while copying the original. Finally, copies may contain alterations unauthorised by the issuer.<sup>193</sup> With the evolution of photocopying technology, it is increasingly easy to introduce unauthorised alterations.<sup>194</sup> The marking of an original document with a stamp of the word 'original' is done just as easily by the person tampering with the document as the issuer.

Articles 17(b) and (c) state that any document will be treated as original if it includes an original signature, stamp, label or mark. The document will also be treated as original if it is written, typed or perforated, or if there is any indication that the document is original. In one case, the court of appeal held that 'an insurance policy which was not marked as an original but produced by a word processor and printed by a laser printer onto the insurance company's headed paper, with its logo is to be accepted as an original'.<sup>195</sup>

It follows from the wording of the abovementioned articles that if the document does not appear to contain any sign of originality, such as a signature, stamp or logo, the bank will have to

---

<sup>190</sup> Article 17(a) 'At least one original of each document stipulated in the credit must be presented'.

<sup>191</sup> *Glencore International* (n 28) 111.

<sup>192</sup> *Takahashi* (n 57) 620.

<sup>193</sup> *ibid.*

<sup>194</sup> *ibid.*

<sup>195</sup> *Kredietbank Antwerp v Midland Bank* [1999] CLC 1108, 1117.

examine whether the document satisfies the requirements of originality given in Article 17(c). The bank can no longer reject documents on the grounds that they were not marked as originals if they bear any of the characteristics provided in Articles 17(b) and (c).

These articles were introduced to clarify the issue of conflicting decisions made under the previous UCP 500. In the *Glencore* case, for example, the English Court of Appeal ruled that a beneficiary certificate with a manual signature but without a stamp noting ‘original’ on its face could not be considered an original document under the UCP.<sup>196</sup> For bankers and traders, such a ruling is counterintuitive, as the signature would make the document an original document, while the stamp ‘original’ cannot make a copy document an original document.<sup>197</sup>

The court’s decision in the *Voest-Alpine* case,<sup>198</sup> years after the *Glencore* case, was somewhat supportive of the banking community.<sup>199</sup> In this case, the court held that the presented documents appeared to be original and did not need to be stamped.<sup>200</sup> The dispute centred on the issuer’s claim that certain wet ink signed documents were discrepant under UCP 500 Article 20(b) because they were not marked original.<sup>201</sup> Again, in *Credit Industriel et Commercial v China Merchants Bank*,<sup>202</sup> despite the fact that a document was not marked ‘original’, the court refused the bank’s decision of rejection and accepted the document because it had been prepared by the means described in Article 20(b)(UCP 500).<sup>203</sup> This controversial article states: ‘banks will also accept as an original document(s), produced or appearing to have been produced: i) by reprographic, automated or computerized systems’. This article takes into account technological changes and considers computer-generated documents; yet, it has led to difficulties.<sup>204</sup> The article can be interpreted in a strict manner to mean that all word-processed

---

<sup>196</sup> *Glencore International* (n 28) 111.

<sup>197</sup> Song (n 154) 542.

<sup>198</sup> *Voest-Alpine* (n 39).

<sup>199</sup> James Barnes and James Byrne, ‘Letters of Credit: 2000 Cases’ (2001) 56 *The Business Lawyer* 1805, 1806 Published by: American Bar Association <http://www.jstor.org/stable/40688033>.

<sup>200</sup> *Voest-Alpine* (n 39) 948-949.

<sup>201</sup> *ibid* 943.

<sup>202</sup> [2002] EWHC 973 (Comm), [2002] CLC 1263.

<sup>203</sup> *ibid* 1277.

<sup>204</sup> *Mugasha* (n 16) 129.

documents must be marked as original and signed. According to this interpretation, if the documents were produced on a computer, for example, they might be rejected if they were not marked as originals, even if they were properly signed and complied in every other respect with the credit. Another controversial aspect of the article was the phrase ‘produced or appearing to have been produced’.<sup>205</sup> It is believed that the term ‘produced’ might give a seller licence to produce a document by any means, legal or otherwise, including by forgery.<sup>206</sup> ‘Appearing to have been produced’ has provoked even more controversy, because it requires a bank official to confirm that documents appear to have been produced in a given manner; this might require them to go beyond the documents, which is not accepted.

Despite the fact that the aim of this UCP 500 rule was to ensure the originality of documents, it has not been helpful because it has not taken into consideration the custom usage for trade and banking practice. Moreover, it is believed that courts interpreted Article 20 of the 500 version in a statutory interpretation manner, rather than in the context of international standard practice.<sup>207</sup> Consequently, this ruling ran counter to international banking practice and caused much confusion.<sup>208</sup> It was argued that if *Glencore* had been considered by the DOCDEX panel, the judgment would have been different.<sup>209</sup> With regard to the arguments on Article 20 (UCP 500), the ICC referred to the Policy Statement to clarify what is meant in this article. The Policy Statement made it clear that documents would be presumed to be originals unless they were obvious copies, such as photocopies and faxes.<sup>210</sup> This ICC policy has been incorporated into the new rules, particularly in Article 17, which is more satisfactory.<sup>211</sup>

The exceptions stipulated under Article 17 might not be entirely helpful. With the evolution of technology, it is not difficult for a document to satisfy the requirement of an ‘original’

---

<sup>205</sup> Charles Chatterjee, ‘Letters of Credit Transactions and Discrepant Documents: An Analysis of the Judicial Guidelines Developed by the English Courts’ (1996) 11 *Journal of International Banking Law* 510, 511.

<sup>206</sup> *ibid* 511.

<sup>207</sup> Song (n 154) 545.

<sup>208</sup> *ibid* 542.

<sup>209</sup> *ibid*.

<sup>210</sup> ICC Banking Commission Policy Statement 12 July 1999, paras 2 and 3; Goode (n 25) [35.64].

<sup>211</sup> Janet Ulph, ‘The UCP 600: Documentary Credits in the Twenty-First Century’ (2007) 4 *Journal of Business Law* 355, 365.

document as stipulated in Article 17. Since the condition of originality is based only on a specific mark, stamp or a written method, a document is easy to forge. Moreover, it might be impossible to distinguish an ‘original’ document from a ‘copy’, when the document is referred to as ‘electronic’. The reliance on e-documents will lead to a growing problem in terms of determining their originality: how can the bank know if such documents are original or if they were made by a computerised system? This requirement is not as simple as it may appear, as both original documents and copies are often issued by the same printing devices and, hence, bear the same appearance; these documents are, therefore, easily forged. Further, to determine whether a document appears to have been produced in accordance with Articles 17(b) and (c) requires a certain degree of skill on the part of the bank official and will require them to go beyond the documents, contrary to their duty under the rules. Examination of the documents is a duty solely assumed by banks; they cannot forward the documents to be checked by the applicant for their originality. This issue is important in that documents are often produced or forged with the help of technology; hence, in my judgment, such exceptions need to be overlooked.

Although Article 17 indicates that one original document must be presented, in case of multiple documents being required, it is acceptable to present one copy and one original.<sup>212</sup> As long as one original is presented, the presentation is considered compliant. Nonetheless, any statement such as ‘true copy’, ‘shipping copy’ or ‘customer copy’ does not treat the documents as original.<sup>213</sup> In contrast, if the credit indicates that a ‘full set’ of documents is required, a whole set of original documents must be presented, as specified under Article 20(a)iv. According to this article, copy documents are not permitted in a full set.<sup>214</sup>

---

<sup>212</sup> Schulze (n 101) 247.

<sup>213</sup> Takahashi (n 57) 617.

<sup>214</sup> Özkan (n 152) 78; fn 20.

In general, the number of document originals or copies required must be understood with reference to the credit's conditions. If the intention in the credit is to require copies only, the credit must indicate that clearly. Otherwise, one original must be presented as required in the article.

**c) *Error in data:*** Article 5 and 14 of the new rules states that a bank is bound to examine only the documents and, in particular, the data that appear in them. However, Article 14(d) stipulates that when examining the documents, these data need not to be identical and, at least, must not be in conflict with each other. Therefore, if the data are not fully in compliance, the bank must refuse to honour the credit on the ground that the documents are defective.

These errors or defects can appear in documents due to human error, failure to follow the instructions drawn in the credit or issued by third parties other than the seller.<sup>215</sup> According to Mann, because it is easy to gain payment in letters of credit by presenting documents, most beneficiaries attempt to submit the 'required' documents instead of 'complying' documents.<sup>216</sup> In other words, the beneficiary presents the required documents regardless of what they should indicate. Therefore, this type of discrepancy might appear.

Typically, when errors are revealed in the presented documents, from the bank's perspective, they are non-compliant. Nonetheless, courts have ruled differently in many cases, finding that in a case of genuine discrepancy, the bank is entitled to reject the documents, but that in the case of a typographical error, the documents are considered compliant.<sup>217</sup> One issue is that some words are considered equivalent in the trade sector even if they are written differently.<sup>218</sup> This is an issue for banks that are not expert in the language used in the trade sector and might reject a presentation for these differences. Error in data is, by far, one of the most common

---

<sup>215</sup> Bergami (n 42) 112.

<sup>216</sup> Mann (n 42) 2494.

<sup>217</sup> Andrew Burrows, *Principles of English Commercial Law* (Oxford, OUP 2015) 232.

<sup>218</sup> *JH Rayner* (n 96).

reasons for document rejection, and most litigation arises from discrepancies in regard to data.<sup>219</sup>

Unfortunately, the UCP rules do not stipulate any guidelines for the examination of documents in order to distinguish between genuine discrepancies and typographical errors. The implications of this are that examiners must check the documents according to their own understanding and commercial knowledge.<sup>220</sup> This is problematic because, as identified in a report issued by United Nations Conference on Trade and Development (UNCTAD), bank staff are not qualified to examine the documents.<sup>221</sup>

It is crucial to determine whether an inconsistency is either a typographical error or a genuine discrepancy if the bank has the right to reject documents. This distinction between a typographical error and a genuine discrepancy is not easily inferred, however; as Evans observed in *Kredietbank*, ‘the distinction between “trivial” discrepancies and those which require the bank to reject the documents tendered is not always easy to draw’.<sup>222</sup> Moreover, such duty to evaluate the errors in the presented documents is difficult and unsuitable for bankers.<sup>223</sup>

This confusion can harm the efficiency of documentary credits as a secure method of payment, jeopardising the view of the system as wholly reliable. Moreover, bank’s ability to determine which type of error in the defective documents constitutes ground for rejection is fundamentally important to international documentary credit law. Therefore, there is a significant need to distinguish between typographical errors and discrepancies in defective documents, something which is explained more precisely in the third chapter.

---

<sup>219</sup> SITPRO (n 47) 2.

<sup>220</sup> Hang Yen Low, ‘UCP 600: The New Rules on Documentary Compliance’ (2010) 52 International Journal of Law and Management 193, 197.

<sup>221</sup> Frida Youssef, ‘Documentary Risk in Commodity Trade’ (UNCTAD 1998) <[http://unctad.org/en/Docs/itcdcommisc31\\_en.pdf](http://unctad.org/en/Docs/itcdcommisc31_en.pdf)> accessed 28<sup>th</sup> July 2017, 6.

<sup>222</sup> *Kredietbank* (n 195) 1111.

<sup>223</sup> Kurkela (n 34) 124.

### 2.2.3 Other discrepancies

All other types of discrepancies fall in this category; these include error in signature, partial shipment, short shipment and any other mistakes during preparation of the required documents. The beneficiary might fail to follow the formality conditions stipulated in the credit, such as requiring a specific transportation for shipping the goods or missing a signature or specific conduct requested by the buyer.<sup>224</sup> In the case of such omissions, the bank must reject the presentation and dishonour the credit on this ground.

One of the most frequently observed mistakes is the omission of the carrier's information from the bill of lading.<sup>225</sup> This occurs when the signatory party of the bill does not give the carrier's information despite determining to sign it as the agency of the carrier. It is necessary to mention the carrier information on the bill of lading, as this information is important in terms of determining the responsible firm if the goods are destroyed during transport. Omission is, therefore, considered a discrepancy.<sup>226</sup> Nonetheless, there are exceptions in which giving the carrier's information is not required and, hence, will not give rise to a discrepancy. First, if the letter of credit allows for charter party bill of lading presentation, and second, if the credit contains the statement 'freight forwarder transport document is acceptable'.<sup>227</sup>

Other types of discrepancy have been mentioned in DOCDEX decisions and ICC official opinions.<sup>228</sup> For example, in the Official Opinion R197, the credit requested a 'certificate duly signed by the captain's vessel stating the cleanness of the tank steamer'; however, the presented document included an inspection report 'for approval'. It was concluded that since a report instead of a certificate was presented, there was justification for claiming a discrepancy.<sup>229</sup> In one case, the credit required a presentation of a 'freight prepaid' bill of lading; however, the

---

<sup>224</sup> *Soproma SpA v Marine & Animal By-Products Corporation* [1966] 1 Lloyd's Rep 367, 370.

<sup>225</sup> Özkan (n 152) 78.

<sup>226</sup> *ibid* 78.

<sup>227</sup> *ibid* fn 19.

<sup>228</sup> International Chamber of Commerce (n 77).

<sup>229</sup> *ibid* 4.

tendered document was a 'collect freight' bill of lading.<sup>230</sup> Despite the fact that examiner is not required to have knowledge of these terms, the court considered this error as a discrepancy.<sup>231</sup>

Another example of discrepant presentation is failure to follow the credit terms with regard to the currency. Article 18(a)iii UCP provides that the commercial invoice must be in the same currency as the credit. It is reported in the Official Opinion TA.815 rev (4) that the presented commercial invoice referred to the designated currency as the dollar ('\$'). This was considered by the issuing bank to be a discrepancy on the grounds that the actual currency was not specified. In this case, the invoice was judged in compliance and the discrepancy invalid because the beneficiary was not located outside the United States, which uses dollars ('\$') as its currency, and because there was no data in the invoice or any other document implying that '\$' referred to a currency other than the United States dollar.<sup>232</sup>

Although it is agreed that the document examiner should not be expected to understand trade terms or their legal meaning, if the presented documents fail to follow the credit terms with regard to shipment method (e.g., CIF or FOB), they will be considered discrepant.<sup>233</sup> In the Official Opinion TA.817 rev, the credit required the bill of lading to show shipment in an 'FCL' container. However, the presented bill of lading stated 'CY/CY' and not 'FCL'. It was considered to be discrepant document, as it did not make express reference to an 'FCL' shipment.<sup>234</sup>

From these reports, it can be concluded that the beneficiary must comply with the credit's terms and conditions. Failure to follow the credit terms gives the bank legitimate reason to reject the documents. Once the credit is issued, the beneficiary must fulfil the duty under the credit and must present the required documents in compliance with the credit's terms.<sup>235</sup>

---

<sup>230</sup> *Soproma* (n 224) 368.

<sup>231</sup> *ibid* 370.

<sup>232</sup> International Chamber of Commerce (n 77) 6.

<sup>233</sup> *ibid* 6.

<sup>234</sup> *ibid* 6.

<sup>235</sup> *WJ Alan & Co Ltd v El Nasr Export and Import Co* [1972] 2 QB 189, 209.



In one case litigated by the DOCDEX panel, a dispute arose in regard to the credit's written language. The document had been issued in Russian and English, with all details given in both languages. The panel referred to the ICC official Opinion R451 – 2000/01, which stated that 'A requirement for a document to be issued in a specific language does not prohibit other languages or dual languages being used, provided the information requested by the credit is clearly indicated in the requested language.' Hence, this document was not judged discrepant.<sup>236</sup>

Signature errors might justifiably be considered as a discrepancy,<sup>237</sup> due to the effect of a signature in commercial transactions. Normally, a signature is required to safeguard the integrity of a document's contents and to identify the author of a document and the author's approval. A signature may also serve to confer original status on a document.<sup>238</sup> For these reasons, the UCP rules required signatures for insurance documents and shipping documents (e.g., bill of lading, multimodal transport).<sup>239</sup>

Based on the new rules, there are some exceptions pertaining to who should sign a shipping document. According to Article 22(a)(i) of these rules, a transporter and captain with their agencies can sign the bill of lading except a charter party bill of lading.<sup>240</sup> That is, in a charter party bill of lading, which has an indication or record about being tied to a charter party, it can be signed only by the following individuals: the master or a named agent for and/or on behalf of the master, the owner or a named agent for and/or on behalf of the owner, or by the charterer or a named agent for and/or on behalf of the charterer.

In one reported case, there was a dispute about the validity of a signature in a charter party bill of lading. The charter party bill of lading was manually signed by a signatory, who is an employee for the company, as follows: '*COMPANY S as agents for and/or on behalf of CAPT.*

---

<sup>236</sup> ICC Banking Commission (n 157) Decision No.304, 84.

<sup>237</sup> Error in signature might qualify the said document to be considered as a forged one. See chapter six for more details.

<sup>238</sup> Bridge (n 1) [23-145].

<sup>239</sup> Articles 19, 20, 21, 22, 23, 24, 25 and 28. However, under article 18(a)(iii) the commercial invoice need not to be signed.

<sup>240</sup> Article 19 (a)i and Article 22 (a)i.

*P, MASTER OF VESSEL D.*”<sup>241</sup> That statement in the charter party bill of lading had clarified that it signed it as an agent pursuant to the provision ‘any signature by an agent must indicate whether the agent has signed for or on behalf of the master’. Hence, the bill of lading complied with the requirement of sub-Article 22(a)(i) of UCP 600. It should be noted that the wording ‘for and/or on behalf of’ a company is a common method of signing a document by the authorised signatory for the company.<sup>242</sup>

Generally, if the beneficiary fails to follow these conditions with regard to the signature requirements stipulated either in the credit or in the UCP rules, the bank has the right to reject the presentation. In one case, the applicant inserted a specific requirement in the credit that the ‘signatures to be notarized by a Public Notary in Oslo, Norway, and legalized by way of Apostille, or by the relevant Norwegian authorities and by the Embassy or Consulate of the United States of America in Oslo, Norway’.<sup>243</sup> The demand letter was legalized by Apostille only. On presentation, the bank rejected the tendered documents on the ground that the beneficiary did not follow the stated conditions.<sup>244</sup> The court, however, rejected the bank’s decision and stated that the clause can be read to have an alternative meaning, so the beneficiary did comply with the clause inserted in the credit.<sup>245</sup>

It appears from the language of the clause it had specified the qualified parties to sign the document, the minimum number of signatures, and the requirements for the validation of those signatures. Failure to follow this general condition will definitely validate the bank rejection. However, in some cases, a missing signature in a required document cannot be considered a major discrepancy. This is the case as such error might be under the power of the beneficiary to cure it, for example, a document issued by the beneficiary.<sup>246</sup>

---

<sup>241</sup> ICC Banking Commission (n 157) Decision No.284, 27, 28.

<sup>242</sup> *ibid* Decision No. 284, 27.

<sup>243</sup> *Ocean Rig ASA v Safra National Bank of New York*, 72 F Supp 2d 193, 202 (SD NY, 1999).

<sup>244</sup> *ibid* 197.

<sup>245</sup> *ibid* 203.

<sup>246</sup> *Mugasha* (n 16) 132.

Another example of a discrepancy, which might be valid grounds for rejection of the presentation, is trans-shipment. Article 20(b) defines it as ‘unloading from one vessel and reloading to another vessel during the carriage from the port of loading to the port of discharge stated in the credit’. A letter of credit may prevent trans-shipment, while a bill of lading might include a clause accepting trans-shipment, in this occasion according to Article 20 (c)(ii), the bank must disregard the credit and accept that clause.<sup>247</sup> This occasion is accepted only if the goods have been shipped in a container, trailer or LASH barge, which will be evidenced in the bill of lading, even if the credit prohibits trans-shipment. This approach is entirely contrary to previous versions, which indicated that the bank must strictly obey the credit terms and disregard such a clause.<sup>248</sup>

Nonetheless, it is not always the case that, under Article 20(d), any clause in a bill of lading stating that ‘*the carrier reserves the right to tranship*’ will be disregarded. This is a very sensible provision of the UCP because, in principle, the bank is not required to be aware of the legal meaning of the documents or the clauses inserted into them. The bank in this transaction is obeying only the applicant’s instructions and not those of any other party or parties. However, if the applicant raises no objections with regard to trans-shipment, it is advisable to indicate that clearly in the credit, in order to decrease ambiguity and prevent disputes in the future.

Taking the above-stated observations into consideration, the beneficiary must comply with all conditions stipulated either in the credit or in the UCP rules. As seen from the preceding discussion, failure to follow these conditions will result in the presentation’s non-compliance, granting the examiner the right to reject the documents.

---

<sup>247</sup> Article 20 (c)(ii) ‘A bill of lading indicating that transshipment will or may take place is acceptable, even if the credit prohibits transshipment, if the goods have been shipped in a container, trailer or LASH barge as evidenced by the bill of lading’.

<sup>248</sup> Winston Choon Teck Chew, ‘Strict Compliance in Letters of Credit: The Banker’s Protection or Bane’ (1990) 2 Singapore Academy of Law Journal 70, 79; Clive Schmitthoff, ‘Discrepancy of Documents in Letter of Credit Transactions’ [1987] Journal of Business Law 94, 96.

## 2.3 Conclusion

The aims of this chapter were first, to illustrate how a presentation will be considered as non-complying and, second, to ascertain why it is considered so. By examining the presented documents, the examiner can evaluate whether these documents are compliant with the letter of credit. Achieving consistency in how the documents are evaluated has not been an easy task and, as seen from the discussion above, this principle has been implemented and interpreted differently between courts. Although the UCP draft commission has made efforts to clarify the compliance principle, there is yet no guidance on how to achieve it or apply it; this is the main issue that has been considered in this chapter.

Interpreting the compliance standard in a 'strict' manner does not always provide a suitable interpretation or solution. Even if this strict standard is required to maintain the integrity of documentary credits, the bank and the applicant can abuse it for their own self-interest. The 'substantial' standard is somewhat preferable, as it provides parties with greater flexibility. Nonetheless, this standard may reduce the applicant's security, as the documents have the potential to be accepted despite the existence of discrepancies.

Deviations will undoubtedly appear in international trade; hence, it is recommended that the examiner's evaluation of such deviations take this likelihood into consideration and allow for greater leeway. The call for a 'strict' standard does not mean that the presented documents must be a mirror image of the credit, rather, what is meant by compliance is that the presented documents, particularly the data, show similarity. However, in the case of any conflict between the presented documents and the credit, evaluation of the deviations will be within the issuer's duty besides with consultation of the applicant. Although there are some reservations in this respect, interpreting the compliance standard must allow some flexibility to all parties.

In short, the general approach should be based on substantial compliance, with certain exceptions that require a more strict approach. It is necessary for banks and courts to recognise

both standards of compliance, namely; strict and substantial, as they complement each other. As such, it is not advisable to apply one standard or the other universally in all situations. The ‘strict’ standard may be suitable for one case but may not be apt for others; the same can be said with regard to the ‘substantial’ standard. As seen throughout the chapter, courts have judged disputes according to the facts of each case and according to their own understanding. If banks and courts are able to implement both common standards, as applicable to each case and its facts, the possibility of conflict between opinions will decrease to a large degree.

As discussed in the second part of the chapter, a presentation will be considered non-complying if it includes a discrepancy or discrepancies. This banking term is used to describe any error discovered while examining the tendered documents. These errors may emerge from a misunderstanding on the part of the beneficiary or a third party working on behalf of the beneficiary (e.g., the shipper). The issue in such cases is the distinguishing of these errors. Some may not suffice to legitimate a rejection, while others might. As affirmed in many cases, banks are only a financial entity and are considered a neutral party in such contracts. They are not experts in international trade nor are they required to be such experts; nonetheless, it is important to distinguish between material discrepancies and immaterial discrepancies.

As seen from the preceding discussion, banks excuse that any error discovered in the presented documents will be a ground for them to reject the presentation; this decision was not always upheld by courts, which reversed the banks’ decisions in some cases.

The justification for the courts’ judgements is satisfied by saying that some of these alleged discrepancies are not forms of ‘commercial’ discrepancy. If these alleged errors are affecting the commercial value of the presented documents, then there is legitimate ground for rejection. Courts are no doubt aware of such differences and are, hence, able to distinguish between commercial and banking discrepancies, simply because they are a legal party unlike banks. The question that remains is how the UCP rules can ensure that examiners are able to distinguish

between material and immaterial discrepancies without requiring examiners to go beyond their prerogatives.

In conclusion, a complying presentation means ‘the presentation that does not have any type of discrepancies and which is consistent with the letter of credit terms, conditions and the UCP rules’. That is, if the tendered documents fulfil these conditions, the presentation is compliant and the bank is bound to honour the credit.

### Chapter Three: The Puzzle of Discrepancy

Although there are many categories of discrepancy, as discussed in Chapter Two, arguably the most challenging are those that relate to *'defective documents'*, particularly where there are inconsistencies with the data. A report from the Simplification of International Trade Procedures Board (SITPRO) revealed that errors in data are one of the most common reasons for a rejection of presented documents.<sup>249</sup> It has been reported that the cost to the UK beneficiaries of rejecting discrepant documents, particularly those with data discrepancies, is more than £100 million per year.<sup>250</sup>

The fundamental obligation of a bank, once documents are presented by the beneficiary, is found in Article 14 of the UCP 600 which provides: *'a. A nominated bank acting on its nomination, a confirming bank, if any, and the issuing bank must examine a presentation to determine, on the basis of the documents alone, whether or not the documents appear on their face to constitute a complying presentation.... d. Data in a document, when read in context with the credit, the document itself and international standard banking practice, need not be identical to, but must not conflict with, data in that document, any other stipulated document or the credit'*. According to Article 16 of the UCP 600, if the bank *'determines that a presentation does not comply, it may refuse to honour or negotiate.'* Thus, if there is a disparity in data between the terms of the credit and the presented documents, they will be rejected. However, in practice it is not always easy to determine whether a presentation is compliant because some errors might be linguistic, including typographical errors, misspellings or the absence of some details.<sup>251</sup> These types of error are particularly troublesome for the bank because their duty is merely to examine the data in the presented documents in order to determine the status of the shipped goods so that it can be ascertained that the parties'

---

<sup>249</sup> SITPRO (n 47) 2-13.

<sup>250</sup> *ibid* 2.

<sup>251</sup> Bridge (n 1) [23-131].

contractual obligations have been fulfilled. Therefore, these linguistic errors are critical as they will be a key factor in determining the compliance of the presentation. An example of a linguistic error is where the credit stipulates that it has been drawn for the benefit of ‘Sung Jin’ but the presented documents refer to ‘Sung Jun’,<sup>252</sup> or ‘Pan Associated *Pte Ltd*’ instead of ‘Pan Associated Ltd’<sup>253</sup>. Further examples are where the credit number is (6910) but the presented documents show (691), (61910) or (691Q), or where the credit refers to ‘Any Western Brand’ but the presented documents show ‘Any Western Brand-Indonesia’.<sup>254</sup> The question then is whether, in light of the standard of examination imposed on banks in Article 14, these types of error will require the bank to reject the documents in accordance with Article 16, or entitle the bank to ignore the errors as trivial.

In some circumstances, the bank has considered such errors as a simple misspelling or a typographical error, which would not oblige it to reject the documents.<sup>255</sup> In contrast, on some occasions these types of error have been considered by the bank as a discrepancy, requiring it to reject the presentation and refuse to honour the credit.<sup>256</sup> From the perspective of the courts, not every linguistic error is viewed as a genuine ground for withholding the payment as some errors are typographical or misspellings, which would not affect the right of payment.<sup>257</sup> That is to say, banks often make the wrong decision when it comes to determining whether such typographical errors are discrepancies or not, and as a result, they are placed in a difficult legal position against the other parties.<sup>258</sup> Accordingly, a bank’s ability to determine what errors in the data constitute a proper ground to dishonour the credit is questionable.<sup>259</sup>

---

<sup>252</sup> See *Hanil Bank* (n 37).

<sup>253</sup> See *United Bank Ltd v Banque Nationale de Paris* [1992] 2 SLR 64.

<sup>254</sup> See *Glencore International* (n 28).

<sup>255</sup> *Bank Melli Iran* (n 45); *Bank of Cochin* (n 37).

<sup>256</sup> *Hanil Bank* (n 37); *Beyene* (n 39); *Seaconsar Far East* (n 48); *Glencore International* (n 28).

<sup>257</sup> *New Braunfels* (n 28); *All-American Semiconductor* (n 45).

<sup>258</sup> *Guaranty Trust of New York* (n 45); *Bank Melli Iran* (n 45); *All-American Semiconductor* (n 45).

<sup>259</sup> *Hanil Bank* (n 37) 1; *Glencore International* (n 28); *Gook Country Estates Ltd v Toronto Dominion Bank* [2001] BCCA 578.



The distinction between typographical errors and discrepancies is an area of uncertainty and confusion for both the banks and the courts.<sup>260</sup> It has been argued that it is the applicant's extensive instructions which can be difficult to understand or fulfill that are the main reason for these errors to emerge.<sup>261</sup> Since the issuing bank must adhere to its mandate, the bank interprets the credit in accordance with 'what appears to be the intended wording rather than the actual wording at its peril'.<sup>262</sup> This dilemma means that the character of a documentary credit is not understood by either the bank or the beneficiary.<sup>263</sup> It has also been argued that banks will sometimes intentionally look for 'unsound' discrepancies such as linguistic errors so that they can gain a 'discrepancy fee', which is deducted from payments made under the credit if the issuing bank finds any discrepancies in the documents presented.<sup>264</sup> Moreover, such duty to evaluate the errors in the presented documents is difficult and unsuitable for bankers.<sup>265</sup>

The problem for banks is the uncertainty of when an error will be regarded as a discrepancy and when it can be ignored as trivial. Further, the bank must decide in a short period of time whether to reject or accept the documents. It is evident that the identification of a discrepancy as a linguistic error or a genuine discrepancy is crucial to determine whether it is a ground for rejection or not. Moreover, this conflict between banks and courts regarding these types of discrepancies have raised a large volume of discussion over time.<sup>266</sup> Therefore, attention should be focused on such a matter as the guidance for the examiner in this respect is confusing.

For these reasons, this chapter will classify and analyse each type of 'data discrepancy' that can occur in defective documents in order to create a set of guidelines that will help both the

---

<sup>260</sup> *Kredietbank* (n 195) 1111.

<sup>261</sup> Bridge (n 1) [23-125]; Todd (n 57) 247.

<sup>262</sup> *ibid* [23-125].

<sup>263</sup> Goode (n 25) [35.63]; in one report by SITPRO it is argued that the beneficiary is responsible for the high rates of discrepancies: SITPRO (n 47) 14.

<sup>264</sup> Bridge (n 1) [23-229].

<sup>265</sup> Kurkela (n 34) 124.

<sup>266</sup> See *Bank of Cochín* (n 37); *New Braunfels* (n 28) 318; *Hing Yip Hing Fat Co Ltd v The Daiwa Bank Ltd*, [1991] 2 HKLR 35, 36 (High Court); *Voest-Alpine* (n 39) 943; *First Nat'l Bank of Atlanta v Wynne*, 256 S.E.2d 383 (Ga. App., 1979); *Credit Industriel* (n 191).

banks and the courts when determining discrepancies. As such, this Chapter will examine a large volume of cases from both perspectives (banks and courts) in conjunction with scholars' arguments. It will highlight the problem of inconsistent decisions by both banks and courts regarding discrepancies in presented documents, particularly in relation to data. The Chapter will also include the results of an empirical study in which a number of banks were contacted with a view to gaining an understanding of how banks apply the rules in practice when determining whether a document is compliant or not. This study involved four Jordanian banks which were selected according to their banking reputation (internal and external) and their use of letters of credit. The study involved two parts. The first part included interviews with the participating banks which involved a general discussion and questions about their experience of letters of credit, with particular emphasis on the examination of the presented documents. The second part involved a questionnaire of 16 questions relating to five types of linguistic errors that might appear in the presented documents, namely error in name, date, address, number and description of the goods. Each type of error included different scenarios. The questionnaire focused both on whether the examiner would consider the linguistic errors presented as a discrepancy entitling them to reject the documents, and an explanation of why this decision was reached, i.e. the legal and banking policy justification.

Ultimately, the Chapter will recommend guiding principles that will assist banks in determining the types of discrepancy that will entitle them to reject the documents, thereby releasing them from their obligation to effect payment to the beneficiary.

The chapter is divided into five sections which deal with each of these linguistic errors separately. Each section will propose some hypotheses and guidance which will be designed to assist the examining bank to determine whether such an error is typographical or a genuine discrepancy. These proposed hypotheses and guidance will emerge from analysing cases from different jurisdictions as well as the UCP 600 rules and ISBP 2013.

### 3.1 Error in number

Often the credit will require certain numbers to be cited on the presented documents. These numbers might include the credit number, the insurance number, the amount of goods, and their price. Such numbers are therefore important under the contract. However, many cases have demonstrated that there have been inconsistencies and confusions regarding numerical errors and whether they can be considered by the bank as a valid ground to dishonour the credit. In general, such errors can arise in two contexts: either the whole number is *missing from the presented document*, or it *does not match*, meaning that it might include an extra digit, a missing digit or the number is different to that stipulated in the credit.

#### 3.1.1 Missing whole number

In *Seaconsar Far East Ltd*,<sup>267</sup> a letter of credit was opened which required that each tendered document should state the name of the buyer and provide the letter of credit number. On presentation, the bank refused to honour the credit on the ground that one of the presented documents did not fulfil this requirement. The court affirmed the bank's decision and justified it by commenting that since the credit number and buyer's name were specifically required by the credit, the bank was entitled to reject the documents. Lloyds LJ said:

‘[The plaintiff] argues that the absence of the letter of credit number and the buyer's name was an entirely trivial feature of the document. I do not agree. I cannot regard as trivial something which, whatever may be the reason, the credit specifically requires.’<sup>268</sup>

In another case, a bank refused to honour the credit because the letter of credit number was missing in a required document. In similar vein to *Seaconsar*, the court held that because the credit expressly required all the documents to contain the letter of credit number, the bank had

---

<sup>267</sup> *Seaconsar Far East Ltd* (n 48).

<sup>268</sup> *ibid* 89.

been entitled to conclude that the documents were discrepant.<sup>269</sup>

Similarly, in *First Nat'l Bank of Atlanta*,<sup>270</sup> the bank rejected the presented documents and dishonoured the credit because the beneficiary failed to include the letter of credit number in one of the presented documents, contrary to the credit requirements.<sup>271</sup> However, unlike the previous two cases discussed, the court disagreed with the bank's decision and ruled that there was no defect because the claimant's document was accompanied by other documents that did include the letter number. The court argued, therefore, that the omission in one document could be cured by reference to the other documents that all contained the number. Consequently, the failure to include the credit number was not material, meaning that the presentation complied with the credit terms.<sup>272</sup>

In *Wynne*, there was an explicit requirement that the letter of credit number be quoted in every document presented. It is submitted that the court should have considered such an error as a discrepancy due to the explicit condition stipulated in the credit.

The outcomes of the interviews that were conducted with Jordanian banks emphasised that a missing number in the presented documents might be a dangerous sign of fraud, thereby entitling the bank to dishonour the credit. According to one bank, 'missing a number in the credit will be a major discrepancy subject to UCP 600 and ISBP'.<sup>273</sup> Another bank commented that these numbers are sometimes required to distinguish between different types of models or some legal applications such as insurance, shipping or customs, which might be important from the buyer's perspective.<sup>274</sup>

The aim of different details on the credit, such as numbers, names, address and contact information, is to identify and distinguish each letter of credit and each party involved.

---

<sup>269</sup> *Wood* (n 49).

<sup>270</sup> *First Nat'l Bank of Atlanta* (n 266).

<sup>271</sup> *ibid* 385.

<sup>272</sup> *ibid* 387.

<sup>273</sup> Interview with Jordanian Banks (Amman, Jordan on 10<sup>th</sup> January 2018).

<sup>274</sup> *ibid*, on 9<sup>th</sup> January 2018.

Similarly, the idea of inserting these numbers in the credit is to assist tracing the documents.<sup>275</sup>

If one of these identifying details are missing, there might be an issue of not recognising to which credit these documents refer, which is ultimately the sale of goods transaction, if no other identification is available. Such an omission might affect the examiner's decision to honour the payment. If the bank on such occasion honours the credit, it will put its reputation at risk, and will also be liable to the applicant. Therefore, the examiner needs to apply the 'strict' standard, especially if the number was required under the credit. Such requests will be treated as a condition; therefore, failing to obey it will release the examiner from accepting the presentation.

However, there is an alternative if the facts of the case permit. This alternative, or the 'substantial' standard, was applied in the third case, where the court held that the requirement for the missing number was fulfilled in other documents. This approach affirms the duty to 'read all documents' when examining them, which can be understood, implicitly, from the language of Article 14(d). This duty means that the examiner must read all the presented documents as a whole to ensure that they are linked to the same transaction. If they cannot be linked or identified with the goods or services in question, the presentation will be rejected.<sup>276</sup> Notably, it can be understood that the UCP rules accept the implementation of both standards, but which standard is applied is chosen based on the facts of the case.

### **3.1.2 Missing digit**

The second category of error is where there is a missing digit or digits. In *Bank of Cochin*,<sup>277</sup> the confirming bank honoured the credit despite an error in the insurance certificate which included the number (4291) instead of (429711). It was held that as such an error would justify

---

<sup>275</sup> Bridge (n 1) [23-133].

<sup>276</sup> *Banque de L'Indochine et de Suez S. A. v. J H Rayner (Mincing Lane) Ltd* [1983] 3 QB 711, 732-733.

<sup>277</sup> *Bank of Cochin* (n 37).

the refusal by the insurance company of honouring the insurance policy, it constituted a discrepancy.<sup>278</sup> The presented number missed two digits (71), which is more than a trivial error. In light of the ISBP, such a mistake will affect the eligibility of the credit.<sup>279</sup> This major difference between the numbers is obvious and cannot be accepted. Any diligent examiner could be misled by such error and must consider it as a discrepancy, which again, confirms the implementation of the ‘strict’ standard by the court. The effect of the omission when determining if it is proper ground for rejection or not will depend on the volume of such omission. Bridge argues that if only one digit is missing, it is a trivial matter and will not have an effect on the transaction.<sup>280</sup> While it could be argued that the omission of one digit is trivial, it must depend upon the individual circumstances. If the omission related to the credit number but it was clear that the presentation otherwise correctly referred to the relevant transaction, the omission of one digit could be regarded as trivial. By contrast, if the omission is present in a document such as a shipping document or if it relates to an insurance number as in the *Bank of Cochin* case, because the insurance company will not accept such a defect this omission should be considered as a genuine discrepancy.

For some banks in Jordan, inconsistent numbers will be considered as a discrepancy only if the number was missing or the whole number was different. If there is an extra digit, a missing digit or any other type of error, the examiner will reject the documents if the error misleads the bank and changes the classification or category of the goods.<sup>281</sup> From one expert point of view, ‘digits in model numbers, for instance, are important and must comply strictly with the letter of credit terms and conditions’;<sup>282</sup> hence, the value of such omission will not be treated in the same manner for all documents. Another supporting view considered the omission of a digit as

---

<sup>278</sup> *Bank of Cochin* (n 37) 1540-1543.

<sup>279</sup> ICC Publication No. 745E (2013).

<sup>280</sup> Bridge (n 1) [23-131]; see in general *Credit Industriel* (n 191) [20]. Even if not considered a typographical error, there may be no ground for refusal. (in this case the packaging list missed one digit out of 13 digits, the court considered it a typographical error and not discrepancy).

<sup>281</sup> Interview with Jordanian Banks (Amman, Jordan on 7<sup>th</sup> – 8<sup>th</sup> January 2018).

<sup>282</sup> *ibid*, on 7<sup>th</sup> January 2018.

a major discrepancy, ‘especially if the number, for example, concerns weight of the goods or quantity’.<sup>283</sup> However, according to one expert ‘an omission might be remedied in other presented documents; therefore, it will not be a discrepancy’.<sup>284</sup>

From my point of view, the general obligation is to examine the documents according to the UCP rules and the credit’s terms and conditions. If there is no condition stipulated under the credit in regard to a required number, this error should not be considered as a discrepancy if it was remedied when other presented documents were read. There is no reason why a missing digit should invariably be treated as a major discrepancy. Unless there is more than one digit missing in the presented number, this typographical error should not be a significant ground to stop the payment if other presented documents are compliant. Missing more than one digit, however, would require treating the presented document as missing the whole number, which cannot be disregarded. The rule is very simple: the examiner must follow the credit terms and conditions and the UCP rules in order to evaluate the effect of this error.

Although these two types of error have a common element, namely a missing number, the question is why a bank should treat a missing digit differently to a missing whole number. From my point of view, missing a whole number is a more serious problem for a bank than missing a digit. This is not only a problem for banks, but any document that misses a required element might be questionable in practice. The omission of a whole number might affect the legal value of the document while missing a digit will still provide the document with its legal value. Therefore, if a whole number is missing, the bank needs to check if there is any specific condition stipulated in the credit with regard to a missing number, then it is necessary to examine and read all documents together in order to find a linkage between them. If there is no linkage, it is a discrepancy. In contrast, a missing digit can be treated differently; if it was only one digit, the bank needs to check if this omission is remedied in other documents and in the

---

<sup>283</sup> Interview with Jordanian Banks (Amman, Jordan on 11<sup>th</sup> January 2018).

<sup>284</sup> *ibid.*, on 10<sup>th</sup> January 2018.

credit terms. However, it will be vital if it was more than one digit, in which case it is a discrepancy. In short, a missing digit is a trivial error that will not drive the examiner to reject the presentation.

### ***3.1.3 Different digit***

Another type of error is when the presented number includes a different digit. The debate continues in these cases, where courts have disagreed with the banks' decisions for different reasons.

In *New Braunfels*,<sup>285</sup> the court considered the inclusion of number 5 instead of the letter S as a typographical error, where the presented document showed the credit number as (86-122-5) instead of the correct number of (86-122-S). The court held that the tendered documents could not mislead the bank and therefore, such presentation complied with the terms of the credit.<sup>286</sup> It stated that banks must allow 'something less than absolute, perfect compliance' when reviewing the compliance of the documents with the conditions of a letter of credit.<sup>287</sup>

Another interesting case that included a different digit in the credit number was *E & H Partners v Broadway National Bank*.<sup>288</sup> The presented document included the number (1547424), which did not match the credit number (1537424). The court disagreed with the bank's decision to refuse to honour the credit and regarded such a change as insignificant as it did not mislead the banker.<sup>289</sup> The court stated that 'even under the strict compliance standard a variance may be allowable if there is no possibility that the document could mislead the paying bank to its detriment'.<sup>290</sup>

---

<sup>285</sup> *New Braunfels* (n 28).

<sup>286</sup> *ibid* 318.

<sup>287</sup> *ibid*.

<sup>288</sup> 39 F Supp 2d 275 (SD NY, 1998).

<sup>289</sup> *ibid* 284.

<sup>290</sup> *ibid* 283.



Agreeing with both judgments, such a mistake as in the *New Braunfels* is minor; it would not confuse the banker. In that case, ‘86’ represented the year in which the credit was issued, ‘122’ represented the numerical sequence of all credits ever issued by the bank and ‘S’ indicated that the credit was a ‘standby’ letter of credit.<sup>291</sup> From this fact, it is obvious that the incorrect digit in the presented document will not mislead. Moreover, it was established that the draft was accompanied with a cover letter that contained the correct number.<sup>292</sup> No reasonable examiner could be confused by such error. Therefore, the bank should accept such documents.

In *E & H Partners*, the bank even admitted that it had not been misled by the incorrect digit.<sup>293</sup> Regarding this category of error, the ICC Banking Commission has noted that ‘the misquoting of the reference number in a stipulated document, ... should not be raised as a ground for refusal’.<sup>294</sup>

As observed from both judgments, the courts applied a less strict standard for the compliance principle. However, from the examiner’s eyes, it is risky to accept such an error and go beyond the instructions when not following them will make the bank solely responsible. As a banker’s thinking is not the same as the courts’, we should keep in mind that banks are not experts – they only represent a ‘financial service’ and therefore, as a neutral party in such transactions, they will always take the safest approach by applying the strict standard unless there is a guide for them regarding such an error.

### **3.1.4 Extra digit**

The final type of error is when the number includes an extra digit. In *Voest-Alpine*,<sup>295</sup> the issuing bank refused to honour the credit due to an incorrect letter of credit number. The credit number was stipulated in the credit as 9521033/95 while the number in the presented document

---

<sup>291</sup> *New Braunfels* (n 28) 315.

<sup>292</sup> *ibid* 318.

<sup>293</sup> *E & H Partners* (n 288) 283.

<sup>294</sup> Collected Opinions 2005-2008, R. 635.

<sup>295</sup> *Voest-Alpine* (n 39).

appeared as 95231033/95. However, the court disagreed with the bank's decision and justified this in terms of the interpretation of the UCP rules (UCP 500 at that time).<sup>296</sup> The court argued that the alleged discrepancy was simply a typographical error, which would not affect the right of payment.

Similarly, in *Uniloy Milacron Inc v PNC Bank*,<sup>297</sup> the issuing bank issued a discrepancy notice and refused to honour the credit due to a number of alleged discrepancies including a mistake in the insurance number. The insurance number appeared on the credit as NO1A010088 while the presented invoice showed the number NO1A0100088. With reference to *Voest-Alpine*, the court disagreed with the bank's decision and found in favour of the beneficiary because such a mistake would not mislead the bank.<sup>298</sup> It considered the incorrect invoice number as typographical error only and not a discrepancy because it would not mislead the bank if it carefully read all data in the documents, where that invoice mentioned a description of the goods that were related to the same transaction specified in the credit.<sup>299</sup>

As observed from the above cases, the banks took the same view in regard to the same error: they considered it as a discrepancy. Such a decision was reversed by the courts who stated that it is only a typographical error. This is to be welcomed. In *Voest-Alpine*, the omission was remedied by virtue of Article 13(a) UCP 500 rules when other tendered documents were read, which was also referred to in *Uniloy Milacron*. In any case, when a bank examines such documents, they must perform the mandated duty of examination with the level of skill and care reasonably expected under the specific circumstances.<sup>300</sup> The American court referred to Article 13(a) of UCP 500, which states: 'Documents which appear on their face inconsistent with one another will be considered as not appearing on their face to be in compliance with the terms and conditions of the credit'. This judgment can be illustrated under the new rules as

---

<sup>296</sup> *Voest-Alpine* (n 39) 949.

<sup>297</sup> U.S. Dist. LEXIS 33063 (WD Ky, 2008).

<sup>298</sup> *ibid* 33063.

<sup>299</sup> *ibid* 33063.

<sup>300</sup> Schulze (n 101) 242.

when all the documents are read together, their data has to be consistent with the data stipulated in the credit. In these cases, the court affirmed that when the documents were read ‘on their face’, they obviously referred to the same transactions, which a reasonable examiner would notice. The language of the referred articles included a sensitive term: ‘on their face’. This term is a controversial subject for scholars as the rules do not explain what it means.<sup>301</sup>

Generally speaking, ‘on their face’ does not refer to a ‘simple front versus the back of a document’; neither does it mean to go beyond it to determine whether the beneficiary has fulfilled their obligation.<sup>302</sup> The examination ‘on their face’ of documents means ‘review of data within a document to determine that a presentation is in compliant with the credit’s terms’.<sup>303</sup>

It is a ‘visual inspection’ of the documents along with a search of the terms and conditions stipulated in the credit, which can be mentioned in the rules to ensure the ‘autonomy principle’.<sup>304</sup>

As explained by experts, if a number is different in any way that misleads the bank or changes the classification or category, the bank must reject the presentation. Where such errors are minor and will not affect the transaction, banks can disregard them and release the credit. To ‘read all documents together’ means when all documents are read together, they must provide accurate and true data; moreover, they must refer to the same goods. This means that they should be linked to the same transaction. In *Voest-Alpine*, the number was incorrect in only one document, as the other presented documents showed the correct number.<sup>305</sup> Moreover, other pieces of information contained in the document were correct.<sup>306</sup> Therefore, it was easily understood that such an error is not vital, as there was linkage in the presentation with the

---

<sup>301</sup> Manganaro (n 46) 282.

<sup>302</sup> Bridge (n 1) [23-114]; Gary Collyer, *Commentary on UCP 600* (ICC Publication No.680E 2007) 62.

<sup>303</sup> *ibid* 62.

<sup>304</sup> Antoniou (n 188) 28.

<sup>305</sup> *Voest-Alpine* (n 39) 949.

<sup>306</sup> *ibid*.

incorrectly numbered document that identified the transaction. Clearly, linkage between the presented documents must reflect the same transaction, where these documents will be subsequent parts of the main sale of goods. Briefly, linkage does not mean a ‘puzzle game’; there only needs to be one common element in the tendered documents that is a ‘reflection’ of the same transaction that led to opening the credit.

Despite the new rules omitting the term ‘reasonable care’, banks are still expected to conduct their duties and obligations with reasonable care. Professor Cranston commented that a bank’s duty of care will not require it to go beyond the documents and the bank will not be liable for a failure to discover any discrepancies as long as it has fulfilled its duty of care.<sup>307</sup> Banks are not required to adopt a reasonable interpretation, all that is required is a visual inspection.<sup>308</sup> Importantly, all interviewed banks preferred to apply the ‘reasonable care’ for their applicants and their interests, not for the beneficiary.<sup>309</sup>

In summary, according to the abovementioned cases relating to the issue of numbers, the debate focuses on two events: missing a whole required number or the number does not match. The number may either be missing a digit or include the wrong digit or includes an extra digit. From the examiner’s point of view, these different errors are genuine discrepancies and grounds for rejection. One explanation for such an approach is that they applied the compliance principle strictly in all cases except in *Bank of Cochin* where such an error was disregarded and the credit honoured. This approach from the examiner indicates that banks do not prefer to evaluate any error discovered, nor do they try to find a linkage in the presented documents. In contrast, in only three cases have the courts upheld the banks’ decisions, while in other cases the courts disagreed with the banks and reversed their decisions. From the courts’ perspective, it is not always the best solution to apply the compliance principle strictly; they believed that some

---

<sup>307</sup> Cranston (n 64) 521, 531.

<sup>308</sup> *ibid* 532.

<sup>309</sup> Interview with Jordanian Banks (Amman, Jordan on 7<sup>th</sup> – 11<sup>th</sup> January 2018).

relaxation should be achieved. Moreover, the courts affirmed the necessity of applying the linkage between documents when evaluating a discovered error. This linkage will help examiners to identify the presented documents that might correct the error.

In conclusion, with regard to these types of error, examiners need to evaluate very carefully, but not strictly, to decide if there is any linkage between the presented documents. One occasion where it is acceptable to apply a strict standard is when there is a condition stipulated under the credit in regard to a specific number required in the presented documents.

Consequently, by analysing the courts' judgments alongside the UCP rules, there are certain rules that the bank should follow in order to ensure that the decision is consistent with both the UCP rules and the courts. In all cases, the examiner must act with reasonable and due diligence. The other matters require certain distinctions:

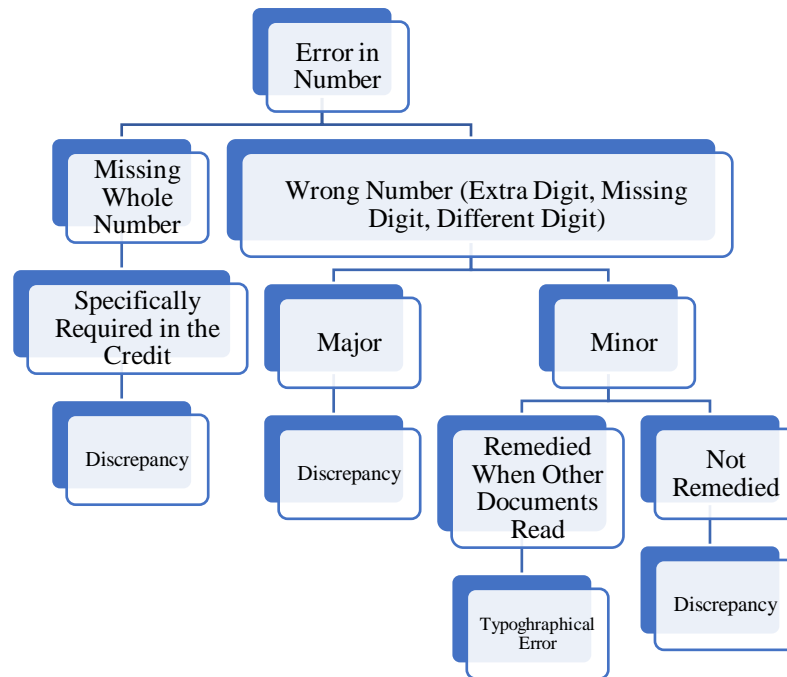
**Proposition One:** If the number is *entirely missing in the draft*, and such number is *specifically required* to appear in a specific document or in all documents, its omission constitutes **a discrepancy**. (Strict Compliance Standard)

**Proposition Two:** If the document includes a wrong number (extra, missing or different digit), there will be two categories of case:

1. If the error is **major**, which means here that the error is in more than one digit, its omission constitutes a discrepancy. (Strict Compliance Standard)
2. If the error is **minor**, which means here that the error is in one digit, there are two sub-categories (derived from applying Article 14 (d) and the Substantial Compliance Standard):
  - a.** If the mistake is *remedied by reference to other presented documents* and they *refer to the same transaction* under the credit, the mistake constitutes a typographical error and not a discrepancy.

**b.** If the mistake is not *remedied by reference to other presented documents* and they do not *refer to the same transaction* under the credit, the mistake constitutes a discrepancy and not just a typographical error.

See below a guideline for the examiner in the case of any error in the numbers:



\*Figure 1: Error in Number

### 3.2 Error in date

The applicant will provide the issuer with some specified periods in different types of required documents. These different periods are varied and reflect different duties to be fulfilled in the sale of goods, such as the date of shipment, date of issuing a required document, date of boarding the goods. Therefore, these dates are important under such a contract as they determine specific elements in each type of document.

Although few cases have confronted a court in regard to dates, they are, nonetheless, vital in such transactions. Notably, banks and courts argue as to whether they should be considered as discrepancies or typographical errors. Due to their importance, this section will discuss the issue of defective dates in the presented documents.

In *Voest-Alpine International Co v Chase Manhattan Bank, NA*,<sup>310</sup> which included different types of discrepancies in addition to a dispute regarding the date, the issuer refused to honour the credit due to an incorrect shipment date. The credit's terms asked for specific date of shipment – no later than **31 January 1981**. Although the presented bill of lading was dated exactly as required, the weight certificates and certificates of inspection stated that the goods had been loaded aboard the vessel between **February 2** and **February 6, 1981**.

The court upheld the bank's decision to deny the right of payment by justifying its rule in terms of the interpretation of Article 7 under UCP 290 (1974 revision), at that time.<sup>311</sup> The court ruled that documents that appear 'on their face' to be inconsistent with one another, will be considered as not appearing 'on their face' to be in accordance with the terms and conditions of the credit.<sup>312</sup> What is important here is that the date was a condition of payment under the credit where it required that the drafts submitted by the beneficiary should be accompanied by

---

<sup>310</sup> 545 F Supp 301 (SD NY, 1982).

<sup>311</sup> *ibid* 304.

<sup>312</sup> *ibid* 304.

three documents, among them an on-board bill of lading evidencing current shipment dated **no later than January 31, 1981**.<sup>313</sup>

There is no doubt that both judgments – bank and court – are correct. Presenting two documents with two different dates might mislead the examiner, especially when one of them bears a later date than the required one under the credit’s terms – 2<sup>nd</sup> February 1981. If this date was *before 31 January*, the bank’s decision might be different due to the explicit condition of ‘no later than’, as it will not draw any attention. However, with such an error, the validity of the document with a later date will be questionable, whereas the court noticed that this error could possibly be a sign of fraudulent action by the claimant.<sup>314</sup> Most importantly, in light of the terms specified in the credit, such date is a condition and failing to meet that date will justify the bank dishonouring the credit. As a result, such an error is a discrepancy and the bank will be entitled to dishonour the credit.

A few years later, another dispute confronted the court regarding dates. In *Breathless Associates v First Savings & Loan Association of Burkburnett*,<sup>315</sup> the bank dishonoured the credit on the ground that the date on the promissory note was wrong. Notably, the credit asked for a promissory note to be dated **April 28, 1983** but the document presented showed a date of **April 29, 1983**. Surprisingly, the court reversed the bank’s decision and ruled in favour of the beneficiary. It stated that the date of execution of the promissory note was neither an important term to either party nor had any relevance whatsoever to performance by the beneficiary.<sup>316</sup> It is noteworthy that the beneficiary knew of the defect in the documents to be presented under the credit and had tried and failed to remedy the defect, but such failure did not cause any damage.<sup>317</sup> Furthermore, from the nature of the transaction as shown by the documents, the

---

<sup>313</sup> *Voest-Alpine International* (n 310) 302.

<sup>314</sup> *ibid* 305.

<sup>315</sup> 654 F. Supp. 832 (ND Tex, 1986).

<sup>316</sup> *ibid* 837.

<sup>317</sup> *ibid* 839.



date of execution of the promissory note was not an important term to either party.<sup>318</sup>

Consequently, such an error in date is trivial and cannot be considered a discrepancy.

Similarly, in *Credit Agricole Indosuez v. Chailease Finance Corp.*,<sup>319</sup> the defendant bank issued a letter of credit in favour of the beneficiary, *Chailease*. The credit was for ‘vessel MV “Mandarin” sale agreement dated July 31, 1998 for delivery in Taipei during August 17–20, 1998... against presentation of the following documents: [among others]... a bill of sale... and a copy of acceptance of sale.’<sup>320</sup> However, the beneficiary presented the documents, including a bill of sale dated August 21 and an acceptance of sale stating that delivery had taken place on August 21. On presentation, the bank rejected the documents on the ground that ‘date of delivery of the vessel was stated in the bill of sale and the signed acceptance of sale to be 21 August 1998 when the letter of credit stated that the vessel was for delivery...August 17–20, 1998’.<sup>321</sup> The court disagreed with the bank and ruled in favour of the claimant. In fact, the court justified its rule by stating that the delivery date was not part of the goods description, and therefore the documents complied with the requirements of the credit.<sup>322</sup>

Based on these cases, the issue of dates can relate to: *a date that doesn’t match a specified date in the credit*, and *a situation where there is a difference in dates*. Nevertheless, such differences in dates may not be a proper ground for the bank to dishonour the credit. In *Breathless Associates* case, the bank had a different view to the court’s perspective. The date here was one day after that required by the credit, but it did not affect the right of payment because the court found that the date referred to the execution of the promissory note.<sup>323</sup> Meaning it had no relevance to the beneficiary’s performance unlike the former case of *Voest-Alpine*.

---

<sup>318</sup> *Breathless Associates* (n 315) 837.

<sup>319</sup> [2000] CLC 754.

<sup>320</sup> *ibid* 754.

<sup>321</sup> *ibid* 754.

<sup>322</sup> *ibid* 767.

<sup>323</sup> *Breathless Associates* (n 315) 837.

Sander J. explained the court's judgment by commenting: *'Manifestly, the requirement has two purposes: to limit the obligations of the issuer to examination of documents while at the same time affording the customer the greatest possible assurance that the beneficiary will not be paid (nor the customer be liable for reimbursement) unless and until the beneficiary has performed its obligations – for example, shipment by a certain date – under the underlying contract of sale. A discrepancy therefore should not warrant dishonour unless it reflects an increased likelihood of defective performance or fraud on the part of the beneficiary. In deciding this question, a court should consider only what may reasonably be inferred from the face of the documents.'*<sup>324</sup>

Such judgment might not be convincing for banks, where the purpose of documentary credit is to secure payment in international transactions. How can the examiner decide if the promissory note is or is not important for the applicant? The ICC has affirmed many times that banks are not experts and should not be involved in the underlying transaction, but in the above case, the court's judgment seemingly violated the ultimate aim of letters of credit and implicitly required the bank to go beyond the documents and to inquire whether the 'promissory note' was important to the applicant.

Once again, in *Credit Agricole Indosuez*, the court disagreed with the bank and stated that the presented documents complied with the requirements of the credit despite the difference in the delivery dates. The court stated that: *'the letter of credit does not state that the documents and in particular, the acceptance of sale and bill of sale, have to show that the vessel has been delivered within any range of dates, in particular the period August 17–20... If it had been intended that the bank was obliged to pay only against documents showing that delivery of the vessel had been affected by a particular date, that could readily have been provided for.'*<sup>325</sup>

---

<sup>324</sup> *Breathless Associates* (n 315) 837.

<sup>325</sup> *Credit Agricole Indosuez* (n 319) 767.

From the court's standpoint, since the delivery date was not part of the goods description, the bank should accept the presentation. It was only for a commercial reason, an obvious reason for the credit to provide that the actual date be shown, because payment of the first and second tranches due under the credit was to be 10 and 50 days respectively after delivery.<sup>326</sup>

With respect to the courts' judgments, such an excuse will not only harm the bank, but also will put them under pressure as it requires them to go beyond the documents and deal with the underlying transaction, regarding which they are not expert. The banks involved in documentary credits are simply a 'guarantee box' for both parties; by virtue of the principle of autonomy they are not required to be involved in either the main transaction or in the duties of both parties under such transaction. There is a difference between a commercial and a non-commercial discrepancy; banks are not aware of the commercial impact of the documents, which is why they might consider any error as a discrepancy.

According to experts, the date is an important element which has a legal impact and vital role in international transactions. As such, all interviewed banks confirmed that any error in this regard would be considered as a discrepancy. Moreover, in the case of a document bearing a date prior to that stipulated in the credit, insurance companies will not indemnify the insured for any harm that might affect the shipped goods due to this error.<sup>327</sup> Most importantly, 'a document with a missing date will not be accepted because the applicable rules indicated that all documents must be dated'.<sup>328</sup>

Nonetheless, date errors need not be treated in the same manner for some documents as there are exceptions under the current rules. For instance, under the ISBP, documents may be dated after the date of shipment, including a certificate of analysis, inspection certificate and pre-shipment inspection certificate.<sup>329</sup> However, they must not indicate that they were issued after

---

<sup>326</sup> *Credit Agricole Indosuez* (n 319) 767.

<sup>327</sup> Interview with Jordanian Banks (Amman, Jordan on 9<sup>th</sup> January 2018).

<sup>328</sup> *ibid.*, on 10<sup>th</sup> January 2018.

<sup>329</sup> ICC Publication No. 745E, 2013.

the date they are presented. According to UCP rules, if the date of shipment is not stipulated in a transport document, the date of issuance of the said document will be deemed to be the date of shipment unless the said document contains notation indicating the date of shipment.<sup>330</sup>

It should be noted that some required documents such as a transport document or inspection certificate are issued from a third party other than the beneficiary, meaning that it might be impossible to stipulate a precise date under the credit for issuing a required document because such duty of issuing is not under the beneficiary's control. Having said that, it is possible to require these documents to refer to a specific period (e.g. 'within 10 days' or 'from 12–18 of June'), and not on a specific date (e.g. '17<sup>th</sup> December').

In contrast, the date on the insurance document must be considered carefully according to Article 28(e). Although other documents are important to these trade transactions, the insurance document is of particular importance for the following reasons. Firstly, despite the fact that it is issued by the insurance company, the beneficiary still has a degree of control because it is for the beneficiary to approach the insurance company to open the insurance contract. Secondly, it is important due to its role and value in providing compensation in the event that the goods are damaged or lost. Therefore, any error regarding the date of such document might be the fault of the beneficiary somewhat. In this regard, the date of this document must be no later than the date of shipment, unless it appears from the insurance document that the cover is effective from a date not later than the date of shipment because the aim of an insurance document is to compensate the loss if it occurs due to the shipping or through the shipment and not later. This means that such a document should be dated as a general rule no later than the shipment date, unless it covers the harm after that date. However, if the date was missed or is different, it is obviously a discrepancy and the bank should not accept as this might be a sign

---

<sup>330</sup> Article 19(a)(ii) states: 'The date of issuance of the transport document will be deemed to be the date of dispatch, taking in charge or shipped on board, and the date of shipment. However, if the transport document indicates, by stamp or notation, a date of dispatch, taking in charge or shipped on board, this date will be deemed to be the date of shipment.' See also Article 20(a)(ii): 'The date of issuance of the bill of lading will be deemed to be the date of shipment unless the bill of lading contains an on board notation indicating the date of shipment, in which case the date stated in the on board notation will be deemed to be the date of shipment.'.

of fraud. Therefore, based on the above discussion and recognising the importance of the insurance certificate, a proposed hypothesis is useful for such an issue.

**Hypothesis one:** In regard to the date of the '*insurance certificate*', if there is a specific requirement under the credit, the examiner must apply the condition strictly. Otherwise, as a general rule the date should be no later than the shipment date, unless it covers after that date. However, if the date is different or missed, it is a discrepancy.

**Hypothesis two:** In regard to date of '*other documents*' (e.g. transport documents or inspection certificates), if there is a difference in dates, the examiner has two options:

- a. If there is a specific requirement under the credit, the examiner must apply the condition strictly.
- b. Otherwise, the presented date, when read in conjunction with the rest of the documents, must not be in conflict with the dates expressed in the other documents. However, if the date was missed, the bank examiner is bound to apply the 'Strict Standard' and consider it as a discrepancy.

### 3.3 Error in party's address

In international transactions this important detail will clarify from where the goods will be shipped and where they will be delivered. One of the significant changes in the current UCP rules is the addition of a new provision concerning the address of the beneficiary and the applicant. The new rule is stipulated in Article 14(j), which states that 'When the addresses of the beneficiary and the applicant appear in any stipulated document, they need not be the same as those stated in the credit or in any other stipulated document but must be within the same country as the respective addresses mentioned in the credit'.

Accordingly, there is no need for the parties' addresses to be consistent with other addresses in the credit as long as they refer to the same country. However, there is one exception and that

is where, if ‘the contact details of the applicant appear as part of the consignee or notify party details on a transport document subject to articles 19, 20, 21, 22, 23, 24 or 25, they must be as stated in the credit’.<sup>331</sup>

When I asked the experts about any possible error regarding this element, all those who were interviewed agreed that it would only be considered as a discrepancy if the address was missed. However, if the address was different, it would be accepted as long it referred to the same country, as required by Article 14(j). If it didn’t, it would be considered a discrepancy. The view of one expert was that, ‘it depends on the situation of the address, if it is required in the consignee field or the notify party field, it is necessary to be complied with’.<sup>332</sup>

It could be argued that the language of Article 14(j) leads to confusion. Since international trading will inevitably involve addresses in foreign languages, typographical errors with addresses could occur. If the bank is bound to obey such a rule, they will be expected to honour the credit despite the inconsistency of the addresses within the documents, as it can be understood from the Article that what matters is the country of the parties, not their location within the country. Furthermore, the language of this article will lead to the issue of ignoring the identification details by banks such as the telephone number, email and others.

This determination will leave the door open for sellers with bad intentions who could take advantage of this loophole to reinforce their fraudulent activities. Assume that a seller with bad intentions presented fake documents, which include the exact details and information required in the credit but they inserted a fake address of either party but within the same country as required in X document. For the examiner, it complies, but it does not for the applicant. The aim of requiring accurate details in general is to ensure the trustworthiness of the beneficiary. Moreover, it will protect banks from any legal disputes in this regard.

---

<sup>331</sup> Article 14(j).

<sup>332</sup> Interview with Jordanian Banks (Amman, Jordan on 7<sup>th</sup> – 11<sup>th</sup> January 2018).

From the perspective of a bad intention's seller, the less difficult the requirements to access the payment means the easiest way to defraud other parties. The general rule in letters of credit is to facilitate the payment for the beneficiary. Compliance is not engaged with form or a specific language for the data in the presented documents, it is only about the accuracy and trustworthiness of them. There is no doubt banks are not required to check the accuracy and truthfulness of the presented documents, but at least requesting specific details (e.g. address), might ensure the accuracy and truthfulness of the details. It is not acceptable to require hard tasks or conditions from the beneficiary to gain the payment, but it is important to request accurate data.

Although the language of this article will be helpful in relation to companies that have subsidiaries in different destinations in the same country, it would not be helpful to individual parties. Assume that the goods should be shipped to a trade company in Jordan, where the headquarters is in the capital, but instead the goods were shipped to the subsidiary in another city in Jordan. This occasion will not harm the company as the goods will eventually be transported to the nominated subsidiary. In contrast, if the goods should be shipped to an individual who is settled in the capital, but the goods were shipped to another city in the same country, how will that party guarantee that the goods will be transported to their location? Indeed, such incorrect shipping could harm the individual concerned and, of course, will impose an extra and unexpected fee on the recipient.

Furthermore, disregarding other contact details will not help the examiner to decide if two different addresses are in fact the same place. Sometimes, addresses in the same country that are similar but not identical, could, in reality, be two entirely different places in the same country. For example, will the bank consider an address in the presented documents, '*Turku-Pori, Finland*' to be equivalent to this address on the credit '*Turku, Finland*'? (They are two

completely different places).<sup>333</sup> The same dilemma can also occur for other addresses, for instance, *Washington, USA* instead of *Washington DC, USA* or *Bradford, UK* instead of *Bradford St, UK*.

Another example, which will clarify the possibility of confusion for the examiner, is if a document refers to the place of delivery as ‘**Slovenio**’ instead of ‘**Slovenia**’ (letter O instead of letter A), will the address be the same or will it be decided as a trivial and obvious typographical error, and hence the documents should be accepted?<sup>334</sup> Moreover, in the same example, if the document referred to ‘**SlovANia**’, instead of ‘**SlovENia**’, is the mistake with the letter A and it should have been ‘**SlovENia**’ or is the mistake with the letter N and it should have been ‘**SlovaKia**’?<sup>335</sup> In this example, they are entirely different countries.

For such an example, assume that the address on the credit is ‘Slovenia’ but the presented documents show the address as ‘Slovenia’ but in fact, the goods had been delivered to the same address specified in the credit ‘Slovenia’. From the examiner’s standpoint, they would apply Article 14(j), and consequently, reject the documents. Yet, assume that it might only be a misspelling error; is it fair to reject the documents? Again, only one letter is wrong, but surely the documents would have to be rejected by virtue of the article, on the ground that the address is not within the same country. There is no doubt that the bank deals with data and not facts; however, will such a misspelling be considered as a serious error and postpone the payment? What can be drawn from the above examples is that the language of the criticised article needs to be amended, as currently it helps neither the examiner nor the parties, especially in a transaction that involves international parties. Predominately, any further inquiry about the presented documents will not be accepted because UCP rules stipulate that the bank examiner

---

<sup>333</sup> Paul Downes, ‘UCP 600: Not So Strict Compliance’ (2007) 4 *Journal of International Banking and Financial Law* 196, 201.

<sup>334</sup> Antoniou (n 188) 33, 34.

<sup>335</sup> *ibid.*



is only responsible for examining documents or, more precisely, the data in the documents. Hence, they are not required to go beyond the documents to determine whether they comply.

Therefore, this research proposes the current article should be stipulated as follows:

**Hypothesis: A.** in the case of **companies**, the addresses of the beneficiary and the applicant appear in any stipulated document **need not be the same** as those stated in the credit or in any other stipulated document **but must be within the same country** as the respective addresses mentioned in the credit. Contact details as part of the beneficiary's and applicant's address need not be disregarded.

**B.** in the case of **individual parties**, the addresses of the beneficiary and the applicant appearing in any stipulated document **must be the same** as those stated in the credit or in any other stipulated document. Contact details as part of the beneficiary's and applicant's address need not be disregarded.

### 3.4 Error in name

Among the details that the applicant provides the issuer with are different names in the different types of documents required. These names include the issuing bank name, insurance company name, applicant name, and beneficiary name. This detail is important under such contracts, since it will define the parties involved in such transactions. Many cases have involved an error in a name and the banks and courts have had to grapple with whether such an error should be considered as discrepancies or simply typographical errors.

In order to explain the problems in interpreting the compliance principle in the UCP rules from both perspectives – bank and court – this part of the chapter will be divided into two groups. The first group will include examples of the conflict between banks and courts, where the former dishonour the credit due to an alleged discrepancy; in contrast, courts disagree and

consider them as a typographical error only. The second group will include examples of errors in names where both parties consider them as a discrepancy.

### ***3.4.1 Error in name regarded as typographical error or misspelling***

In *Hing Yip Hing Fat*,<sup>336</sup> the error in the name came under the umbrella of ‘*different misspelling*’. In this case, the bank refused to honour the credit due to an error in the applicant’s name. The credit referred to ‘Cheergoal **Industries** Limited’, but in the bill of exchange it was drawn as ‘Cheergoal **Industrial** Limited’. In hearings, the court reversed the bank’s decision and held that the use of the word ‘Industrial’ was an obvious typographical error from the word ‘Industries’ and was not a discrepancy upon which the bank could rely.<sup>337</sup> In justifying its judgment, the court stated that ‘[Strict compliance] does not extend to the dotting of i’s and crossing of t’s or to obvious typographical errors either in the credit or the documents. Because of the wide variations in language to be found in both, it is impossible to be dogmatic or even to generalize. Each case is to be considered on its merits, and the bank’s obligation may obviously be most difficult to fulfil’.<sup>338</sup>

The court believed that in such an international transaction, which rely on foreign language, such mistakes can happen; therefore, there is no need to consider it as a discrepancy. In other words, for a reasonable examiner, such an error is obviously only a spelling mistake. Importantly, the ISBP rules stipulate that a ‘misspelling or typing error that does not affect the meaning of a word or the sentence in which it occurs, does not make a document discrepant’. Therefore, the difference between ‘*industrial*’ and ‘*industries*’ will not change the meaning. Similarly, in *Voest-Alpine*,<sup>339</sup> where the rejection was on the ground of a syntax error in the presented documents, *Voest-Alpine*’s name was listed as ‘Voest-Alpine **USA Trading**’ instead

---

<sup>336</sup> *Hing Yip Hing Fat* (n 266).

<sup>337</sup> *ibid* 39.

<sup>338</sup> *ibid* 44.

<sup>339</sup> *Voest-Alpine* (n 39).

of ‘Voest-Alpine **Trading USA**’ (the term ‘USA’ was written before the term ‘Trading’). The court reasoned that the ‘documents did not appear to come from a beneficiary other than that named in the credit; accordingly, the name inversion was insufficient to justify dishonour’.<sup>340</sup> The court reversed the bank’s decision by justifying that all the documents presented were obviously related to the same transaction. Moreover, the cover letter containing the documents presented as part of the letter of credit drawing identified the beneficiary as ‘Voest-Alpine Trading U.S.A’.<sup>341</sup>

Notably, the court referred to the opinions issued by the ICC Banking Commission, which stated the following: ‘one of the Banking Commission opinions defined the term “consistency” between the letter of credit and the documents presented to the issuing bank to mean that “the whole of the documents must obviously relate to the same transaction”, that is to say, that each should bear a relation (link) with the others on its face..’<sup>342</sup> and concluded that ‘... the issuing bank is required to examine a particular document in light of all documents presented and use common sense but is not required to evaluate risks or go beyond the face of the documents’.<sup>343</sup> Such justification is reflected in the new rules, particularly in Article 14(d).

Although the ‘linkage’ requirement is not stipulated in the new UCP rules, yet, in my judgment, the linkage test is important and required. Linkage of the presented documents is necessary where the presentation should relate to the same goods and transaction. This linkage requirement can be fulfilled once the presentation provides reference either directly or indirect to the goods.<sup>344</sup> Generally speaking, any reasonable and diligent examiner will be able to unequivocally a document is referring to the same transaction and will identify the transaction. From the current UCP600 provisions, it might be argued that there is no necessity to link the

---

<sup>340</sup> *Voest-Alpine* (n 39) 948.

<sup>341</sup> *ibid* 948.

<sup>342</sup> *ibid*; International Chamber of Commerce, Banking Comm’n, Publication No 371, Decisions (1975-1979) of the ICC Banking Commission R 12 (1980).

<sup>343</sup> 167 F Supp 2d 940, 947 (SD Tex, 2000).

<sup>344</sup> *Zhang* (n 35) 107-108.

content in a generic document with the descriptions of goods or any reference numbers under the credit, and the document will be accepted as long as no conflict data in there.<sup>345</sup>

Nevertheless, the linkage requirement remains, implicitly, under article 14(f) that a presented document within its scope must ‘appear to fulfil the function of the required document’.<sup>346</sup> This article, alongside with sub article 14(d), affirmed, implicitly, on the ‘linkage’ requirement between the data and the transaction with all the presented documents. From the author’s perspective, despite the fact that there are no express linkage requirements under the UCP600 rules yet, it can still be strongly argued that the linkage test is an essential element to judge whether the presented document has fulfilled its function.

In regard to the mention case above, these documents did clarify the name of the contracted company and consequently, a reasonable and diligent examiner would not be misled when reading these documents. However, the new rules do not mention the duty of reasonable care by a bank, even though it must follow such care.

Therefore, the bank examiner’s decision, in this case, was incorrect. By reading all documents together, the examiner would not be misled; hence such an error is only a typographical error and not a discrepancy. For some experts, if there is an extra digit or missing digit, the examiner will reject the documents only if the error misleads the bank and changes the meaning; otherwise, they will accept the documents.<sup>347</sup> From their points of view, the only reason to reject the discrepant document is if the name was missed or completely different than stipulated under the credit.<sup>348</sup>

In *All-American Semiconductor*,<sup>349</sup> the payment was conditioned on presentation of different documents including a statement made by the beneficiary and the relevant invoices. The

---

<sup>345</sup> Zhang (n 35) 111.

<sup>346</sup> Bridge (n 1) [23-130].

<sup>347</sup> Interview with Jordanian Banks (Amman, Jordan on 7<sup>th</sup>- 10<sup>th</sup> January 2018).

<sup>348</sup> *ibid*, on 7<sup>th</sup> - 10<sup>th</sup> January 2018.

<sup>349</sup> *All-American Semiconductor* (n 45).

beneficiary tendered the required statement on a company letterhead that named the company only as ‘**All-American**’ and invoices containing the name and purchase order of the buyer and ‘**All-American Semiconductor Inc**’ as the invoicing party. The bank rejected the presentation, alleging that the presented statement discrepantly stated the beneficiary’s name. The court disapproved the bank’s decision and observed that the statement alone might have justified dishonour but the documentary presentation, taken as a whole, had identified the beneficiary; thus, the presentation was compliant.<sup>350</sup>

In this case, the error type can be related to the ‘*missing terms*’ criteria, where the presented statement discrepantly stated the beneficiary’s name. However, such a mistake was not trivial from the court’s point of view, which reversed the bank’s decision and observed that the statement alone might have justified dishonour but the documentary presentation, taken as a whole, had identified the beneficiary; thus, the presentation was compliant. It can be understood from the court’s judgment that it, again, relied on the ICC opinion, similar to *Voest-Alpine* case, which affirmed ‘linkage’ of the data of the presented documents all together.

Nevertheless, such judgment was criticised by Adodo, who commented that any presentation that includes omitted words or misspelling in names should be considered as discrepant, requiring the court to order the bank to dishonour the credit.<sup>351</sup> Generally speaking, Goode argued that sometimes it is difficult to add the whole name or abbreviations to the SWIFT message if the documents were sent through fax; hence, the examiner on this occasion would consider such a message as a discrepancy.<sup>352</sup>

In my opinion, the court’s judgment is persuasive, yet, in this case, there was a unique element that should distinguish this error from others. In the said case, the applicant, when requesting to open the credit, did stipulate some conditions with regard to payment which was presenting

---

<sup>350</sup> *All-American Semiconductor* (n 45) 889.

<sup>351</sup> Ebenezer Adodo, *Letters of Credit: The Law and Practice of Compliance* (OUP Oxford, 2014) 166.

<sup>352</sup> Goode (n 25) [35.68]; fn 147.

a statement. Therefore, this defective name should be considered as a discrepancy. According to Sir Thomas Bingham, the duty of the issuer is only to make payment against documents that strictly comply with the terms of the credit.<sup>353</sup> Therefore, if the bank disregards the error in the name as it appears in this statement document, despite the fact that the name was written correctly in the remaining documents, the applicant might disagree. In other words, this document might be important for the buyer, otherwise there was no requirement for it. Consequently, it would be advisable to reject the payment due to such a condition from the applicant, even if the name was correct in others.

However, sometimes these omissions in names might not be acceptable. For instance, in *Bulgrains & Co Ltd v Shinhan Bank*,<sup>354</sup> the bank refused to honour the credit on the ground of discrepant names in the presented documents, which was upheld by the court. The documents contained the wrong name, 'Bulgrains Co **Ltd**' instead of 'Bulgrains **&** Co **Limited**'. The error was in using abbreviation for the term 'Limited' and omitting the ampersand.

Quoting from *Jack: Documentary Credit*,<sup>355</sup> and the court stated that 'a document containing an error with a name or similar should be rejected unless the nature of the error is such that it is unmistakeably typographical, and the document could not reasonably be referring to a person or organisation different from the one specified in the credit. In assessing this, the bank should look only at the context in which the name appears in the document, but not judge it against the facts of the underlying transaction'.<sup>356</sup> The court believed that the phrases 'and' and 'limited' should have been used because the name of the company in the Cyrillic alphabet included the single letter, the translation of which means 'and'.<sup>357</sup>

This name, in general, is a company name, therefore, it should be considered as a discrepancy and not a typographical error. When they register, companies designate a unique name that will

---

<sup>353</sup> *Glencore International* (n 28) 152.

<sup>354</sup> [2013] EWHC 2498 (QB).

<sup>355</sup> Malek (n 76).

<sup>356</sup> *Bulgrains* (n 354) [18] (Judge Gore QC).

<sup>357</sup> *ibid* [24].

distinguish their goods and business from other companies and to eliminate the similarity, to a large degree, with other national and international companies. This unique name is their ‘trademark’; therefore, if the name in the tendered documents did not match with those stipulated in the credit, it should be considered as a discrepancy due to this merit. In spite of that, the new UCP rules deprived banks from turning to any contact details mentioned in the documents for both parties. Consequently, with such deprivation and binding them not to go beyond the documents, it will be difficult for the banks to distinguish whether these two different names refer to the same company.

Conversely, it is acceptable under the ISBP to use an abbreviation. The ICC Banking Commission published a guideline for the examining bank regarding the required practice that they should obey in terms of the common discrepancies that may appear when the bank examines the documents.<sup>358</sup> The ICC approved the use of abbreviations instead of the full name, where possible; for instance, ‘Ltd’ referred to ‘Limited’ or ‘CO.’ referred to ‘Corporate’. In *Astro Exito Navegacion*, it was held that the expressions ‘ex Berger Pilot’ and ‘previous name Berger Pilot’ meant the same thing and would not be considered as a discrepancy.<sup>359</sup> In *Bulgrains*, the court upheld the bank’s decision regarding the omitted ‘and’ and stated that ‘on the facts, the discrepancy in the claimant’s name had not been clearly and demonstrably a typographical error. The word” and” could and should have been used’.<sup>360</sup>

One expert believed that names are a sensitive element in the credit, which must be reflected as a ‘mirror image’; therefore, any types of errors in such elements will be regarded as a discrepancy. Justifying this position, they argued that ‘these names are required sometimes, for different governmental institutions, which will provide legal rights by virtue to different legislations.’<sup>361</sup>

---

<sup>358</sup> International Standard Banking Practice 2013 edition, International Chamber of Commerce Publication No. 745.

<sup>359</sup> *Astro Exito Navegacion* (n 135) 458.

<sup>360</sup> *Bulgrains* (n 354) [24].

<sup>361</sup> Interview with Jordanian Bank (Amman, Jordan on 7<sup>th</sup> January 2018).

In any case, the judgments of the two previous cases are different despite having a common issue in the name – ‘*missing terms*’. However, the courts applied different standards to justify their judgments. For instance, in *Bulgrains*, the court applied a ‘strict’ standard, whereas in *All-American Semiconductor*, the court applied a ‘substantial’ standard. The vital point in the latter case was that the presented documents did refer to the same transaction and the applicant’s name, which remedied the mistake in the name, whereas in the former they did not, and consequently, in my judgment, if one of the presented documents in *Bulgrains* case had referred to the right name, the court’s judgment might have been different.

Another interesting case that demonstrates the conflict between banker and court is *Equitable Trust*.<sup>362</sup> In this English case, the credit required a presentation of a certificate issued by the Chamber of Commerce of Batavia, where such a body did not perform the functions of the chamber of commerce for some time. However, the beneficiary presented a certificate issued by the *Handelsvereeniging of Batavia*, which was a semi-official body that fulfilled the functions normally associated with a chamber of commerce. However, the bank rejected the presentation. Against that, the court held that such a presentation was in compliance with the credit.<sup>363</sup>

Notably, the ISBP rules stated that if the credit required a specific document from a specific entity, such a requirement would be fulfilled if the required document was issued by any public or industry body that is competent to attest its origin.<sup>364</sup> In this regard, the question is whether a document issued from ‘The Ministry of Transportation and Highways, North Cariboo District’ with an address in Quesnel will be equivalent to a document issued from ‘Minister of Finance and Corporate Relations of the Province of British Columbia as represented by: The District Highways Manager of the Ministry of Transportation and highways, District Located

---

<sup>362</sup> *Equitable Trust* (n 51).

<sup>363</sup> *ibid* 52. The presentation was ultimately deemed non-compliant on other grounds.

<sup>364</sup> ISBP 2013, para L(c)(i); *Bridge* (n 1) [23–144].



as 213-1911 Fourth Ave., Prince George, B.C. V2L 3H9.’<sup>365</sup> The court did not consider this misnomer a discrepancy.<sup>366</sup>

The English court found that the implementation of the principle of ‘strict’ compliance in this case had little precedential value, which would not be helpful.<sup>367</sup> According to Evans LJ, the implementation of a ‘strict’ compliance standard should not mean how literally the consistency must be, where the examiner needs to build his decision with due diligence according to the credit terms and the presented documents.<sup>368</sup>

It seems that the court’s comments regarding the relaxation of the compliance principle in order to maintain the utility of such method for payment is logical in part, but such relaxation cannot be accepted regarding names. In *Equitable Trust* case, how can the examiner know that *Handelsvereeniging of Batavia* is a semi-official body that fulfils the same functions associated with a chamber of commerce in Batavia? From the bank’s perspective, it is a clear discrepancy because the presented document misnamed the beneficiary.

UCP rules affirmed that a bank’s duty is restricted to examining the data of the documents only ‘on their face’. However, despite banks being unable to undertake any further inquiry, some experts stated that they might go beyond their duties by contacting the specialized entity or some ports to check on the names specified in the presented documents.<sup>369</sup> Such examination of the documents means to check whether the data ‘claimed’ to be drafted in them are correct without the need to go beyond their meaning. Therefore, any tender of documents which, properly read and understood, calls for further inquiry or appears to invite litigation is clearly a bad tender.<sup>370</sup>

Banks are not expected to decide whether an incorrectly rendered name refers to the correct

---

<sup>365</sup> See *Gook Country Estates* (n 259) [5]-[6].

<sup>366</sup> *ibid* [11].

<sup>367</sup> *Equitable Trust* (n 51) 52.

<sup>368</sup> *Kredietbank* (n 195) 221.

<sup>369</sup> Interview with Jordanian Banks (Amman, Jordan on 10<sup>th</sup> January 2018).

<sup>370</sup> *M. Golodetz & Co Inc v Czarnikow-Rionda Co Inc* [1980] 1 Lloyd’s Rep. 453, 467.

party name if the other documents failed to remedy such a defect, as they are not expert in the trade sector. Here, the focus is on documentary credit from the bank's perspective, both statements from the court and the ISBP are convincing but such judgment will only be acceptable in hearings, not before. When banks examine the documents, all that is important for them is the data. Their duty is restricted to checking them, not to evaluate them. Therefore, it is legitimate to consider such types of error, as in the previous case, as a discrepancy.

The conflict about errors in names between banks and courts continues and appears in the Italian courts. In one case, an Italian rice company entered into a contract with a Lebanese client to supply a certain quantity of rice. The issuing bank refused to honour the credit claiming six discrepancies. Among the alleged discrepancies, there was error in the name of the applicant. The tendered bills of lading were issued to the order of *Nacinter*, rather than to the order of *Riserie Virginio* and later endorsed to *Nacinter*. Despite other alleged discrepancies, the court rejected the bank's claim with regard to the name error and ruled that it was a mere 'formal' discrepancy and could not be considered, alone, as a legitimate reason for the bank to refuse to pay the beneficiary.<sup>371</sup> In this case, such bills of lading did not diminish the guarantees of the bank; even if the bills of lading had been endorsed to *Nacinter*, it would not have received any major guarantee.

Regarding this case, the name on the presented bill of lading was not the same as the applicant, it was a different name, which could be understood to be different party. Again, similar to the above cases, such a judgment may not be helpful for banks. They are not expert in such transactions and are neither bound to be engaged with the main transaction nor required to investigate further in the performance of the obligations of the parties. The bank examiner is not bound to know whether such endorsement is legitimate or not; hence, such an error needs

---

<sup>371</sup> *S.p.a. Riserie Virginio Curti v BNL and Banque Nationale de Paris "Intercontinentale"* [1981] Tribunale di Roma, Corte di Appello di Roma (1985) at 296, 297; Corte app. Roma, 8 ottobre 1985, in *Rivista di Diritto Commerciale*, II, 1986, 368, cited via Erika Arban, 'The Doctrine of Strict Compliance in the Italian Legal System' (2005) 23 *Arizona Journal of International & Comparative Law* 77, 92.

to be considered as a discrepancy. Experts believed that an inconsistent name will usually be considered as a discrepancy only if it was missed or the whole name was different, similar to this case.<sup>372</sup>

Nonetheless, always applying the strict standard is not recommended in regard to these types of errors. This means that the strict compliance principle does not require a mirror image replication of the terms of the credit in all cases. Some margin is permitted for sustaining the integrity and efficiency of letters of credit. Sometimes, there is a need for an exception of the compliance principle in order to avoid damage to the applicant, as long as the names refer to the same party.

#### ***3.4.2 Error in name regraded as a discrepancy***

There are a few cases where the courts upheld the banks' decisions regarding such errors. One of the benchmark cases was in the United States, where the beneficiary sued the confirming bank for its failure to pay under a letter of credit. In *Beyene* case, the credit specified that a bill of lading was to be issued to 'Mohammed Sofan' (the applicant), but the tendered bill of lading listed the party to be notified by the shipping company as 'Mohammed Soran' (it used the letter r instead of the letter f).

In the judgment, the court upheld the bank's decision and found that the misspelling in the applicant's name at issue was a material discrepancy that entitled the confirming bank to refuse to honour the letter of credit.<sup>373</sup> It stated that 'literal compliance is generally essential so as not to impose an obligation upon the bank that it did not undertake and so as not to jeopardize the bank's right to indemnity from its customer'.<sup>374</sup> This judgment is according to the ISBP that 'a misspelling or typing error that does not affect the meaning of a word or the sentence in which

---

<sup>372</sup> Interview with Jordanian Bank (Amman, Jordan on 7<sup>th</sup> – 10<sup>th</sup> January 2018).

<sup>373</sup> *Beyene* (n 39) 6.

<sup>374</sup> *ibid* 6.

it occurs does not make a document discrepant.<sup>375</sup> According to this paragraph, such a name might not refer to the same person as, in Mediterranean countries, ‘Sofan’ is not the same as ‘Sor<sup>an</sup>’; therefore, the meaning has changed. Furthermore, the wrong name in this case was drafted in the bill of lading; hence, due to its important role in the commercial transaction, the court affirmed the ‘strict’ standard to be applied for the compliance principle.

Another interesting case is *Bank of Coch*<sup>in</sup>, where the issuing bank brought an action against the confirming bank for wrongful honour of a letter of credit on the basis of several discrepancies in the presented document, as mentioned earlier in this chapter. Among other discrepancies, there was an error in the applicant’s name. The tendered documents appeared with the applicant name as *St. Lucia Enterprises* while the name specified in the credit was *St. Lucia Enterprises Ltd* (the abbreviation ‘Ltd’ was omitted). Similar to *Beyene* case, the court held that although there did not appear to be any difference between *St. Lucia Enterprises* and *St. Lucia Enterprises Ltd*, it was not clear that the ‘intended’ party was paid. The difference in names could also possibly be an indication of unreliability or forgery.<sup>376</sup> In fact, this case involved an obvious fraud, where no goods were shipped to the applicant and the beneficiary disappeared.<sup>377</sup>

In the above case, the company name missed a phrase and such missing affected the meaning as it could refer to a different company to the one nominated under the credit. Besides that, as mentioned earlier, if the presentation of the required documents necessitated further inquiry, then it should be considered as a discrepancy. Hence, such differences in the name constitute a discrepancy, not a typographical error and the bank was justified in dishonouring the confirming bank. Moreover, on the basis of ISBP, any misspellings that affect the meanings of the words will be considered as discrepant. For instance, presentation of documents bearing

---

<sup>375</sup> International Standard Banking Practice for the Examination of Documents under Documentary Credits, 2007 Revision for UCP 600, ICC Publication No. 681E (ICC 2007); ISBP 2013, ICC Publication No. 745E.

<sup>376</sup> *Bank of Coch*<sup>in</sup> (n 37) 1541.

<sup>377</sup> *ibid* 1534-1536.

the beneficiary's name as '*Pan Associated **Pte** Ltd*' as opposed to '*Pan Associated Ltd*' in the letter of credit will justify the dishonour.<sup>378</sup>

So far then, in letters of credit transactions, matters of names and designation of a requisite party will continue to constitute a matter of critical importance. Consequently, if a misspelling of such appellation would ostensibly create doubt for the bank examiner, then the bank is entitled to reject the document in which the error is contained.

Turning to *Hanil Bank*, the name specified in the credit was *Sung **Jin** Electronics*, but the bill of lading misspelled the name as *Sung **Jun** Electronics* (Jun instead of Jin). The bank dishonoured the credit for this mistake, and the court upheld this decision. The court commented that **descriptions must be as stated in the credit**,<sup>379</sup> which was not in this case. Therefore, by applying Article 13(a) UCP 500 (which were in force at that time), the misspelled name was considered a discrepancy.<sup>380</sup>

However, in a similar case, *South Korean Hyosung Corp v China Everbright Bank*,<sup>381</sup> the written name of the issuer was **BNAK** instead of **BANK**. For the examiner, the order of letter (**A**) is different; consequently, the typed name is wrong and the credit was dishonoured. However, for the court, '**BNAK**' was incorrectly typed, which is an obvious typographical error.<sup>382</sup>

The two previous cases are similar as the misspelling in the name is only in one letter: '*Jun*' instead of '*Jin*' and '*BNAK*' instead of '*BANK*'. Yet, they are not the same. The error in *Hanil Bank* did mean another party than the credit stipulated, while in *South Korean Hyosung*, such an error did not affect the meaning and would not mislead the examiner. When I asked Jordanian experts about such errors, they stated that 'when opening the credit, the applicant

---

<sup>378</sup> *United Bank* (n 253) 65.

<sup>379</sup> *Hanil Bank* (n 37) 5.

<sup>380</sup> *ibid* 4.

<sup>381</sup> [2003] Civil Judgement, Min Jing Zhong Zi Bo. 069; Fujian High People's Court [China].

<sup>382</sup> *Ibid*; Fujian High People's Court [China], Abstracted by JIN Saibo and YANG Wantao of Zhonglun Law Firm, at 2006 Annual Survey of Letter of Credit Law & Practice Handbook, edited by James E. Byrne and Christopher S. Byrnes, The Institute of International Banking Law & Practice, Inc, 445.

fills the application and inserts specific requirements and terms. Therefore, the examiner must comply with them. Hence, if there is inconsistency in the presented names and the credit, the examiner will reject the presentation on this ground, as there is conflict with the credit terms.<sup>383</sup> However, if there are any missing letters in the presented name, the examiner will accept such presentation. The experts believed that missing letters will not affect the meaning as it would not affect identification of the names.<sup>384</sup> The same justification is followed in the case where the presented name included extra letters. In short, all interviewed Jordanian banks confirmed that they will only consider the misnomer as a discrepancy either if the whole name was missed or different.<sup>385</sup> However, there is an exception if that name was stipulated in the credit terms as a condition. In this case, the name must comply strictly with the name drawn in the credit.<sup>386</sup> Both courts' judgments are logical and in accordance with ISBP. It is noteworthy that the criticism of the *Hanil* case is that the misnomer was committed by the issuing bank and not the beneficiary; therefore, such an error need not be considered as a discrepancy.<sup>387</sup> It is correct, in essence, that the misnomer was not by the beneficiary; nonetheless, because such payment is based on a specific duty upon the beneficiary when presenting documents, it is their own responsibility to check their conformity before confirming the credit or presenting the documents. Basically, before confirming the credit, the seller will have an opportunity to check or amend the credit terms as they are in a better position than other involved parties to correct any mistake before presentation.<sup>388</sup> Therefore, such misnomers cannot be at the risk of the issuer as the beneficiary has not lost their right to check the conformity of the documents; thus, it is their responsibility to bear the risk of such an error.

Contrary in the Chinese case, *BANK* instead of *BNAK* cannot be discrepant, it is simply a

---

<sup>383</sup> Interview with Jordanian Banks (Amman, Jordan on 7<sup>th</sup> – 11<sup>th</sup> January 2018).

<sup>384</sup> *ibid.*

<sup>385</sup> *ibid.*

<sup>386</sup> *ibid.*, on 7<sup>th</sup> January 2018.

<sup>387</sup> *Hanil Bank* (n 37) 4-5.

<sup>388</sup> *Mutual Export Corporation v Westpac Banking Corporation*, 983 F.2d 420, 423 (2<sup>nd</sup> Cir, 1993).

typographical error. According to ISBP, such misspelling is similar to the case of ‘modle’ instead of ‘model’, which would not make the document discrepant. That is to say, any reasonable examiner will notice that the miss-ordering of the letters is a typographical error only and, as such, is not misleading. In this respect, such an error shall not be regarded as a discrepancy, while in contrast, the examiner could not expect that *Sung Jun* is the same as *Sung Jin*. The misspelled ‘Jin’ could refer to a different party than the one designated in the credit, similar to (BONG CHUN) instead of (BONG CHEON).<sup>389</sup> Regrettably, *PT Bank Negara Indonesia* failed to present a complying presentation. Therefore, this misspelling in the name of the applicant is a proper ground for the bank to dishonour the credit. Hence, it should be considered as a discrepancy because it is a crucial error in the transaction and would lead to confusion.

Another example took place in the previous Chinese case, where the credit stipulated the manufacturer’s name as ‘KOMHO CHEMICALS CO., LTD.’ but the presented packing bill stated it as ‘KUMHO CHEMICALS, INC.’ (difference in letters and abbreviations in addition to an omitted phrase ‘CO.’). Regarding this error, the issuing bank refused to honour the credit due to non-compliance, which the court agreed with and justified its judgment by applying ISBP. It stated that the name of the manufacturer might lead to another meaning, which would confuse the examiner.<sup>390</sup>

It is easy to say that the courts’ judgments are convincing. As observed, if the error could not mislead a reasonable examiner when checking the defective paper in accordance with the credit requirements for the said paper or data, then such error should be disregarded. In the above cases, the stipulated names in the presented documents were not compliant – they could refer to different party. In one opinion for the Banking Commission, the surname of the ‘Attention Party’ in an Airway bill spelt as ‘*Chai*’ instead of ‘*Chan*’ (letter I instead of letter N) was

---

<sup>389</sup> South Korea Supreme Court, 2005 da 63227, 2006, cited via Kang (n 107) 97.

<sup>390</sup> *South Korean Hyosung Corp* (n 381) 446-447.

discrepant as it could have meant someone else.<sup>391</sup> The point of this is, any error that could misled the examiner is discrepant; therefore, the bank is justified to refuse the presentation.

A recent case in US regarding different errors in the name is *Piaggio & C.S.p.A. v Bank of Nova Scotia*.<sup>392</sup> The facts of this interesting case are as follows:

Bank of Nova Scotia (BNS) issued three letters of credit on behalf of its customer, Canadian Scooter Corp. (*Scooter*). Scooter's applications for the credits informed BNS to issue the credits in the following names:

for the first credit — 'Piaggio and C.S.P.A./**Aprilia**,'

for the second credit — 'Piaggio and **c.s.p.a. (Aprilia)**,' and

for the third credit — '**PIAGGIO AND C.S.PA./APRILIA**.'

On presentation, the name in the presented documents was '*Piaggio & C.S.p.A*, which was exactly the name of the beneficiary. The presentation was rejected and considered as non-compliant. In the hearings, the court upheld the bank's decision regarding other errors such as missing the term 'Aprilia' in the presented names, and stated that 'letter of credit transactions, documents are of paramount importance'.<sup>393</sup> However, it ruled with regard to the abbreviation in the original name of the company (C.S.p.A) that the other presented names in the three documents were not discrepancies.<sup>394</sup>

In such a case, the controversial issue was in using different abbreviations regarding the company name, which was in the phrase (*and*), using capital or lower case letters, and sometimes both, in the in the terms '*C.S.p.A.*' and '*Piaggio*' and by adding the term 'Aprilia'. Again, when dealing with companies, it is more appropriate to examine their name strictly, where each company will have its own trading name, which will not be used for other

<sup>391</sup> ICC Banking Commission, Collected Opinions 1995-2001, R 209 (Ref. 55); cited via Bridge (n 1) [23-131].

<sup>392</sup> 2011 ONSC 2567 Carswell Ont 5698 (Ont. S.C.J., 2012); cited via John Dolan, 'Documentary Compliance in Letter of Credit Law: What's in a Name, and What Need for an Original? Case Notes and Comments [*Piaggio & C.S.p.A. v. Bank of Nova Scotia*]' (2011) 28 Banking and Finance Law Review 121.

<sup>393</sup> *ibid* 123.

<sup>394</sup> *ibid* 122.



companies. The omission of the term '*Aprilia*' could certainly change the meaning and refer to a different party, even though the original name included neither the term (*Aprilia*) nor any slash or parentheses.<sup>395</sup> Therefore, it is justified to consider it as ground to reject the presentation. It is affirmed from court's judgment that the beneficiary must follow the credit terms strictly in order to gain a legitimate right of payment. As noticed, the presented documents did identify the original name of the beneficiary but the reason for the rejection was missing some of the terms stipulated under the credit terms in regard to the name.

In contrast, the issue of other abbreviations, such as the term '*and*', is no longer a problem. The ISBP relaxed the line of examination regarding them and accepted using similar abbreviations as long as they have the same meanings. However, using uppercase or lowercase in the name, in my judgment, is not detrimental to the right of payment as long as there are no other errors and the name is typed correctly.

Notably, the court's judgment is suitable with the applicable rules. Admittedly, UCP 600 and the ISBP make it clear that documents need to be compliant with the credit terms. Moreover, they need to clearly define the parties involved when referring to the same underlying transaction. These two sources have always ensured that there is no room for documents that are almost the same, or that will do just as well.<sup>396</sup>

As affirmed many times, it is of paramount importance that documents in such international transactions should be compliant with the credit terms exactly as required. Nevertheless, if the variance between the documents specified and the documents submitted is not fatal, the bank should accept the presentation. However, if there is a possibility that the documents could mislead the bank, it should not honour the credit.<sup>397</sup>

---

<sup>395</sup> *Piaggio* (n 392) 122.

<sup>396</sup> *Equitable Trust* (n 51) 52.

<sup>397</sup> *Flagship Cruises* (n 108).

In summary, errors in names are very common and are a sensitive matter under documentary credits. In this part, the mentioned cases showed the variety of errors that an examining bank might be confronted with when examining the presented documents. These errors can relate to missing letters or phrases, extra letters or phrases, different spellings or sometimes an entirely omitted name.<sup>398</sup> In all cases, the banks took the same view and dealt strictly with these errors, resulting in them being considered as discrepancies. In contrast, the courts, as some cases explained, disagreed with the banks and reversed their decisions where such errors were not considered as discrepancies but only as typographical errors.

The fact that such international transactions include foreign languages increases the possibility of these errors appearing in the required documents. These names refer to individuals and, sometimes, companies, that the banker might not be familiar with. Moreover, the required documents, in general, are issued from third parties, who may not be an expert; therefore, the possibility of errors in drafting names is possible. In my view, the general rule for examiners is to apply the strict standard if there are specific conditions stipulated in the credit regarding names. Then, apply their own judgement if this error is satisfied by the whole presentation or not in order to evaluate whether it should be considered as a genuine ground for rejection.

As observed, such methods of payment rely heavily upon presenting different documents in order to claim payment. Among these documents is a bill of lading, which is a document of title that will provide the holder with the right of possession over the goods mentioned in it.<sup>399</sup> This document was described as ‘a key which in the hands of a rightful owner is intended to unlock the door of the warehouse, floating or fixed, in which the goods may chance to be.’<sup>400</sup> Consequently, due to its special legal value as a ‘guarantee right’ for possession over the goods,

---

<sup>398</sup> see *Seaconsar Far East* (n 48).

<sup>399</sup> Charles Debattisa, *Bills of Lading in Export Trade* (3<sup>rd</sup> Revised edition, Tottel Publishing 2009) 27.

<sup>400</sup> *JH Rayner* (n 96) 39.

this thesis poses a solution in the case of errors in names that might occur in a bill of lading document, which is:

**Hypothesis:** ‘if the applicant name presented on the bill of lading is not in compliance with the designated name on the credit, the bank is bound to refuse the presentation and dishonour the credit’.

Such a ‘strict’ standard, which was applied in some cases regarding errors in bills of lading, will be favoured due to the sensitive position that such a document can provide its holder. Therefore, any type of error in regard to the name, such as a missing name, missing letter, extra letter or different name, that appears in the bill of lading will be considered as a discrepancy. Consequently, the name under the bill of lading must be a ‘mirror image’ with that specified on the credit. However, regarding other documents required under the credit, the situation is different, and bank must not treat them in the same manner as a bill of lading. For instance, under Article 18(a)(ii), the commercial invoice must be issued in the name of the applicant; therefore, if the written name was wholly different or missed, it is a discrepancy by virtue of the strict condition under the said article. However, if there was misnomer in the commercial invoice (e.g. different letters, missing letters, extra letters), will this error be a discrepancy?

Conversely, from the UCP 600 language, other documents, such as a transport document or insurance document, must include a name.<sup>401</sup> This name might be the name of the carrier or their agent. Therefore, if the name is missed or wholly different, such an error is a discrepancy. However, if there was misnomer (e.g. a different letter, missing letter, extra letter), will this error be a discrepancy?

Sometimes, these documents are the only ‘evidence’ of the underlying transaction; therefore, the research proposes a guideline for the examiner regarding the types of errors that might occur in them. This proposed guideline is the outcome of the interpretation of both rules, UCP

---

<sup>401</sup> Articles 19(a), 20(a), 21(a), 22(a), 23(a), 24(a), 25(a), 28.

and ISBP, and the implementation of the ‘substantial’ standard for the compliance principle that was applied by courts in some cases to justify its judgment.

**First:** when the examiner encounters an error, they should ask whether there is a specific condition stipulated under the credit in regard to defective documents.

If there is **a condition**, the bank must obey the credit and consider it as a **discrepancy**.

However, if there is no specific requirement/condition, the examiner will follow another route, as follows:

**Second:** when reading all the presented documents together, was such an error remedied?<sup>402</sup>

Did the presented documents identify the required name?

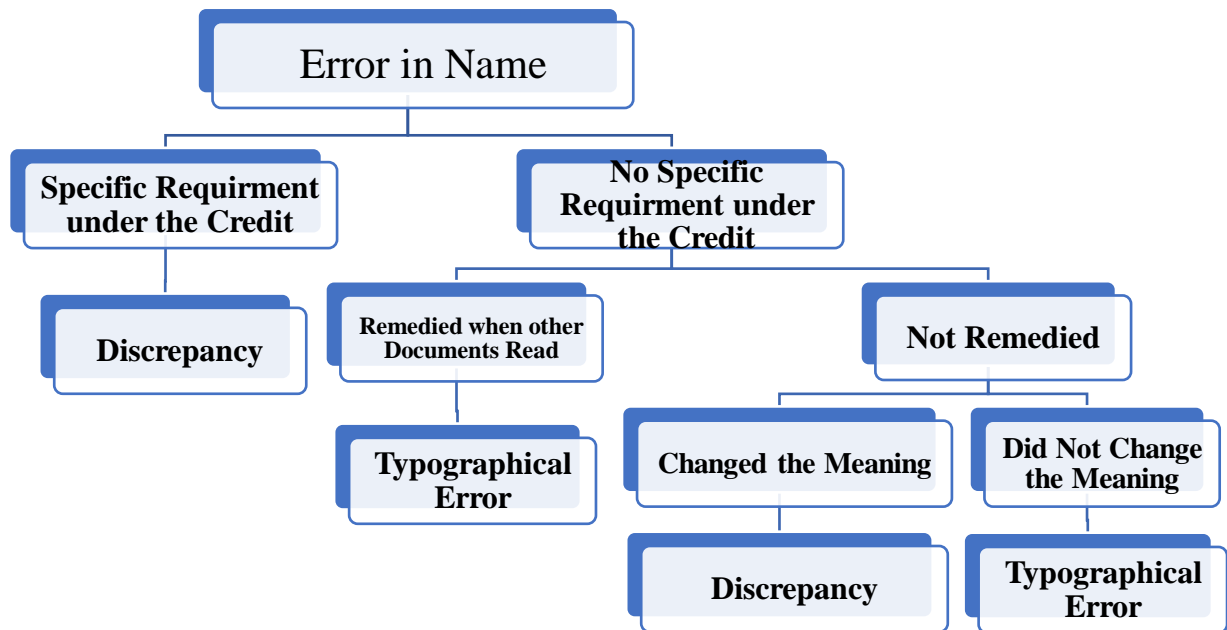
If the error is **remedied** it *will not be considered a discrepancy*; thus, the presentation **complies with the credit** and **the error will be considered as a typographical error only**.

However, if the error **was not remedied**, the examiner will have to ask **whether such an error changes the meaning**. If the meaning **is changed, where it might refer to a party other than as specified in the credit**, it is **a discrepancy**, otherwise, it **will be considered as a typographical error only**.

See below a guideline for the examiner in the case of any error in the names, except the applicant’s name, under a bill of lading:

---

<sup>402</sup> Article 14.



\*Figure 2: Error in Name

Generally speaking, the suggested guidelines might harm the beneficiary more than the other parties involved, but in order to affirm the equity and justice and maintain the letter of credit mechanism, the beneficiary under the credit is obliged to present compliant documents in order to grant the payment. Therefore, it will be their duty to check the compliance of the documents, where he or she is the only party who can contact the issuing party who is responsible for issuing the required documents; hence, in the case of any error appearing, there will be time to remedy the issue earlier.

### 3.5 Error in description of the goods

One of the most important elements in the credit terms is the description of the goods. These goods are the core of the main transaction, ultimately representing the legitimate requirement for the payment of the credit. Therefore, the description of these goods is important under such a contract, especially from the applicant's perspective. Nonetheless, many cases highlighted different types of errors in this element, which banks and courts argued as to whether they should be considered as a ground to dishonour the credit or were typographical errors. This section will discuss the issue of defective descriptions in the presented documents and is split into three sections: *differences in the description*, *missing description* and *extra description*.

#### 3.5.1 Differences in the description

The first type of error is where there is inconsistency in the description of the goods. In *JH Rayner*,<sup>403</sup> the bank rejected an invoice that showed the goods description as 'Machine Shelled groundnuts kernels' with an additional mark of 'O.T.C/C.R. S/Aarhus'. In contrast, the credit stipulated the goods description as 'Coromandel groundnuts'. This description was not similar to the stipulated description in the credit from the examiner's point of view, which justified the dishonour of the credit. Notably, the court stated that 'machine-shelled groundnut kernels' were the same commodity as 'Coromandel groundnuts' and would be universally understood to be so in the trade in London.<sup>404</sup> Further, the marginal mark 'C.R.S.' was short for 'Coros' or 'Coromandels' and would be so understood in the trade.<sup>405</sup> Nonetheless, the court agreed with the bank's decision.

This benchmark case showed a proper example regarding the difference of the goods description in the credit. Using a similar trade description is not accepted in such transactions

---

<sup>403</sup> *JH Rayner* (n 96).

<sup>404</sup> *ibid* 38.

<sup>405</sup> *ibid* 38.

that include a party who is not familiar with the trade customs. Despite the fact that these two names are well-known in the specific business area, it is not the examiner's responsibility to know these terms.<sup>406</sup>

Such a judgment is fashioned to emphasise one of the documentary credit principles – that banks should not be involved in such transactions due to their lack of knowledge and expertise in the trade sector. For instance, claiming that 'Fishmeal was a sufficiently generic description to identity in all the documents other than an invoice' is not accepted.<sup>407</sup> If the credit asked for 'Fish Full Meal' but it was described in the documents as 'Fishmeal', the documents would be rejected due to their inconsistency with the credit terms.<sup>408</sup> Indeed, it is quite impossible to suggest that the examiner should have knowledge of the customs of the international commercial system.<sup>409</sup> That is to say, if the compliance of the documents is based on specialist trade knowledge, the documents must be considered as non-complaint.

Similarly, in *Courtaulds North America Inc v North Carolina National Bank*,<sup>410</sup> the description of the goods in the presented documents was not the same as the credit. In this case, the plaintiffs contracted with the seller to purchase yarn. An irrevocable letter of credit was established in favour of the seller calling for documents, including a commercial invoice showing '100% Acrylic Yarn'. However, the submitted documents showed the description as 'Imported Acrylic Yarn', which was refused by the bank and considered it as a discrepancy. However, the trial court disagreed on the ground that the presented invoice was accompanied with a packing list that specified the goods' description as stipulated under the credit.<sup>411</sup> On appeal, the court reversed the trial court's judgment and upheld the bank's decision on the ground that documents tendered under the credit did not strictly conform to the credit terms,

---

<sup>406</sup> *JH Rayner* (n 96) 39.

<sup>407</sup> *Soproma* (n 224) 371 & 389.

<sup>408</sup> *ibid* 390.

<sup>409</sup> *JH Rayner* (n 96) 41.

<sup>410</sup> 387 F. Supp. 92 (M.D.N.C., 1975); 528 F.2d 802 (4th Cir, 1975).

<sup>411</sup> *ibid* 97-101.

where the beneficiary needed to comply with the credit descriptions.<sup>412</sup> It ruled that a banker need not be conversant with the different trades involved in letters of credit transactions.<sup>413</sup> Even though the tendered invoices were accompanied by packing lists, which disclosed on their faces that the packages contained ‘Cartons Marked: -100% Acrylic’, the court considered such documents as non-compliant.<sup>414</sup> It held: ‘Free of ineptness in wording the letter of credit dictated that each invoice expresses on its face that it covered 100% acrylic yarn. Nothing less is shown to be tolerated in the trade. No substitution and no equivalent, through interpretation or logic, will serve’.<sup>415</sup>

What is important in this case is that this difference occurred in the commercial invoice, which must reflect the description as exactly stipulated in the credit by virtue of Article 18(c) in the UCP. Despite the fact that many documents are required under the letters of credit mechanism, the only documents that are required to relate to the goods under UCP 600 are the commercial invoice and the certificate of origin. The general rule under Article 14(e) in regard to the goods’ description is that a general description in other documents will be sufficient and must not be in conflict with the credit. Data need not be a ‘mirror image’ as required in the credit. The only exception is the commercial invoice, which must be a ‘mirror image’ by virtue of Article 18(c). The language of this article asks for an exact description of the goods by using the words ‘*must correspond*’.

The reason for such an exception is due to the importance of such a document, which acts as an accounting document and is provided directly to the buyer by the seller.<sup>416</sup> Such a document is described as a ‘primary document used worldwide for customs identification, classification, duty/tax assessment, and final approval of entry of the goods’.<sup>417</sup> It gives a complete description

---

<sup>412</sup> *Courtaulds North America* (n 410).

<sup>413</sup> *ibid.*

<sup>414</sup> *ibid.*

<sup>415</sup> *ibid.*

<sup>416</sup> *Youssef* (n 221) 31.

<sup>417</sup> *ibid* 31.



of the goods and their price, terms, currency of the transaction, the names and addresses of seller and buyer, the buyer's purchase order number or reference number for the transaction, and the tariff classification used by the buyer's country.<sup>418</sup> Notably, it is the only document that is prepared by the beneficiary.<sup>419</sup>

More importantly, the beneficiary, who is entitled to draw against a letter of credit, must strictly observe the terms under which the credit is to become available, and has no cause for action against a bank refusing to honour a draft where such terms are not complied with.<sup>420</sup> The appeal court took that view here and again emphasised the importance of strict compliance between the presented documents and the credit terms. Although the description in the invoice was 'Imported Acrylic Yarn', when read together with the packing list stating '100% Acrylic Yarn', it referred to the same goods under the credit.<sup>421</sup> This difference in the goods description is non-compliant from the examiner's point of view, even if '100% Acrylic Yarn' is similar to 'Imported Acrylic Yarn'.

An important fact must be emphasised: banks examine documents on their face and in accordance with the credit terms. Once they find the presentation is non-complaint, they will reject such a presentation. However, due to the explicit condition under Article 18, the goods' description must be as stipulated in the credit, meaning the compliance here needs to be in the verbalisation as well as the amount. Therefore, the rejection is accepted. In my opinion, if the error here occurs in documents other than the commercial invoice, the court's judgment might be different.

This scenario appears again in Italy, wherein the *Adriacommerce Koper v Credito Italiano* case, the bank rejected the submission of the documents due to a difference in the description of the goods, in addition to other default procedures by the beneficiary such as late presentation

---

<sup>418</sup> Youssef (n 221) 31.

<sup>419</sup> James Byrne, *International Letter of Credit Law and Practice* (2016 edition, Thomson West 2016) 341.

<sup>420</sup> *Courtaulds North America* (n 410) 104.

<sup>421</sup> *ibid* 99.

and not obeying the conditions required by the applicant. In this case, the commercial invoice showed the description as ‘cow tongue’ (*lingua bovina*), while in contrast, the credit asked for ‘cow meat’ (*carne bovina*). However, the courts in all three stages – Lower Court, Court of Appeal and the Court of Cassation – ruled in favour of the bank and rejected the claimant’s argument. The Court of Cassation stated that the description was inconsistent with the credit.<sup>422</sup> In this case, the differences in the description of the goods occurred in the commercial invoice. Therefore, as a general rule in regard to the commercial invoice, the description must be in strict compliance. In this respect, Jordanian bank experts emphasised that any error that might occur in the commercial invoice will be considered a major discrepancy for the examiner, as commercial invoice must indicate the description of the goods as required in the credit. This special document does not tolerate any type of errors; therefore, it will be refused.<sup>423</sup> According to Article 14(e), the description in documents other than the invoice need not be in conflict with their description under the credit. Yet, the rules do not indicate the situation if the description is in conflict between the presented documents.<sup>424</sup> On this occasion, there is no reason why this inconsistency can be considered as a complying document.<sup>425</sup> From Article 14(d) language, ‘Data in a document ... must not conflict with, data in that document, any other stipulated document or the credit’, meaning the description need not be in conflict with other documents, if the description between the two documents is in conflict, it will be a questionable presentation.

In *Banque de l’Indochine et de Suez* case, the required documents under the credit were not in compliance with the credit’s terms. In fact, the description of the goods under the commercial invoice was not as required. The credit, however, required these goods as: ‘Covering shipment: “2000 (two thousand) metric tons up to 5 percent more or less EEC white crystal sugar category

---

<sup>422</sup> Tribunale di Brescia (1973), Corte d’Appello di Brescia (1975), Corte di Cassazione (1979); cited via Arban (n 371) 91.

<sup>423</sup> Interview with Jordanian Banks (Amman, Jordan on 9<sup>th</sup> January 2018).

<sup>424</sup> Bridge (n 1) [23-141].

<sup>425</sup> *ibid* [23-141].

no.2 minimum polarisation 99.8 degrees... and freight liner out of Djibouti packed in new polythene lined jute bags of 50 kgs net as per your telex dated 1/7/81”.’

Although the presented commercial invoice described the goods as ‘40,000 polythene lined unmarked jute bags of white crystal sugar weighing 2,018.6 metric tons gross’, one of the certificates of origin and one of the quality certificates referred to the goods as 1,009 gross 1,000 metric tons nets of sugar of the correct description. The court upheld the bank’s decision and noted that the presentation of these documents was not in compliance with the description of goods under the credit, as they had not been identified ‘unequivocally’.<sup>426</sup>

The fact that Article 14(d) relaxed the degree of compliance between data means a lesser degree of ‘mirror image’ is accepted. However, in the above case, any reasonable examiner would notice that the description in the submitted documents partially identified the goods and their status only. Such a statement is not a genuine description, it is only a narrative description that was not in description language and was far from similarity with the required description under the credit. The point here is that there is a real distinction between an identification of the goods and a description of those goods.<sup>427</sup> The court held that the bank did not argue about the commercial invoice, the real matter was about the linkage between other presented documents and the description of the goods.<sup>428</sup> Through reading the presentation, it appears that the shipped goods might have come from two different destinations.<sup>429</sup>

Simply, facial discrepancies can be discovered with ease without the need for the bank to go beyond the documents.<sup>430</sup> Consequently, the goods’ description in this English case was not identical with the one specified in the credit and did not appear to have any degree of similarity; therefore, such an error is a valid discrepancy.

Nevertheless, some cases demonstrated that there are differences in the description, yet the

---

<sup>426</sup> *Banque de l’Indochine et de Suez* (n 265) 734.

<sup>427</sup> *ibid* 732.

<sup>428</sup> *ibid* 731.

<sup>429</sup> *ibid* 731.

<sup>430</sup> *Ren* (n 59) 15.

bank disregarded them and authorised the payment under the credit. For instance, in *Bank Melli Iran* case, the credit was issued in regard to the payment of ‘100 New Chevrolet Trucks’. However, the payment was authorised against the required documents which referred to the Chevrolet trucks as ‘in New Condition’. The bank did not consider the differences in the goods’ description as a fatal error and honoured the credit. Such payment was rejected by the court, which held that ‘according to the doctrine of strict compliance the goods description in the commercial invoice “in new condition” was not the same as “new”, and, therefore, the documents against which the payment was made were not in accordance with the issuing bank’s mandate’.<sup>431</sup>

Despite the fact that reasonable duty of care is not mentioned in the new version of the rules, banks are bound by this duty. This duty means ‘the degree of care that would be exercised in the circumstances by a bank competent to handle documentary credit transactions, that will be determined by reference to the facts of the case and expert evidence’.<sup>432</sup> That is to say, such duty is based on a diligent manner and professional attitude. Therefore, in the above case, the bank did wrong when authorising the payment, where the term ‘*In new condition*’ might have, implicitly, a different trade meaning to the term ‘*new*’.

Without doubt, banks are not expected to be aware of the sector, yet, in order not to bear the risk, the bank should reject such a presentation, especially when this questionable description appears in the presented documents and is in conflict with the stipulated description under the credit. Although the new rules accept a general description under Article 14(e), the description should not be in conflict. Usually, if the presented documents were ambiguous, the bank examiner should reject the payment, otherwise it will lose the right of reimbursement by the applicant.<sup>433</sup> In the case of any vague details, the examiner should ask for clarification; if no

---

<sup>431</sup> *Bank Melli Iran* (n 45).

<sup>432</sup> Michael Isaacs and Michael Barnett, ‘International Trade Finance - Letters of Credit, UCP 600 and Examination of Documents’ (2007) 22 *Journal of International Banking Law and Regulation* 660, 662.

<sup>433</sup> see *Commercial Banking* (n 128).

clarification is provided, it will be considered as a discrepancy. Consequently, for these reasons the court's decision in considering such differences as a discrepancy is correct.

In a similar Italian case, the documentation contained inconsistent descriptions but the bank disregarded them and honoured the credit. The credit was issued for alcohol content of Marsala wine but the certificate did not match the credit. The beneficiary presented a certificate showing '*Marsala wine having a general alcohol content of seventeen percent*' while the presented document included '*an alcohol content of seventeen percent "al piccolo Malligand"*'. The courts in the three stages – Lower Court, Court of Appeal and the Court of Cassation – ruled in favour the bank and rejected the claimant's argument. The courts added that the 'documents are not identical, but a "mirror image" is not required'.<sup>434</sup>

Usually, the issue of a discrepancy in the document is a matter of substance rather than linguistics. The bank's and the courts' judgment in the above case is correct; any diligent examiner when reading both descriptions could understand that they are similar. The description here was through a general language that did not change the meaning nor the category of the product. In this regard, one expert commented that a 'commercial invoice must include all the description as specifically required in the credit but in other documents, a general description will be accepted as long as it will not affect the nature, classification or category of the goods'.<sup>435</sup> The general description required under Article 14(e) is acceptable as long as the wording still functions as a description of the goods.<sup>436</sup> In one view for the DOCDEX panel 'stainless steel' is acceptable if the credit required 'prime quality stainless steel coil slitted edge'.<sup>437</sup>

Since only the bank's duty is limited to what is within the capacity of the average diligent bank employee, they are not required to demonstrate specific knowledge in a technical field.<sup>438</sup> In

---

<sup>434</sup> *Credito Italiano v Banco di Sicilia*, Corte di Appello di Palermo (1951), Corte di Cassazione (1953); cited via Arban (n 371) 86-87.

<sup>435</sup> Interview with Jordanian Bank (Amman, Jordan on 10<sup>th</sup> January 2018).

<sup>436</sup> Bridge (n 1) [23-140e].

<sup>437</sup> ICC Banking Commission (n 157) Decision No. 292.

<sup>438</sup> *Credito Italiano* (n 434) 404; cited via Arban (n 371) 87.

fact, examining the documents needs to be for ‘inter-documentary consistency’, which means that the tendered documents do not contradict one another and should be most closely linked in the sense that they identify the same goods.<sup>439</sup> These tendered documents did refer, indeed, to the same goods but through a different pattern; consequently, they were compliant with the credit’s terms.

### ***3.5.2 Missing description***

The second form of errors that might occur is when the description includes a ‘missing description’. In *Guaranty Trust of New York*, the bank considered the missing word in the goods description as a discrepancy and, as a result, rejected the presentation. In this case, the description of the goods under the credit was ‘**Manila Coco-Nut Oil**’, while in contrast, the bill of lading showed the description as ‘**Coco-Nut Oil**’ without the word ‘Manila’. In the hearings, the Court of Appeal reversed the bank’s decision and stated that ‘when reading all the presented documents together the missing word will be remedied, therefore there is no discrepancy’.<sup>440</sup> This judgment is compliant with Article 14 of the new rules where the omission was remedied in another presented document. In the above case, the bill of lading and certificate of origin together complied with the letter of credit regarding the omission of the word ‘Manila’.<sup>441</sup> The point of this article, that the duty of the bank’s examiner when examining the tendered documents is to find the link in them regarding the data. Such ‘linkage’ will be fulfilled when these documents can be read together as if they were one document, which means that, as long as the tendered documents referred to the same transaction and the contracted goods, such an error should not be considered as a discrepancy.

---

<sup>439</sup> Mugasha (n 16) 130.

<sup>440</sup> *Guaranty Trust of New York* (n 45) 454.

<sup>441</sup> *ibid* 454.

In another similar case, the court took a different view and evaluated the error from another angle. The credit required an original and four copies of the commercial invoice for merchandise described as ‘**LEVI JEANS 501-0191, NEW, ORIGINALS, MADE IN USA LABELS**’. In presentation, the banks paid against an original invoice that included ‘**LEVI 501-0191, NEW, ORIGINALS, MADE IN USA LABELS**’ on one line, **with the word ‘JEANS’** typed right above the word ‘LEVI’. However, the copies of the invoice did not contain the word ‘JEANS’ at all. As a result, the applicant sued the bank for the wrongful honour. The court, reversed the bank’s decision and considered this matter as a discrepancy.

The court’s judgment was based on Article 41(c) UCP 400 at that time and held that: ‘this discrepancy was significant because a letter of credit transaction is intended to ensure receipt of the correct goods and therefore an exact description of the goods in the invoice is required. A mis-description of those goods – especially when a word as important as ‘JEANS’ is left out – may signal a shipment of incorrect goods. Therefore, the applicant was right on this issue’.<sup>442</sup> From the court’s opinion, the credit asked for four copies of the commercial invoice and, as mentioned earlier, due to the important role of such document, the description of the goods needed to be strictly the same as specified in the credit. More importantly, any reasonable examiner would notice that ‘LEVI’ is a famous company in manufacture sector. The company produces different types of commodities such as jeans and shirts. Therefore, the omission of the word ‘JEANS’ in the submitted document is a material error; hence, the bank should reject such documents because it is a discrepancy.

Normally, if the credit asked for specific information and it was missing, it would be considered as a discrepancy. For instance, the Supreme Court of Hong Kong held that ‘a credit requiring shipment of “375 bales each containing 400 pieces New Indian Heavyceee Bags size 29’x 43’, weight 2%P1/2%P lbs overhead sewn green centre stripe”’ was not satisfied by a bill of lading

---

<sup>442</sup> *Rudy T. Oei and M.J.F.M. Kools, d/b/a Kools de Visser v Citibank, N.A. and Citibank International*, 957 F. Supp. 492, 505 (S.D.N.Y., 1997).

stipulating “375 bales gunny bags””.<sup>443</sup> In another case, the credit covered the shipment of ‘silk ladies’ blouses FOB Shanghai’. The commercial invoice, however, did not contain the trade term ‘FOB Shanghai’, which was considered as a ground for the rejection. In one inquiry to the Banking Commission of the ICC whether a trade term can be considered as part of the goods description, it stated that ‘the trade term mutually agreed upon by the parties is often placed in the field “Goods description” of the letter of credit; therefore, it is regarded as part of the description. In this case, the commercial invoice must contain the trade term’.<sup>444</sup>

In this regard, the majority of Jordanian bank experts agreed that in case of missing part of the description, they will accept the documents and consider them as in compliance in spite of such an error. From their point of view, the only document that must state the description as exactly specified in the credit is the commercial invoice. In contrast, it is not necessary for the description in other documents to be the same. Notably, none of the interviewers referred to Article 14(d) from UCP 600 when examining the documents, despite the fact that they claimed to hold an expert certificate for examining the documents issued by the ICC.<sup>445</sup>

However, despite the fact that errors in goods’ descriptions are a sensitive and controversial matter under documentary credits, the applicant will waive them most of the time. The justification for such an action is that the ‘applicant is not interested in documents; what matters is the goods themselves’.<sup>446</sup>

### 3.5.3 *Extra description*

We now turn to the last scenario of errors in the description of the goods, which is ‘extra description’ in the presented documents. In *Glencore International*, the bank refused to honour the credit due to differences in the description of goods. The tendered documents showed the

---

<sup>443</sup> *Netherlands Trading Society v Wayne and Haylitt Co*, (1952) 36 Hong Kong LR 109.

<sup>444</sup> Gary Collyer, *Opinions of the ICC Banking Commission 1995-1996: Responses to Queries on UCP 400, UCP 500 and URC 322* (ICC Publishing S.A. 1997) R.237.

<sup>445</sup> Interview with Jordanian Banks (Amman, Jordan on 8<sup>th</sup> – 11<sup>th</sup> January 2018).

<sup>446</sup> *ibid* on 7<sup>th</sup> – 11<sup>th</sup> January 2018.



part of the description as ‘any western brand – Indonesia (Inalum Brand)’, instead of ‘any western brand’ as required. The first court – the Commercial Court – upheld the decision and stated that the additional words ‘Indonesia (Inalum Brand)’ could have a special trade meaning that the bank should not be expected to be aware of, and therefore, the invoice failed to comply with the terms of the letter of credit; hence, the bank was entitled to reject.<sup>447</sup> On appeal, the court disagreed with the first court’s decision and considered these extra words as aiming to determine the origin of the goods, where they give a broad meaning.<sup>448</sup> It believed that the examiner should not go beyond the meaning of the data because they are not expert; there was no need for any further inquiry and therefore, such differences would not bind the bank to dishonour the credit.<sup>449</sup>

Here, the Court of Appeal rejected the bank’s argument on the basis that the description in the commercial invoice fell within the broad generic nature of the description of the credit. Although the description in the commercial invoice was more specific than the description in the credit itself, this was accepted because it fell within the broad nature of the description in the credit. So, even with a commercial invoice where the test is stricter, it could be argued that there is still no need for a mirror image so long as the description falls within the broad nature of the description in the credit. That is to say, despite Article 18 requiring a mirror image under the commercial invoice, in this case there was no harm in the extra words ‘Indonesia (Inalum Brand)’. These words had a geographical meaning, where it merely qualifies the description.

In *Sunlight Distribution Inc v Bank of Communications*,<sup>450</sup> the presented document included an extra phrase in the description, but the court took a different view. In this case, a letter of credit was issued for sale of: ‘MOTOROLA 8900X-2 (ETACS) Portable Radio Telephone, 2600 UNITS’. However, the bank rejected payment to the beneficiary due to the wrong

---

<sup>447</sup> *Glencore International* (n 28) 101.

<sup>448</sup> *ibid* 120.

<sup>449</sup> *ibid* 121.

<sup>450</sup> WL 46636 (SD NY, 1995).

description of goods in the commercial invoice which had an extra prefix of ‘S34 10A’ as well as additional descriptions including ‘SNN404A Battery Black HICAP,’ ‘SNN4216A Programming Battery For 8900X-2’ and ‘SNN4216A BATT TEST A/P SAM’. The court ruled in favour of the issuing bank subject to Article 41(c) UCP 400, which emphasised the necessity of compliance in the commercial invoice.<sup>451</sup>

As observed, both cases included an extra description of the shipped goods and both banks took the same view, rejecting the presentation. In contrast, one court agreed<sup>452</sup> and one disagreed.<sup>453</sup> Although these extra details might be useful for both parties (i.e. the buyer and the seller) in the trade sector, it would be a questionable subject from the examiner’s point of view. Initially, we can say that the extra term ‘Indonesia (Inalum Brand)’ in the *Glencore* case would not legitimate the examiner’s rejection of the presented documents. This extra description did not affect the meaning or the category of the goods. However, it is acceptable if the commercial invoice includes additional description where there is no requirement under the rules that the description in the said document be limited to the description under the credit.<sup>454</sup> That is to say, this inclusion of extra information did not create any inconsistency. It could not, on any possible reading of the documents, have been intended to indicate that the goods did not, or might not, fall within the broad description found in the credit.

Moreover, the term ‘Any’ would open the possibility of importing the required goods from any western region, as it seems to be a general condition that can be interpreted in many ways. This generality is the applicant's responsibility, not the issuer’s. Usually, when opening the credit, it is advisable to determine each part of the credit’s terms and conditions in order to prevent such confusion and complexity. Therefore, in my judgment, I cannot see that the presented

---

<sup>451</sup> *Sunlight Distribution* (n 450) 3.

<sup>452</sup> *ibid.*

<sup>453</sup> see *Glencore International* (n 28).

<sup>454</sup> Collected Opinions 1995-2001 (n 391) R 456 (Ref. 187).

documents referred to different goods; hence, it is not a discrepancy. As a result, the bank is in a position to honour the payment.

In contrast, the court's judgment in *Sunlight Distribution* case was logical. Evidently, the difference in the description was not only one word but instead, it was far from compliance with the description stipulated in the credit. In the new rules, the duty of presenting a compliant document is relaxed as it did not ask for an exact description but instead any similar description, an exception for the commercial invoice only. Notably, these differences were in the commercial invoice, which is supposed to demonstrate the description of the goods strictly as stipulated in the credit. It is an important principle in letters of credit law that description of the goods in the commercial invoice must correspond to the description in the credit itself. Conversely, it is acceptable if other documents merely describe shipments in general terms, yet not be inconsistent with the description of the goods in the credit. Therefore, in the above case, since the different description only appears in the commercial invoice, which is material, such an error is a discrepancy.

For some experts, any extra description in different documents, except a commercial invoice, will be considered as a discrepancy only if such description misleads the bank and changes the meaning or the category.<sup>455</sup> On the same approach, the DOCDEX panel believed that sometimes the goods' description might not match, as it might include an extra phrase that would provide the same function as the description; hence, they are not discrepancies and they are acceptable.<sup>456</sup> Therefore, the issue is, if the substance of these additional descriptions change the meaning, which indicates a different type or nature of the goods.<sup>457</sup> However, in two inquiries, the ICC explained its opinion about any extra phrase in the goods description, stating that it would be considered as a discrepancy and not compliant.<sup>458</sup> However, from

---

<sup>455</sup> Interview with Jordanian Banks (Amman, Jordan on 10<sup>th</sup> January 2018).

<sup>456</sup> ICC Banking Commission (n 157) Decision No. 292.

<sup>457</sup> ISBP 2013.

<sup>458</sup> Opinions (1980-1981) of the ICC Banking Commission (ICC Publication No.399, 1982) R80; Unpublished Opinions 1995–2004, R 584 (Ref.388); Bridge (n 1) [23-138].

Bridge's point of view, any additional phrase will not destroy or vitiate the credit, yet it will depend upon the circumstances of each particular case.<sup>459</sup>

Despite the fact that in the above cases the extra description was in the commercial invoice, the courts ruled differently. There is no doubt that a commercial invoice must correspond with the credit, but in *Glencore* case, the extra words are part of the description that identified the origin of the shipped goods. Using the term 'Any' cut the dispute. This linguistic phrase excludes the requirement for 'mirror image' under the commercial invoice.

In my opinion, extra details might not be harmful for the applicant. A description with extra details is always better than a description with missing details. These extra details will identify the shipped goods, which will provide more information for the applicant. It is not for the bank to consider the trade meaning of these extra details, but it should not always be considered as a ground for rejection. If the presentation was generally in essence in compliance with the credit terms but the description includes extra details, the examiner should reject them if they will require further inquiry. Examination of the documents is based on banking according to a diligent manner without the need to go beyond the documents. That is to say, some details can be understood generally, without the need for experts in the trade sector; for instance, 'western brand/Indonesia' is general information which, indeed, would not mislead the examiner. Therefore, when confronted with the extra details, the examiner needs to apply a reasonable approach of understanding but not interpreting their meaning.

In summary, the mentioned cases are related to the issue of errors in the description of goods. This type of error can occur in three forms: firstly, *differences in the* description; secondly, when there is an *extra description*; and thirdly, when some phrases in the description are *missed*.

---

<sup>459</sup> Bridge (n 55) [6.50].

However, from the banks' perspective, the majority of the mentioned cases considered such errors as a discrepancy and, as a result, rejected the submitted documents, whereas only a few cases showed that the concerned banks disregarded such errors and considered the tendered documents as in compliance with the credit terms. In contrast, from the courts' perspective, there were few cases that included discrepancies, whereas the majority of cases were considered as complying documents.

Notably, the mentioned cases showed the obstacle between the banks and the courts when it comes to challenging these types of errors that the bank examiner might confront when examining the presented documents, and the courts delivered different judgments. Therefore, the researcher proposes a solution for these types of errors. However, this proposed solution is suitable for errors in any documents except the commercial invoice, where the description must be in strict compliance as stipulated in Article 18 (c) of UCP600. Such a 'strict' standard will be favoured by virtue of the named article. In addition, due to the sensitive position that such document can place its holder, as explained earlier, the description must be a 'mirror image' of the specified one in the credit.

#### **Hypothesis: Errors in other documents:**

Regarding other documents, the situation is different, and the bank must not treat them in the same manner as the commercial invoice. Sometimes, these documents are only 'evidence' of the underlying transaction; therefore, the researcher proposes a guideline for the examiner with regard to all types of errors that might occur in them. This proposed guideline is the outcome of the interpretation of the UCP 600 rules with the implementation of the 'substantial' standard for the compliance principle that was applied by courts in some cases to justify the judgments.

**A. Different description**

If the submitted documents included a different description from that specified in the credit, the examiner has *two options*: if the error was remedied when reading the other documents and it did refer to the same transaction, it will be in compliant, if not, it will constitute a discrepancy. However, on some occasions the difference might not be fatal, as the goods can be described in other trade terms; therefore, when issuing the credit, it is advisable that the applicant provide the issuer with any familiar or similar terms that the commodity might be known as in the sector.

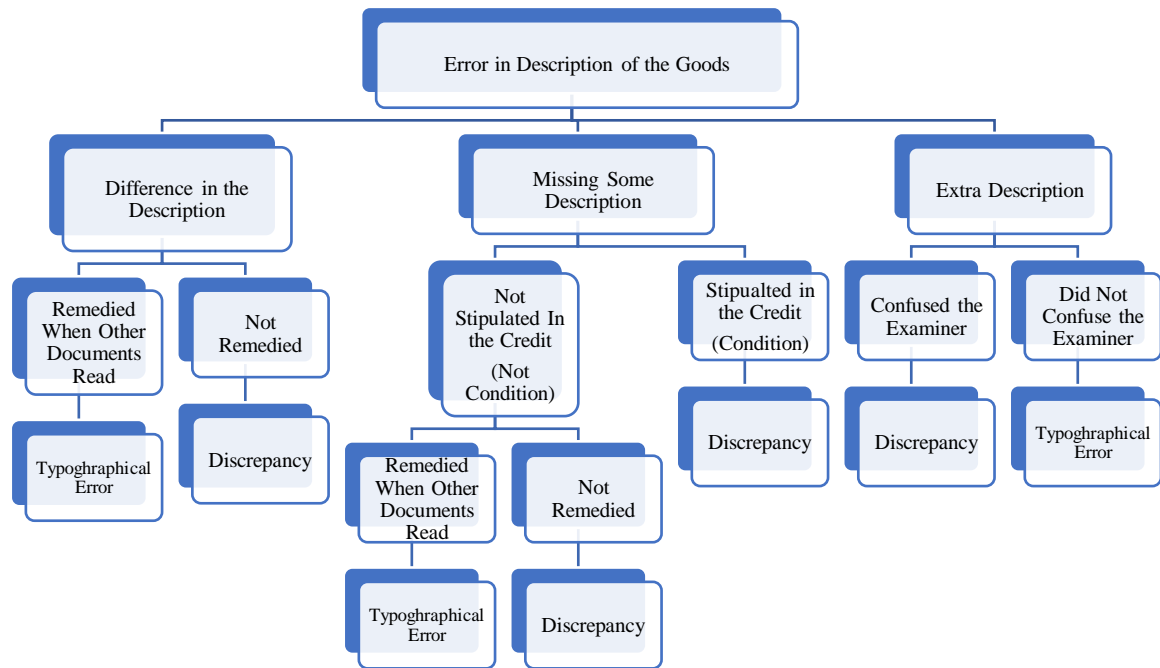
**B. Missed/omitted information**

If the submitted documents omitted certain information from the description, the examiner has two options:

- (i) if the omitted information is specified in the credit, the bank must refuse the tendered documents and consider it as a discrepancy. In contrast,
- (ii) if the omitted information is not specified in the credit, then in such case, if the error was remedied when reading other documents and referred to the same transaction, it will be in compliant, if not, it will constitute a discrepancy.

**C. Extra information**

If the extra information would confuse a reasonable examiner and require further inquiry, then it is not compliant and will be considered as a discrepancy, if not, it will be deemed compliant. A guideline for the examiner in the case of any error in the goods description, except a commercial invoice, is provided below:



\*Figure 3: Error in Description of the Goods

### 3.6 Conclusion

This study demonstrated that the examiner is faced with a number of issues when evaluating the different types of errors as proper grounds for dishonouring a credit. Such issue was in the misevaluation of the discrepancies in data by banks where the examiner considered them sometimes as linguistic errors or discrepancy. In contrast, many cases showed that the courts' disagreed with the banks' decisions regarding these errors, as the chapter showed. The aim of the chapter was to draw some guidelines for examiners to use when they are confronted with documents that contain inconsistencies with the credit. The proposed hypotheses will provide the examiner with more appropriate base that will help the examiner when evaluating these errors in the documents and ultimately, issue more valid decisions. Such hypotheses were emerged through analysing different courts' judgments regarding different cases that included different examples of discrepancies in data, besides with interpreting the current rules; UCP and ISBP.

This chapter concludes that there are three reasons behind the emergence of such a dilemma for the examiner when evaluating errors in data; the first reason relates to the knowledge and understanding of the banks themselves, the second relates to the lack of guidance in the UCP rules, and the third relates to the role of the other parties to the transaction.

First, most examiners lack an understanding of the legal process involved in letters of credit; their knowledge is based only on the basis of such payment. As demonstrated in the case examples, examiners did not give a logical excuse for either rejecting or accepting the presentation. Once they are confronted with any type of discrepancy mentioned here, they will only allege that '*such error does not comply with the credit terms*'. This, from my point of view, indicates that examining banks do not understand the aim of the UCP rules or how they should be applied. There is no doubt that it is not their responsibility to understand, nor are they required to, but it is their duty to provide a more logical, legal reason for rejection.



Although the empirical study provided input from a number of banks from Jordan, the writer also noticed this fact in most of the referred cases: every time banks gave their opinion with respect to errors in data and how they should treat them, their only excuse was ‘not complying with the credit terms or the UCP rules’. None of the contacted banks try to explain more precisely which article in the rules they referred to or what is mentioned in the UCP rules or banking practice.

Moreover, examiners are not aware of the necessity of the ‘linkage’ when examining the documents. When reading the presented documents together, all of the details inserted will help the examiner to identify each credit and its parties as well as distinguishing between different credits issued by the bank each time.

If we suggested, for example, that there is no need to insert the name of the parties involved in the presented documents, namely the beneficiary and the applicant or any other name required. Instead the issuing bank would create a digital profile, which would include all the details required for each credit opened. Only the number of this digital profile number must be printed on any required document. There would be no need to insert any details other than the purpose (e.g. insurance certificate shows only that the goods are insured or a bill of lading only shows that the goods are shipped). No more details are required to be inserted; all that is required from the beneficiary is presentation of the required documents by referring to the digital profile number issued by the bank. However, if the presented documents showed a wrong profile number, this digital profile would not help in the first place. Therefore, the aim of inserting all the required details in the credit helps to identify the transaction by reading all of the presented details together. For instance, the number of the credit, name of the parties, description of the goods – all of these elements would identify the issued credit.

It is to be remarked that the staff in such department are not academically or specifically qualified in documentary credits. This lack of skill will affect the system and the parties in

these transactions. Without a doubt, they are not required to be aware of the legal activities, nor are they required to be involved in any trade transaction, but nonetheless, it is recommended that a series of academic workshops be launched in this department. The purpose of these workshops is to explain to the examiners the legal point of each article in the UCP rules or any other legal instruments in regard to letters of credit. For example, explaining to them the importance of the 'linkage' between the presented documents and how they should check for any linkage. On the one hand, explain each type of the required documents (e.g. insurance documents, transport documents) and the legal elements for these documents. On the other hand, explain some articles with regard to documents such as commercial invoices and how the description of the goods should be described in such a document. These workshops need not take on an excessively legal meaning but instead focus on legal practice and try to provide the banks with an explanation of the courts' thinking, thus eliminating the possibility of struggle to a large degree, which will not only assist the banks' interest but the parties' interest as well.

Some cases, however, showed that the banks did deliver decisions regarding the defective documents but when they cannot evaluate the issue of discrepancies, they prefer to apply the 'strict' standard as their shield in order to protect their reputation, which is a priority. Furthermore, the duty of reasonable care is applied for their interest and for their client, not for the beneficiary.

Turning to the second reason for such conflict, this problem emerged due to the lack of guidelines for the examiner in the UCP rules regarding the parameters of discrepancies that would justify the bank withholding payment on the ground of documentary non-compliance. Despite the fact that the ICC commission draft is neither bound to determine the process of examination nor the type of discrepancies that might be considered as a ground for dishonour the credit, the UCP rules need to be more precise and explicit regarding the duty of

examination. According to the UCP language, it can be understood, implicitly, that it had left the issue of determining the typographical errors and valid discrepancies to the court, which is not acceptable. Neither party will accept the idea of delaying the payment until such matter is decided in the 'second stage' by the court, where the ultimate aim of letters of credit is to facilitate the payment in the sale of goods transaction. Therefore, it is recommended that the next version of the rules includes a proper process of examination in order to reduce the possibility of such issue. During the years from the first issuance of the rules until this version, the ICC had dealt with the duty of examination more carefully, showing progress in the 'compliance principle'.

In this regard, with cooperation between the ICC commission draft and legal scholars, it is possible to draw a guideline for the examiner when it comes to examining the documents. As long as they stipulate specific articles in the rules regarding each required document under the credit, they can add some special treatments for the discrepancies issue or at least emphasise the most important data that the examiner needs to examine very carefully. This study, proposed some hypotheses regarding different types of errors that might help the examiner to deliver proper decisions when confronted with any type of errors.

Thirdly, some parties involved in international transactions could misunderstand the rules. Due to this misunderstanding, some of the required documents could be issued improperly or might include some errors. Moreover, parties in sales contracts sometimes misunderstand the documentary credit mechanism, meaning the applicant inserts some terms that are not understood by the beneficiary or such terms can be interpreted in a different way. Therefore, it is recommended that the buyer should set out clear instructions when opening the credit in order to reduce ambiguity and confusion. In turn, the beneficiary might not understand what is really required under the credit and, as a result, present non-complying documents.

As observed, for a presentation to be considered as a complying presentation, the following four conditions must be met. Firstly, the presentation must include the whole set of the required documents without any missing. Secondly, the presentation must be consistent with the applicant's instructions and the credit terms. Thirdly, the documents must be consistent with the UCP and ISBP. More importantly, the documents must not include any type of discrepancies. That is to say, the examiner must initially follow the applicant's instructions and the credit terms, then, apply the rules.

## Chapter Four: Notice of Refusal – Blessing or Curse?

If the bank considers the presented documents to be non-compliant, it must dishonour the credit. Moreover, it must notify the beneficiary of such a decision through a formal letter. Such duty of notification is set out in Article 16(c) of the UCP 600, which states that: *‘When a nominated bank acting on its nomination, a confirming bank, if any, or the issuing bank decides to refuse to honour or negotiate, it must give a single notice to that effect to the presenter.’*

This notice is known as a ‘Notice of Refusal’ or as a ‘Notice of Discrepancy’.<sup>460</sup> Sub Article 16(c) of the UCP 600 establishes that *‘The notice must state:*

- i. that the bank is refusing to honour or negotiate; and*
- ii. each discrepancy in respect of which the bank refuses to honour or negotiate; and*
- iii.*
  - a) that the bank is holding the documents pending further instructions from the presenter; or*
  - b) that the issuing bank is holding the documents until it receives a waiver from the applicant and agrees to accept it, or receives further instructions from the presenter prior to agreeing to accept a waiver; or*
  - c) that the bank is returning the documents; or*
  - d) that the bank is acting in accordance with instructions previously received from the presenter.’*

Accordingly, there are three conditions that must be followed by the bank when issuing the notice in order for it to be valid; first, the notice must stipulate that the bank is refusing to honour or negotiate (the ‘refusal’ condition), second, the notice must convey each discrepancy in respect of which that decision has been made (the ‘all discrepancies’ condition), and finally, the notice must divulge the status of the documents (the ‘status of the documents’ condition).

---

<sup>460</sup> Kurkela (n 34) 268.

If the bank fails to act in accordance with these conditions, it will be precluded from claiming that the documents are non-compliant by virtue of Article 16(f).

Article 16 is therefore of paramount importance and it must be interpreted and applied correctly. Failing to do so can result in grave consequences for the bank.<sup>461</sup> Notably, in some cases the courts have rejected improper notices of refusal.<sup>462</sup> As a result, the bank will lose their right of rejection, meaning that they will have to accept the documents and pay the seller and potentially face an action against the buyer. In this respect, the ICC Banking Commission has received many inquiries about the correct interpretation of the nominated article.<sup>463</sup> Arguably, a number of areas exist in which Article 16 misses the mark. One of the most serious problems is the question of ambiguity in the use of terms and concepts.<sup>464</sup>

This matter is sensitive because the notice defends the banks position by explaining why it has decided to reject the tendered documents. Furthermore, due to the important relationship between such notice and discrepancies, this chapter will highlight and analyse each of the aforementioned three conditions in Article 16 in order to explain how a bank can satisfy the three conditions and tender an effective notice, since there are many cases which show that banks have failed to act in accordance with the requirements of Article 16. Therefore, this chapter will be divided into three parts; firstly, it will discuss the 'refusal' condition, then it will move to the condition of 'all discrepancies' and finally it will address the 'status of the documents' condition.

---

<sup>461</sup> *Co-operative Centrale Raiffeisen-Boereleenbank v Sumitomo Bank Ltd (The Royan)* [1988] 2 Lloyd's Rep. 250; *Glencore International* (n 28); *Bayerische Vereinsbank AG v National Bank of Pakistan* [1996] CLC 1443, [1997] 1 Lloyd's Rep. 59; *Seaconsar Far East* (n 48); *Bulgrains* (n 354).

<sup>462</sup> *Bankers Trust Co v State Bank of India* [1991] 2 Lloyd's Rep. 443; *Fortis Bank* (n 158).

<sup>463</sup> *Shen* (n 26) 39.

<sup>464</sup> *ibid* 4.

## 4.1 The ‘refusal’ condition

The first condition is that the notice must stipulate that the bank is refusing to honour or negotiate. The following discussion will analyse what this condition means, and the requirements that are needed to satisfy it.

### 4.1.1 What is a ‘refusal’?

In the case of non-compliance, the decision to dishonour triggers a duty to issue a ‘notice of refusal’ letter before the close of the fifth banking day following the day of presentation.<sup>465</sup> In contrast, section 5-108(b) of UCC 1995 states that the bank has a reasonable time after presentation to give the notice but not beyond seven business days after the day upon which it receives the documents. However, if the parties incorporated the UCP they will only have five days.<sup>466</sup>

If no notice is issued, the bank will be estopped from claiming discrepancies in the presentation and will have a duty, under the rules, to make payment.<sup>467</sup> This penalty is stipulated under Article 16(f) of the new rules as a result of the bank’s failing. In addition, if the bank failed to issue the letter duly within the time limit, as a consequence, it cannot rely on the discrepancies. In one American case, the bank issued the notice of refusal after 15 days, rather than the seven days required by the then UCP 500. Accordingly, the court ruled that the bank was precluded from rejecting the documents and they had to make payment.<sup>468</sup>

Importantly, it is at the sole discretion of the issuing bank to determine whether or not a presentation is compliant. The procedure in Article 16 does not allow for the applicant to check the documents or discuss them with the bank. In *Bankers Trust*,<sup>469</sup> the court held that:

---

<sup>465</sup> Article 16(d).

<sup>466</sup> Jeffrey Wood, ‘Drafting Letters of Credit: Basic Issues Under Article 5 Of the Uniform Commercial Code, UCP 600, and ISP98’ (2008) 125 *Banking Law Journal* 103, 118.

<sup>467</sup> ICC Banking Commission (n 157) Decision No.316,125-126.

<sup>468</sup> *Amwest Surety Insurance Company v Concord Bank*, 248 F. Supp. 2d 867, 878 (E.D. Mo., 2003).

<sup>469</sup> *Bankers Trust* (n 462).

*‘There is nothing in the Code ... to prohibit the bank asking the customer whether he is willing to waive any discrepancies. But if the customer does so, he is not exercising a right conferred by the Code. ... The bank's determination to reject the documents remains a determination made by the bank on the basis of the documents alone’.*<sup>470</sup>

Accordingly, while the bank is able to approach the applicant for a waiver of discrepancies already found, Article 16 does not permit the buyers to examine the documents for the purpose of discovering further discrepancies. Simply because the task of examining the documents falls on the bank alone. In *Bayerische*, the bank passed the documents to the applicant to enable them to examine them, and it was held that the bank had failed to act in accordance with the UCP 500 provision at that time.<sup>471</sup>

Accordingly, as observed from the courts’ judgements above, the applicant has no right to double-check the tendered documents. This duty is placed solely upon the bank, a tactic that can be seen as security for the beneficiary’s right of payment; permitting these documents to be checked by the applicant might undermine the aim of letters of credit as a fast payment method. In addition, the exclusivity of document checking ensures the bank’s independent right by virtue of the autonomy principle and, furthermore, saves time. As such, the bank can only contact the buyer to discuss the waiver of a discrepancy already found.<sup>472</sup> This is discussed later in the chapter.

Additionally, the notice should be given in the name of the bank rather than the applicant, which is justified by the article, which imposes the duty of issuing the notice solely upon the issuer. The said article also stipulates once the issuing bank has decided to refuse a presentation, it must issue a notice that indicates its refusal to honour or negotiate.<sup>473</sup>

When the bank issues the notice, it should be forwarded to the presenter of the documents only,

---

<sup>470</sup> *Bankers Trust* (n 462).

<sup>471</sup> *Bayerische* (n 461) 1455.

<sup>472</sup> Article 16(b).

<sup>473</sup> Article 16(c)(i).



as per Article 16(c) which stipulates that ‘*When a nominated bank acting on its nomination, a confirming bank, if any, or the issuing bank decides to refuse to honour or negotiate, it must give a single notice to that effect to the presenter.*’ The latter party might be a party other than the beneficiary such as his agent, a third party facility which has a direct interest at stake, or maybe a collecting bank acting for the beneficiary.<sup>474</sup> However, none of the UCP 600 or the UCC require that such notice is given to any person other than the ‘presenter’ unless otherwise requested by the presenter.<sup>475</sup>

In connection with the first condition, the notice will be issued only if the issuer bank has decided to reject the presented documents and, consequently, refuse to honour the credit pursuant to Article 16(c). Thus, any other decisions such as withholding payment for a second presentation or waiving the alleged discrepancies will not bind them to issue the letter. Therefore, it is apparent that the term ‘refuse’ mentioned in the article means that in case of non-compliance, the bank will not accept the presented documents and, as result, will dishonour the credit.

#### **4.1.2 Language of refusal**

There has been some uncertainty regarding the need for an issuing bank to state explicitly in the notice that a refusal is being made, or whether it is sufficient for them to simply list the discrepancies. In *The Royan*, the notice stated: *Please consider these documents at your disposal until we receive our principal’s instructions concerning the discrepancies.* The statement was not considered to be a valid rejection notice as the bank’s decision to refuse was not clear enough.<sup>476</sup> Similarly, in *Voest-Alpine*, the court ruled that because the notice of refusal failed to state explicitly that it was rejecting the documents. Although the Bank of China argued

---

<sup>474</sup> Adodo (n 351) [4.02]; Kurkela (n 34) 159; UCC 5-108 (official comment).

<sup>475</sup> Article 16(c); UCC 5-108 (b) (3).

<sup>476</sup> *Co-operative Centrale Raiffeisen* (n 461) 254.

that it was a notice of refusal, yet the court ruled that it was invalid. In this case, the bank telex stated:

‘UPON CHECKING A/M DOCUMENTS, WE NOTE THE FOLLOWING DISCREPANCY:

1. LATE PRESENTATION.
2. BENEFICIARY'S NAME IS DIFFER (sic) FROM L/C.
3. B/L SHOULD BE PRESENTED IN THREE ORIINALS (sic) I/O DUPLICATE, TRIPLICATE.
4. INV. P/L. AND CERT. OF ORIGIN NOT SHOWING “ORIGINAL.”
5. THE DATE OF SURVER (sic) REPORT LATER THAN B/L DATE.
6. WRONG L/C NO. IN FAX COPY.
7. WRONG DESTINATION IN CERT. OF ORIGIN AND BENEFICIARY'S CERT.

WE ARE CONTACTING THE APPLICANT FOR ACCEPTANCE OF THE RELATIVE DISCREPANCY. HOLDING DOCUMENTS AT YOUR RISK AND DISPOSAL.<sup>477</sup>

Such notice did not expressly state that the bank was refusing to honour the credit, it was simply a statement that it would contact the applicant for a potential waiver of the alleged discrepancies. Therefore, failing to indicate the bank’s decision consider such letter as invalid.

In an attempt to address this confusion, the current UCP now require in Article 16(c) that ‘*The notice must state: i. that the bank is refusing to honour*’. This express condition in the new rules has seemingly answered the uncertainty found in the previous UCP rules. However, in an enquiry to the ICC Banking Commission<sup>478</sup>, the ICC’s opinion was that failing to state expressly that documents were refused in the issuing bank's notice of refusal, which stated explicitly the discrepancies, may still be considered a valid refusal notice under UCP 500,

---

<sup>477</sup> *Voest-Alpine* (n 39) 887.

<sup>478</sup> ICC Document 470/TA. 390 (Answer to Questions 6-7: "Even not by words stating that documents were refused, the issuing bank stated the discrepancies and that documents were hold at the disposal of the presenter. The issuing bank's refusal is in terms of UCP 500", see in general Jia Hao, 'Refusal Notice as a Shield or as a Sword: A Comprehensive Analysis of the Validity of a Refusal Notice Under UCP 500 and Letter of Credit Law' (2007) 2 *Journal of Payment System Law* 287, 289.

because the refusal could be implied.<sup>479</sup> This viewpoint was also emphasized by the DOCDEX panel, which stipulated clearly that banks are not required to expressly state their refusal; essentially, what is important is the intention behind the notice.<sup>480</sup> The point here is that the term ‘refuse’ specifically is not necessary. It is not necessary to use exactly the term ‘refuse’ what is important is that the bank declares it will refuse the presentation through any clear expression that it is understood without any vague or confusion.

As such, if a notice does not contain a sentence stating that the bank is refusing the presented documents, such notice will not be valid. Nonetheless, in *Standard Chartered Bank v Dorchester LNG(2) Limited*,<sup>481</sup> the notice stated: ‘*This advice does not constitute a rejection of documents by applicant and is only sent in accordance with UCP600 article 16 c. Discrepancies referred to applicant*’.<sup>482</sup> The statement was not a rejection notice as the bank’s refusal decision was not clear enough.<sup>483</sup> In connection with the language of the refusal, if the notice included the statement, ‘As per Article 16... we refuse the documents at this stage’<sup>484</sup> this would, according to the ICC Banking Commission, this statement will constitute a valid notice.<sup>485</sup> As such, as long as the notice conveys that the bank is refusing to honour the credit (and as long as the bank has fulfilled the other two conditions, discussed below) it will be considered valid.

From the above discussion, what is important in the bank’s notice of refusal is that it must state expressly the refusal decision. There is no requirement under the UCP 600 for the refusal to take any particular form or to use any particular language, as long as it is clear and understood. Such an attitude was emphasised in the ICC opinion above, which also supports the idea of clear decision.<sup>486</sup> What is important is the bank’s intention of refuse. The language of refusal

---

<sup>479</sup> R027, ICC China Collected Opinions 1998-2003, at 84-85; see in general Hao (n 478) 289.

<sup>480</sup> ICC Banking Commission (n 157) Decision No.303, 82.

<sup>481</sup> [2013] EWHC 808 (Comm).

<sup>482</sup> *ibid* 15.

<sup>483</sup> *ibid* 61,62.

<sup>484</sup> ICC Banking Commission (n 157) Decision No.300, 74,75.

<sup>485</sup> *ibid*.

<sup>486</sup> *ibid*.

or the used expression that the bank uses to declare its refusal is not important. Moreover, the notice of refusal must not be conditional, which means that the statement must convey that the refusal decision has been reached and is not conditional on the occurrence of some other event, such as a waiver from the applicant.

It seems that the UCP draft commission has tried to solve the banks' misunderstanding of the previous rules by demanding in the UCP 600 that they insert and express their decision very clearly in the rejection notice. Such demand is a necessity as, missing an express statement of refusal in the notice might lead to ambiguity and misunderstanding. Consequently, this improper notice of refusal instead of being a defence argument for the bank's position of refuse, it will be against them as failing to act in accordance with such a condition will prevent the issuer from claiming that the documents are not complying according to article 16(f).

#### ***4.1.3 Right of waiver***

Article 14(b) provides the issuer bank with the right to contact the applicant with a view to waiving the alleged discrepancies found, thereby enabling the bank to accept the documents rather than reject them. If the bank elects to exercise this right it must be done within the five day period of examination envisaged in Article 14(b). Importantly, the issuer bank must not approach the applicant until they have identified apparent discrepancies in the presented documents.<sup>487</sup> This means that the issuer can only contact the applicant once it has discovered discrepancies and only to decide whether to waive them or not. As explained elsewhere,<sup>488</sup> it is neither the applicant's responsibility to check the conformity of the presentation nor to discover any further discrepancies.<sup>489</sup>

---

<sup>487</sup> Kurkela (n 34) 235.

<sup>488</sup> See page 129-130.

<sup>489</sup> *Bankers Trust* (n 462); *Bayerische* (n 461) 1455; *Bridge* (n 1) [23-205, 206].

The language of article 14(b) is that the issuer bank ‘*may* in its sole judgement approach the Applicant for a waiver of the discrepancy(ies).’ Accordingly, it is at the discretion of the bank to approach the buyer, it is not obligatory for them to do so. In practice, the right to consult the applicant is common among banks. It is estimated that over 50% of discrepant documents are waived.<sup>490</sup> The reason for this is that some discrepancies may not be sensitive, meaning that the buyer may wish to waive them. In *The Royan* case, the court noted that *some discrepancies apparently of minor importance, may, in fact, be crucial to the [account party]: others, apparently major discrepancies, may in the particular circumstances be of no importance at all to the [account party]. The issuing bank knows none of these matters. Its concern will be not to pay out under the letter of credit without the [account party’s] mandate.*<sup>491</sup>

What the court’s statement means here is that it is buyers and sellers alone that will understand the severity or not of a discrepancy and the implications it will have on the transaction. It is not for the issuing bank to make a judgement as they are not experts. In other words, the UCP rules have tried to achieve a balance between the contracting parties by providing the applicant with the right of waiver. This right shifts the risk from the bank to the buyer, which can be considered an opt-out option from the compliance principle.<sup>492</sup> Mann argues that banks sometimes push applicants to waive discrepancies as they are afraid they won’t be reimbursed.<sup>493</sup> However, if the issuing bank approaches the applicant for a waiver and it receives no response, it must make a decision whether to refuse the presentation or accept it.<sup>494</sup> In this respect, in my judgement, if the issuer did not receive a response from the applicant regarding a potential waiver it should refuse. The issuer would not have approached the applicant for a waiver in the first place unless there were discrepancies present in the documents

---

<sup>490</sup> Kurkela (n 34) 234, 236.

<sup>491</sup> *Co-operative Centrale Raiffeisen* (n 461) 254.

<sup>492</sup> *Mugasha* (n 16) 131.

<sup>493</sup> Mann (n 42) 2516.

<sup>494</sup> Commission on Banking Technique and Practice, ‘Discrepant Documents, Waiver and Notice’ An ICC Banking Commission Recommendation, Department of Policy and Business Practices (2002) 6.

presented. Therefore, it is more logical that if the bank hears nothing from the applicant, it should refuse the presentation in order to protect its legal position.

In general, if the applicant decides to waive the alleged discrepancies, the issuer bank then has the discretion to decide whether to take up the documents and honour the credit or reject them.<sup>495</sup> In practice this means that the bank has the right to disregard the applicant's decision to waive the discrepancies and instead issue the notice of rejection.<sup>496</sup> That is to say, if the applicant does not raise an objection and decides to waive the discrepancies and accept the documents as they appear, the bank still retains the right to reject them. It is not clear from a legal perspective the bank is entitled to disregard the applicant's decision to waive the alleged discrepancies. It seems, in my judgment, that the ICC Banking Commission meant to empower the bank with the unfettered discretion to examine the documents and decide whether to honour the credit or not. This can also be seen as reaffirming the autonomy of the credit and particularly and the independence of the bank's role in documentary credits.

However, this principle, which gives the issuing bank the right to disregard the applicant's request to waive the discrepancies is ineffective in such transaction for three reasons. Firstly, it undermines the value of giving the buyer the opportunity to waive the discrepancies. Assume that the documents were presented to the bank, which examined them, determined that there were discrepancies and decided to pass them to the applicant to determine whether they would be willing to waive the discrepancies found. Assume that the applicant inspects the documents in light of the alleged discrepancies and determines that they are insignificant and should therefore be waived. Assume that the bank then decides to disregard the applicant's decision and reject the documents anyway. In my own perspective, it goes against the credit document's fundamental objective, which is to facilitate payment to the beneficiary in a speedy manner.

---

<sup>495</sup> Commission on Banking Technique (n 494) 6,7.

<sup>496</sup> Collected Opinions 1995-2001 (n 391) 83; Bridge (n 1) [23-204]; *Uzinterimpex JSC v Standard Bank Plc* [2008] EWCA Civ 819; [2008] 2 Lloyd's Rep 456, 29.

Secondly, it is questionable why the examining bank should be entitled to disregard the applicant's order to waive discrepancies and instead decide to refuse the payment. As stated above, the applicant is normally in a better position to assess the implications of a discrepancy on the transaction. It would therefore be more logical that when the applicant decides to waive the discrepancies, the issuer should obey this decision. Thirdly, ignoring the applicant's decision will have a negative effect on the right of the beneficiary to receive payment. Waiving the alleged discrepancies means that despite the fact that the presentation includes discrepancies, because the applicant has waived them, the beneficiary will still get paid. However, if the bank decided to disregard the applicant's decision and reject the documents, the beneficiary's right of payment will be affected.

Although all the banks involved in such transactions have the same authority as the issuing bank,<sup>497</sup> the issuing bank is the only bank authorised to seek a waiver from the applicant by virtue to Article 16(b). However, the bank will only contact the applicant with a view to seeking a waiver of discrepancies already found, not for the purpose of allowing the applicant to inspect the documents to discover further discrepancies.<sup>498</sup> The aim of this is to ensure that the decision to reject because of discrepancies found is made solely by the bank, and not in conjunction with the applicant. Moreover, the issuer cannot contact the applicant after the time limit stipulated in the rules.<sup>499</sup>

As seen from the preceding discussion, this condition in the article contains two parts. First, the notice must declare, clearly, that the presentation is rejected. There is no need to use the term 'refuse' where any similar term will fulfil the objective as long as it conveys the refusal intention and retains the concept of refusal. Secondly, the decision to reject the documents is at the sole discretion of the bank. The applicant's word has no legal effect and should not

---

<sup>497</sup> Commission on Banking Technique (n 494) 2.

<sup>498</sup> Bridge (n 1) [23-205]; Todd (n 57) 244.

<sup>499</sup> *ibid* 244.

impact upon the bank's decision to refuse. In addition, the notice can be issued only when the bank had decided to refuse the documents. In the case where the bank agrees to follow the applicant's decision to waive the alleged discrepancies, it should accept the presentation and not issue the letter. That is because applicant is more aware of the transaction, meaning the applicant is more expert in what is effecting the goods and what is not unlike the bank.

## 4.2 The 'all discrepancies' condition

This second condition derives from Article 16(c)(ii), which states that: *When a nominated bank ... a confirming bank or the issuing bank decides to refuse to honour or negotiate, it must give a single notice to that effect to the presenter. The notice must state:*

*ii. each discrepancy in respect of which the bank refuses to honour or negotiate.*

### 4.2.1 State the discrepancies

Initially, when the bank decides to issue the notice, it must state all the discovered discrepancies in order to justify their decision; failing to do so will render the notice invalid. This sensitive condition was treated by the courts with the same degree of rigidity as the compliance principle, where any rejection notices that do not comply with the stated conditions will be treated as invalid.<sup>500</sup> In one case, the court found that the notice of refusal not only failed to include the bank's decision to refuse the presented documents, but also did not determine the alleged discrepancies in the letter as a basis for rejection. As a result, it considered the notice of rejection as invalid.<sup>501</sup>

In connection with the discrepancies, the issuer must state in a clear and specific manner each of the discrepancies in the notice.<sup>502</sup> In addition, when the bank gives the notice, it must state

---

<sup>500</sup> Ridoan Karim and Zahidul Islam, 'Critical Analysis of the Principle of Strict Compliance in Letter of Credit Operation with Relation to the UCP 600' (2016) 2 Journal of Asian and African Social Science and Humanities 105, 109.

<sup>501</sup> *Bankers Trust* (n 462).

<sup>502</sup> ICC Banking Commission (n 157) Decision No.296, 56.



the precise documents in which the discrepancies have been found.<sup>503</sup> In *Toyota Tsusho Corp v Comerica Bank*,<sup>504</sup> the notice of refusal was issued with this statement: *documents are rejected due to late shipment*.<sup>505</sup> In this regard, the court held that the language of the notice should clearly communicate the reasons for the refusal by making a specific reference to the document in question and identifying the non-conforming aspect of the document.<sup>506</sup> In this case, it was not specific enough because it did not specify which set of documents included such a discrepancy. Specifying which document is defective will facilitate the correction by the beneficiary, and, if possible provide the beneficiary with a second opportunity to represent the documents before the expiry of the credit.

Furthermore, when the bank makes reference to the discrepancy, it should be ‘explicit, specific and precise enough to be identified’.<sup>507</sup> For instance, in *Philadelphia Gear Corp v Central Bank*,<sup>508</sup> the court stated that ‘providing a detailed list of discrepancies is better than giving a general statement that the documents do not conform’.<sup>509</sup> Therefore, ‘*because presentment was not in compliance with the terms and conditions of the credit*’ the statement of rejection was not sufficient.<sup>510</sup>

It has been argued that the current rules do not impose any requirement for such a strict duty of clarification in relation to the alleged discrepancies and the same view was expressed regarding the previous UCP rules.<sup>511</sup> However, it can be justified that the reason of these improper notices is because they are issued by bank staff, who are not aware of the legal terms.<sup>512</sup> Thus, they cannot explain and address the alleged discrepancies in explicit and proper manner. Conversely, it has been argued that the reason for such a condition is that ‘if a bank

---

<sup>503</sup> *Toyota Tsusho Corp v Comerica Bank*, 929 F. Supp. 1065, 1074 (E.D. Mich., 1996).

<sup>504</sup> *ibid.*

<sup>505</sup> *ibid* 1072.

<sup>506</sup> *ibid* 1074.

<sup>507</sup> Hao (n 478) 294.

<sup>508</sup> 717 F2d 230 (5<sup>th</sup> Cir, 1983).

<sup>509</sup> *ibid* 240.

<sup>510</sup> *Hamilton Bank, NA v Kookmin Bank*, 44 F. Supp. 2nd. 653, 659 (SD NY, 1999).

<sup>511</sup> Shen (n 26) 11.

<sup>512</sup> *ibid* 11.

fails to list a certain discrepancy in its notice of refusal, it may not rely upon it later to justify the refusal'.<sup>513</sup> Typically, it is an opportunity for the beneficiary to remedy the defective documents in order to ensure right of payment. Considered from another angle, insisting on this condition, is because the bank is bound to issue a 'single' notice only, which is the second part of this condition.

#### **4.2.2 Single notice**

Article 14(d)(i) of 500 rules was silent on the number of notices a bank could issue. Due to this omission, uncertainty arose regarding whether the issuer was prevented from issuing a second notice on the basis of a different discrepancy to those cited in the initial letter of refusal. In *Kerr-McGee Chemical Corp v Federal Deposit Insurance Corp*,<sup>514</sup> the issuer refused the presentation and as result issue the notice of refusal. Later, it issued a second notice citing a different discrepancy. The court stated that the: '... [B]ank will be estopped from subsequent reliance on a ground for dishonour if it did not specify that ground in its initial dishonour'.<sup>515</sup> Therefore, it only ruled on the first notice and considered the second as null.<sup>516</sup>

Later, this attitude was affirmed in *Cooperative Centrale Raiffeisen-Boerenleenbank BA (Rabobank) v Bank of China*,<sup>517</sup> where the court held that 'the rejecting bank has only one opportunity under the UCP 500 to frame its discrepancies as the basis for rejection of the documentary rejection [sic], and cannot return for a second "bite of the cherry"'.<sup>518</sup> From the court's approach, even though the term 'single notice' was not mentioned in the UCP 500, the UCP draft commission meant to prevent banks from issuing multiple notices, aiming to preclude them from raising any further discrepancies once they had issued the first notice.<sup>519</sup>

---

<sup>513</sup> Barnes (n 199) 1809.

<sup>514</sup> 872 F. 2d 971 courts of Appeals (11<sup>th</sup> Cir, 1989).

<sup>515</sup> *ibid* 973.

<sup>516</sup> *ibid* 974.

<sup>517</sup> [2004] 3 HKLRD 477 (Court of First Instance).

<sup>518</sup> *ibid* 491 (Stone J).

<sup>519</sup> Bridge (n 60) [6.62].

However, Article 16(c) of UCP 600 explicitly states that the bank must issue only a single notice.

The ICC Banking Commission tried to clarify the UCP draft commission's intention when it expressed that banks must issue one single notice only, and that discrepancies should be stated thoroughly and precisely in that notice; if they issued more than one, the first notice will be valid while the others will be rejected.<sup>520</sup> Moreover, if the bank initially issued an improper notice of refusal and then issued another notice to correct their mistake, the subsequent notice will be invalid, even if it included the correct discrepancies as a ground to dishonour the credit.<sup>521</sup> Even if the subsequent notices were issued within the time limit stipulated in the rules, they will still be rejected.<sup>522</sup> This view was justified by Thomas Bingham who stated that 'it is common ground that this notice ... limits it [the bank] to the discrepancies stated within the notice.'<sup>523</sup> Accordingly, banks must issue one notice only and they cannot remedy their mistake with a second notice. If the bank relies on the first notice then issues a second notice, the court will rely on the first only, even if it was issued within the time limit under the rule.

Nevertheless, it has been accepted in some English<sup>524</sup> and Singaporean<sup>525</sup> cases that in certain circumstances, a bank can validly issue more than one notice. In these cases, the bank issued the first notice indicating its refusal and followed such notice with a subsequent letter declaring the grounds for refusal (i.e., the discrepancies). In these circumstances the subsequent letter will be deemed valid, as long as it is issued within the time limit, namely five banking days.<sup>526</sup> Further, it has also been accepted in English law that banks can validly add further discrepancies in a second letter which had not been included in the first notice and not a second

---

<sup>520</sup> Collected Opinions 1995-2001 (n 391) 170.

<sup>521</sup> *United Bank* (n 253) 47.

<sup>522</sup> *Esso Petroleum Can, a Div of Imperial Oil Ltd v Security Pac Bank*, 710 F. Supp. 275, 280-281 (D. Or., 1989).

<sup>523</sup> *Glencore International* (n 28) 139.

<sup>524</sup> *Bankers Trust* (n 462); aff'd [1991] 2 Lloyd's Rep 443 (CA).

<sup>525</sup> *Kumagai-Zenecon Construction Pte Ltd v Arab Bank Plc* [1997] 2 SLR 805, 29-31; *Amixco Asia (Pte) Ltd v Bank Bumiputra Malaysia Bhd* [1992] 2 SLR 943, 953; *United Bank* (n 253) 76.

<sup>526</sup> *Bridge* (n 1) [23-211].

decision.<sup>527</sup> This will be valid unless the beneficiary can show that she has relied on a promise made to him by the bank that if the discrepancies were cured, the bank would accept the documents.<sup>528</sup> The justification for not preventing the bank from raising a further discrepancy is because ‘the mere failure to raise a discrepancy when refusing an initial presentation does not estop a bank at common law from claiming that a subsequent presentation is non-compliant on the basis of that discrepancy’.<sup>529</sup> The UCC rules in the US, in contrast prevent the bank from issuing a subsequent notice once it has issued the initial notice. However, the rules do provide an exception to this rule in section 5-108(d) which provides that if the reason for dishonour is due to the expiry of the credit, the issuer can give another notice, even if it issued an initial notice.

Generally, the reason behind the UCP rules requiring a single notice stating all discrepancies is to give the beneficiary an opportunity to revise and amend the alleged errors.<sup>530</sup> ‘All discrepancies’ has been described as ‘security’ for the purpose of enabling the beneficiary to remedy the discrepancies.<sup>531</sup> In my judgment, the duty of issuing a notice of refusal is not only an obligation upon the bank, but also a right to secure its position under such a contract. In other words, this letter of refusal will clarify the bank’s status in this contract, namely refuse to honour the credit, and define why it decided not to accept the presentation. Consequently, if the bank failed to clarify its position here, it will be precluded from such claimant by virtue of article 16(f). Assume that the first notice was issued erroneously in any way, such as stating incorrect discrepancies, failing to insert some discrepancies, or failing to follow the Article’s conditions and the bank issues a second notice to correct the mistake. In my judgment, there is

---

<sup>527</sup> Malek (n 76) [5.67]; *Kydon Compania Naviera SA v National Westminster Bank Ltd* (The Lena) [1980] Com. LR 12; [1981] 1 Lloyd’s Rep. 68.

<sup>528</sup> *ibid* [5.53].

<sup>529</sup> *Kydon Compania Naviera* (n 527); *Bridge* (n 1) [23-222].

<sup>530</sup> *Adodo* (n 351) 250.

<sup>531</sup> *Shen* (n 26) 11.

no harm if the court accepted the latter notice as valid, providing it was issued within the time limit determined in the rules.

Based on this reasoning it would not make sense for the court to prevent a bank from referring to the latter discrepancies and instead bind them to honour the credit even if the documents were not compliant with the credit terms. However, such an approach could be beneficial to the seller if, for example, they have acted in reliance on the first notice. Assuming that the beneficiary has corrected the documents in accordance with the first notice and re-submitted the documents. Later, the bank rejected the presentation due to the alleged discrepancies in the subsequent letter, which was sent subsequently after the issuing the initial notice. Therefore, issuing a second letter that includes further discrepancies might be detrimental to the beneficiary's position.

In my opinion, even though this second notice might not be accepted as valid, the more fundamental obligation is surely on the beneficiary to check the conformity of the documents in the first place. Why should banking practice be in favour of the beneficiary and rigid on banks and the applicant? Under this Article, failing to issue the notice in accordance with the rules will in general mean that the bank will be obligated to accept the documents, even if the submitted documents do not comply with the terms of credit. Issuing a second letter with further discrepancies can be seen as a privilege for the bank. This privilege will benefit banks issuing a subsequent notice within the time limit. Consequently, it can be said that subsequent notices, which are issued within the time limit, are a continuum of the first one issued. But the most importantly not a second decision. Conversely, under Article 1 of the UCP 600, parties

can amend the provision: they can amend the conditions of the notice of refusal or the period of examination of the documents.<sup>532</sup>

In sum, a ‘single notice’ means that the bank must issue its decision of rejection once only, despite how many letters or documents attached to the notice are issued stating all the discovered discrepancies as a ground for rejection. Thus, if the bank issued a separate letter stating that ‘it refuses to honour the credit’ and followed such a letter with an ‘all discrepancies’ document, it will fulfil the aim of the notice of refusal. In *Bulgrains*, for example, the bank issued the notice of refusal in a separate message, which was attached with another message that stated all the discrepancies. The court accepted such a notice and considered it as a valid rejection notice.<sup>533</sup> On the other hand, there is no harm in providing the bank with the right of raising new grounds for rejection in a second notice as long as this notice is issued within the five banking day.

From the above discussion, it can be concluded that this condition is important when specifying ‘all the discrepancies’ in the notice of rejection. The bank will justify its decision to dishonour the payment under the credit terms. In addition, it will be helpful for the beneficiary, as it will give them the opportunity to rectify the discrepancies as explaining each type of discrepancy explicitly, in clear manner and where it is mentioned in the documents will save time.

Yet, insisting on a ‘single’ notice might be prejudicial towards the bank, because giving them the right to raise further discrepancies within the time limit provided (but not as a second opportunity to examine the documents) could be efficient to clarify their position. Why should the court prevent the bank from this right of security if it has issued the subsequent notice with other discrepancies within the time limit stipulated under the rules? There is no doubt that they are obliged to deliver their decision once but preventing them from relying on further grounds

---

<sup>532</sup> William Sutton, ‘The Documentary Credit Phoenix: UCP 600 Boasts Fair Rules for Trade Customers, Hard Rules for Banks’ (2012) 37 DAJV Newsletter 62, 64.

<sup>533</sup> *Bulgrains* (n 354) [52].

if exposed within the time limit provision of the article will harm them. That is to say, the new ground/s in the second notice might be genuine grounds for rejection, which the bank missed in the first notice. As a result, this requirement could prevent the bank from securing their position and put them in legal difficulties in front of their clients. Moreover, failing to issue the notice of refusal in accordance with the rules will mean, implicitly, that the presentation is accepted. Although this suggestion will harm the beneficiary it is important for other parties' interest.

### 4.3 The 'status of the documents' condition

If a bank decides to refuse a tender, it must state in the notice what will happen to the rejected documents. The new UCP rules provides the bank with four options when it is dealing with these documents, unlike the previous rules, which provided them with two options only. Article 16(c)(iii) establishes that the notice must state; *'a) that the bank is holding the documents pending further instructions from the presenter; or b) that the issuing bank is holding the documents until it receives a waiver from the applicant and agrees to accept it, or receives further instructions from the presenter prior to agreeing to accept a waiver; or c) that the bank is returning the documents; or d) that the bank is acting in accordance with instructions previously received from the presenter.'* In contrast, the two options per Article 14(d)(ii) of the UCP 500 were; *'it is holding the documents at the disposal'* or *'is returning them'*. Clearly, UCP 600 differ significantly, with two additional options under option (b) and (d).

The importance of this condition is that failing to comply with this condition will prevent the bank from relying upon the discrepancies stated in the notice. In one inquiry, the ICC commission stated that if the notice fails to mention the status of the defective documents in accordance with the article, it will be invalid.<sup>534</sup> Therefore, stating that 'we refuse to accept the documents' is merely an indication of refusal without clarifying disposal of the documents; in

---

<sup>534</sup> ICC Banking Commission (n 157) Decision No.296, 59.

this regard, it is not a valid refusal notice.<sup>535</sup> It is therefore important to analyse these different options and ascertain why they are a condition of a valid notice of refusal.

#### ***4.3.1 Returning the documents***

In connection with the four options set out in the article, the option of returning the documents is one of the most logical for the bank when it decides to refuse them. Firstly, besides their important role in a payment, each of these documents is important in the main transaction, because they each bear a legal or trade value, such as insurance, export or import permission and the ownership right of the goods. Therefore, it makes sense that once the bank decides to refuse the submitted documents, they must return them. Additionally, the alleged errors in the defective documents might be minor errors that can be amended prior to the expiry of the credit.<sup>536</sup> Therefore, the beneficiary can resubmit them if the credit is still available, and if the applicant approves that. Most importantly, returning them will provide the beneficiary with an opportunity to deal with the goods in order to avoid them being damaged or lost, especially if they are still in the port of discharge, which will save time and money for any associated charges.<sup>537</sup>

Although the option of returning the documents is logical, the article does not specify when the rejected documents should be returned. The problem here is that there is no ‘international standard’ for the timeframe to return rejected documents.<sup>538</sup> Therefore, due to such generality, in practice some cases showed that banks either failed to return documents or kept them longer than expected and, as a result of such negligence, they were precluded from relying on the discrepancies mentioned in the presented documents.

In the milestone case *Fortis Bank*, the Indian Overseas Bank alleged several discrepancies in

---

<sup>535</sup> ICC Banking Commission (n 157) Decision No.296, 56.

<sup>536</sup> Ebenezer Adodo, ‘Letters of Credit: Existence of a Duty to Return Documents Listed in a Rejection Notice’ (2012) 27 *Journal of International Banking Law and Regulation* 456, 458.

<sup>537</sup> *Ibid* 458.

<sup>538</sup> Kurkela (n 34) 166.



the presented documents. Consequently, issued notices of rejection and chose the option of returning the documents.<sup>539</sup> However, the notices were dated 4 November 2008, but the documents were not returned until 16 February 2009. The court ruled that the Indian Overseas Bank failed to act in accordance with the nominated article; therefore, it was precluded from relying on the discrepancies in the notice as grounds for rejecting the documents.<sup>540</sup> From the court's judgment, the Indian Overseas bank failed to act in accordance with the article as they took more than two months to return the documents. Although they argued that there is no obligation of such return under the rules.<sup>541</sup>

Moreover, such a delay in returning the documents is prejudicial to the beneficiary, who will be precluded from taking the opportunity to dispose of the shipped goods, a result which is a more harmful result than rejection. In commercial transactions, these documents often have considerable commercial value, which grants the holder the right of possession. Assuming that, while waiting for the return of the rejected documents, the shipped goods may be affected either by a fall in the market price<sup>542</sup> (e.g., in the case of commodities such as cement, iron or aluminium) or spoilage (e.g., in the case of perishables such as fruit, vegetable or meat). Without these documents, the beneficiary cannot dispose of or resell the shipped goods as an option to recover from such harm.

It is recommended by the expert evidence that when the bank issues the notice and decides to return the documents, it must do so as soon as possible after giving the notice<sup>543</sup> or at least within two<sup>544</sup> to three days' maximum.<sup>545</sup> This short period presents the beneficiary with an opportunity either to re-correct the alleged discrepancies and re-present the documents if the credit is still available or to dispose of the goods to avoid any possible loss, as explained earlier.

---

<sup>539</sup> *Fortis Bank* (n 158) 5.

<sup>540</sup> *ibid* 70.

<sup>541</sup> *ibid* 44.

<sup>542</sup> see in general *Voest-Alpine* (n 39).

<sup>543</sup> Peter Ellinger, 'Case and Comment; Rejection of Documents Tendered Under A Letter of Credit: *Fortis Bank V Indian Overseas Bank*' [2013] *Lloyd's Maritime And Commercial Law Quarterly* 1, 4.

<sup>544</sup> *Adodo* (n 536) 458.

<sup>545</sup> *Fortis Bank* (n 158) 35.

It is, therefore, necessary to stipulate a time frame for returning the rejected documents under the said article; this will provide beneficiaries with the quickest options to amend their position. Therefore, it is recommended that the sub-article be amended and a timeframe drawn for returning the documents, especially as there is no internationally recognised standard.

#### ***4.3.2 Holding the documents until receiving waiver***

In addition to the ‘return’ option, the new rules provide the bank with an option to hold the documents until it receives the applicant’s decision on whether to waive the discrepancies or not. In one case, the bank stated in the rejection letter that: *Nevertheless, we have referred the above matter to the applicant and await their response of acceptance of discrepancy/ies or otherwise. Meantime, documents are held at your risk.*<sup>546</sup> Accordingly, the issuing bank declared that it was holding the documents but qualified the manner in which it was holding them. This was deemed to be in accordance with the article.<sup>547</sup>

The same matter was raised in *Credit Industriel*, which was ruled under the UCP 500. Even though the court considered the notice issued by the bank as an invalid letter of rejection due to wrongly stating its intention to refuse.<sup>548</sup> Yet, the bank did state the status of the rejected documents as in accordance with article 14 (d)(ii) of the UCP 500. The notice stated: *Should the disc be accepted by the applicant, we shall release the docs to them without further notice to you unless yr instructions to the contrary received prior to our payment. Documents held at yr risk for yr disposal.*<sup>549</sup> Arguably, this statement declared, in part, the status of the documents, in that it can be read that ‘the documents will be returned to the beneficiary’. However, the grounds for invalidating such a notice might be due to the ‘conditional’ refusal, as stated earlier,

---

<sup>546</sup> ICC Banking Commission (n 157) Decision No.300, 74-75.

<sup>547</sup> *ibid* 75.

<sup>548</sup> *Credit Industriel* (n 191) [76].

<sup>549</sup> *ibid* [67].

where the rejection will be confirmed once the applicant declares their desire not to waive these discrepancies.

However, this new option, in my judgment, cannot be seen as an efficient method to declare that the bank has decided to refuse the tendered documents in the first instance. Generally speaking, the notice of refusal will only be issued if the bank refuses the presented documents but, by virtue of this option, the bank will deliver its decision twice: an initial rejection and later, either accept the waiver request or deliver a second refusal and disregard the waiver desire or agree that the documents should be rejected. Accordingly, this option flies in the face of the condition that requires the bank to issue a ‘single notice’ as discussed above. Further, this option, in my judgment, will give hope to the beneficiary that, despite the fact that the presented documents are not compliant with the credit terms, they might still get paid. This hope, however, may not be affirmed, where the bank decides to exercise its right to reject the documents, despite the applicant’s decision to waive the discrepancies.

Although, this option might have an advantage from the beneficiary’s standpoint. It could be seen as a way of giving the beneficiary all the information as soon as possible rather than waiting to hear back from the applicant. However, this hope will have an opposite effect upon the beneficiary because instead of utilising the beneficiary, it will prevent them from their ‘disposal right’ of the goods, which is a more harmful effect. Consequently, the research believes that there is no need for this extra option as it will cause confusion and chaos.

#### ***4.3.3 Holding the documents pending further instructions or in accordance with instructions previously received***

Turning to the third option for the bank, which is to *hold the documents until receiving any further instructions from the presenter*, this gives the beneficiary security in terms of the documents remaining safe. This option was also present in the UCP 500 but it was phrased

slightly differently as *holding the documents at the disposal of the presenter*. This option is a continuum for the fourth option, which is to act in accordance with the instructions already received from the presenter. These options are logical, and will be useful for the interests of all parties, especially the beneficiary.

In short, this condition is important as it will determine, temporarily, the right of possession of the rejected documents in addition to giving the beneficiary the option to deal with the issue of the rejection by, for instance, correcting and resubmitting the documents or selling the goods to another party. Nonetheless, the language of this condition, in general, is controversial because the new option provided for the bank to *hold the document and wait for a waiver*, which might cause some issues as it is far from efficient. Unlike the previous rules, which are more reasonable and effective. Therefore, it is advisable to re-emphasise the previous options from the old version rules in addition to determining a timeframe in the case of the bank deciding to return the refused documents.

#### **4.4 Delivery of the notice**

In addition to such obligations, according to Article 16(d) the bank must send the rejection notice to the beneficiary ‘by telecommunication, or, if that is not possible, by other expeditious means no later than the close of the fifth banking day following the day of presentation’. This reflects Article 14(b) which provides that the issuer has five banking days following receipt of the documents to examine them and then determine whether to take up or refuse the documents and to inform the beneficiary. The combined effect of these two interrelated provisions confirms that the issuer has the duty of examining documents and, in the event of refusal, notifying that refusal to the beneficiary within the same time limit (before the close of the fifth day). Generally speaking, inserting such a duty is for the benefit of the beneficiary. That is to say, delivering the notice in proper time will decrease the possibility of any commercial harm

to the beneficiary as result of the unavailability of the documents as in the case of a price-market fall.

It is interesting to note that in the previous UCP, Article 14 (d)(i) stated that the notice should be given ‘without delay’ and within seven banking days rather than the current rules which allow only for five banking days. The remove of ‘without delay’ was an appropriate step for the following reasons. Firstly, it was argued that the phrase ‘without delay’ was uncertain and it led to difficulties from the respective viewpoints of the issuing bank and the beneficiary.<sup>550</sup> This term is vague for the issuing bank. It is not clear what is meant by ‘without delay’ and what reasonable period is allowable for the notification. As observed in *Seaconsar Far East*: “‘Without delay’ means what it says: promptly, ... [and] the longer it has taken the decision to reject, the less time the bank will have to give notice if it is to avoid being criticized for delay.’<sup>551</sup> Since there is no guidance to the issuing bank in respect of this requirement, this rule places the bank in a difficult and uncertain position.<sup>552</sup> Secondly, Adodo believes that the duty of providing the notification ‘without delay’ is harmful to the bank. If the notice were issued prior to the expiry of seven banking days, it would be invalid because of violation of the ‘without delay’ duty.<sup>553</sup> The notice would also be invalid if it were issued after the expiry of seven banking days.<sup>554</sup> It was ruled in one case that issuing the notice of rejection ‘in the morning of Tuesday 8 December 1987 was not a notice given without delay, having regard to the evening of Friday 4 December 1987 when a decision to reject the presentation had been taken’.<sup>555</sup> Third, it is argued that this duty of ‘without delay’ has little practical interest from the beneficiary’s perspective. Even though this date is not clear for the issuer but also such date is normally unknown to the beneficiary in practice.<sup>556</sup> Fourth, the duty of document

---

<sup>550</sup> Shen (n 26) 23; Adodo (n 31) 328.

<sup>551</sup> *Seaconsar Far East* (n 48) 95.

<sup>552</sup> Shen (n 26) 23.

<sup>553</sup> Adodo (n 31) 328.

<sup>554</sup> *ibid* 328.

<sup>555</sup> *Seaconsar Far East* (n 48) 94-95.

<sup>556</sup> Shen (n 26) 23.

examination is sometimes compounded by the process of consulting the applicant, which must take place within the same time limit provided by the rules. Performing both these duties ‘without delay’ adds substantial complication, which requires adequate consideration when the beneficiary determines the time frame for the issuing bank’s decision to refuse.<sup>557</sup>

Even though the ‘without delay’ provision was unfavourable, in my opinion, the language of the current sub-article might not always be useful as it is open to abuse by the issuer. Assume that the issuer approaches its decision of rejection on the first examination days allowed and delayed the issuance of the notice prior to the closing of the fifth banking day, which might be the expiry date of the credit in some cases. This delay will harm the beneficiary as there will be no second opportunity to resubmit the documents especially after the goods had been dispatched. An applicant with bad intentions might agree with the issuer to delay issuing the notice relying on this provision in order to force the beneficiary to reduce the goods price. Therefore, the language of the current sub-article might affect adversely on the beneficiary.

Under the previous UCP, the bank had to give the notice to the beneficiary or to the bank from which it received the documents.<sup>558</sup> In contrast, it seems from the nature of the current rules that these options of delivering the notice is not available any more where bank must give such notice to the presenter only.<sup>559</sup> Stipulating the phrase ‘must’ indicates that there is no alternative for the bank. In my judgment, the change in wording might be seen as a reason relating to security<sup>560</sup> or maybe because the ‘presenter’ can be different party other than the beneficiary, as explained earlier. Therefore, instead of restricting the bank from delivering the notice either to the beneficiary or the bank from which it received the document, it must deliver the notice to the presenter only. Article 14 (d)(ii)(2) of the 500 rules states that ii) ‘Such notice must state all discrepancies in respect of which the bank refuses the documents and must also state

---

<sup>557</sup> Shen (n 26) 23.

<sup>558</sup> UCP 500, Article 14(d)(i) which states ‘Such notice shall be given to the bank from which it received the documents, or to the Beneficiary, if it received the documents directly from him.’

<sup>559</sup> UCP 600, Article 16(c) which states ‘it must give a single notice to that effect to the presenter’.

<sup>560</sup> Matti in his book believed that documents belong to the presenter only, Kurkela (n 34) 243.

whether it is holding the documents at the disposal of, or is returning them to, *the presenter*'. Notably, the said article referred to 'presenter' while in contrast article 14 (d)(i) referred to 'beneficiary' and the 'bank from which it received the documents'. Therefore, in order to avoid such confusion, in my judgment, the new rules stipulate expressly that notice must be delivered only to the 'presenter'.

Although the term 'telecommunication' is not defined in the rules, in my judgment it can be defined as any method of communication, directly, between the sender and the receiver without the need for a third party in such communication. Therefore, the telecommunication methods include S.W.I.F.T., telex, fax, telephone,<sup>561</sup> email<sup>562</sup> or any other communication method that can fulfil the duty. That is to say, the point of sending the notice through a telecommunication method is for the benefit of the beneficiary. Accordingly, the latter will know his position as soon as possible so he can, if he is able, correct the discrepancies before the credit's expiry. Moreover, such notice given in any form that is a record and is authenticated will ensure that the notice is timed and that the answerback receipt is recorded, thus avoiding any subsequent disputes.<sup>563</sup> In this respect, it was held in *Hing Yip Hing Fat* that a telephone message given on the presenter's answering machine or voicemail is also sufficient to consider such notification as a valid notice, but only if it includes the required information.<sup>564</sup>

There is, however, an exception to this in the case that it is not possible for the bank to give such a notice through telecommunication methods. Article 16(d) states that the notice must be given by telecommunication, *or if that is not possible, by other expeditious means*. This obscure term is not defined in the rules, which means that it will be for the courts to interpret it. If it is not possible to give notice through telecommunication, it is acceptable for banks to send the notice by airmail or courier<sup>565</sup> or any other available method. However, Benjamin

---

<sup>561</sup> *Seaconsar Far East* (n 48) 93.

<sup>562</sup> *Bridge* (n 1) [23-209].

<sup>563</sup> *Shen* (n 26) 27.

<sup>564</sup> *Hing Yip Hing Fat* (n 266) 59-60.

<sup>565</sup> *Hao* (n 478) 318.

disagree with delivering the notice through carrier or post.<sup>566</sup> In one case, the bank gave the notice of refusal via DHL, which was rejected by the court on the grounds that there were other, more expeditious methods available to send the rejection notice at that time.<sup>567</sup> In my judgment, if no possible telecommunication method is available, it would be acceptable to deliver the notice through post or carrier. What matters is the delivery of the notice and these two methods will fulfil such duty. More importantly, the term ‘*expeditious means*’ leaves the door open for any other method for delivery but only if no telecommunication method is available.

The question of the validity of a notice delivered to the beneficiary through an oral message has been addressed. Normally, it will be accepted as a valid notice of refusal, but only if it is the fastest and most convenient way to reach the presenter.<sup>568</sup> In one case, the notice was given orally in a meeting between the bank and the beneficiary, and this was considered a valid notice.<sup>569</sup> From the viewpoint of the court, if there are no possible written methods to deliver the notice, word of mouth can fulfil the aim of the article, as it falls within the ambit of ‘*expeditious means*’. Despite that, it was suggested that in the event of the notice being delivered orally when telecommunication methods are available, it would be more efficient if it was followed as soon as possible with a formal letter.<sup>570</sup>

## 4.5 Conclusion

Issuing a notice of refusal is the first duty the bank must undertake if it finds that the documents contain discrepancies. The aim of this duty is to secure the bank’s position if it decides to dishonour the credit and to justify such a decision. Consequently, imposing the three conditions under the new version of the rules is a correct step by the draft commission as the aim of these

---

<sup>566</sup> Bridge (n 1) [23-209].

<sup>567</sup> *Bayerische* (n 461) 70.

<sup>568</sup> *Seaconsar Far East* (n 48) 94.

<sup>569</sup> *ibid* 93.

<sup>570</sup> This, in fact, can be seen from expert evidence in *Seaconsar Far East* (n 48) but Tuckey J rejected this opinion.



conditions is not only to legitimise the notice but also to justify the bank's decision. However, it must be emphasised that the language of the article might provide a trap if the bank does not duly implement the conditions set out in the article.

In this regard, the three stipulated conditions are important to justify the bank's decision and to determine the status of the documents. Initially, the condition of 'sole-refusal' is addressed to express the bank's decision. In addition, justifying the reasons that pushed the bank to take such decision by stating all the exposed discrepancies appearing in the presented documents. Thirdly, to decide the fate of the rejected documents and give the beneficiary an opportunity to decide, if there are any available choices, in order to resolve the problem.

Nevertheless, despite their importance, in practice there are some issues regarding the language of the article itself and with the conditions, as this chapter has explained. Firstly, there is no doubt that stating all the discrepancies in the notice is necessary to clarify the reasons for the rejection; however, insisting on a single notice is not sufficient, in some cases, for banks. The examiner might occasionally forget to include some discrepancies in the initial notice; hence, issuing a second notice is legitimate and will not affect the bank's decision but instead, it will reinforce its decision. Although this right of raising further discrepancies in a second notice might adversely affect the beneficiary's position, it is important from the bank's perspective. As long as the notice specifies the refusal decision expressly, the bank can issue another notice stating some further discrepancies provided it is within the time limit provided in the rules. What is important here is the banks' main decision, which is, in this case, rejection. Therefore, if the bank issued a subsequent letter within the time limit stating some further discrepancies, such notice should be accepted.

The justification for such an opinion is simple: assuming that the initial discrepancies might not be proper grounds to refuse the tendered documents and as a consequence will be

disregarded by the courts while in contrast, the subsequent letter might include the legitimate discrepancies.

On the other hand, the four options provided for the bank when they deal with the rejected documents are not preferable, especially the new option in section (c) (iii/ b) of the article. I cannot see any merit in such a condition. Waiting to receive a waiver of discrepancy will not be helpful for the beneficiary, it will be a hopeless decision since the decision will be decided solely by the bank, which has the right not to adhere the applicant's desire. Yet, by delivering a 'direct' decision the beneficiary might recover through other available opportunities.

With regard to time, which is another loophole in the article's language, the lack of a time limit for returning the rejected documents can be seen as a point of weakness, as observed in the *Indian Overseas Bank* case, where they abused their right of returning documents. Furthermore, according to the new article, banks can return the documents 'at any time', which banks might rely on as their shield if they fail to return the documents in a reasonable and timely manner. Consequently, it is advisable to amend the sub-Article in addition to determining a time limit in which to return the rejected documents, which will not be a hard task with the availability of several methods of delivery around the globe. The ability to stipulate the method of delivering the notice through various telecommunication methods, means that, in my judgment, it is possible to determine a specific time limit in which to return the rejected documents.

In summary, as seen from the preceding discussion, the new article and guidelines regrettably fail to constitute a wholly reliable system, although it is believed that UCP 600, in general, and Article 16 in particular, are clearer than their predecessors. What can be drawn from the above is that the answer to the question as to whether the notice of refusal is a blessing or a curse, will be hung until the new version of the rules 'sees the light', or at the least amending Article 16 in the current rules. Consequently, the effect of this article will depend on the bank's

attitude: if the bank failed to act carefully and in accordance with the article's conditions, it will be a curse, otherwise, it will be a blessing.

## **Part Two: Other Grounds for Refusing to Pay**

The general rule is that a credit will be dishonoured if the presented documents do not comply with the credit terms. However, on some occasions the presented documents might 'on their face' be compliant, yet the beneficiary loses their right of payment. These instances include cases of fraud or presenting null documents. There is an ongoing debate with regard to the recognition of these controversial grounds in documentary credits; they are criticised by both courts and academics. As such, this part of the study focuses on these two controversial subjects in the documentary credits arena: fraud (Chapter Five) and nullity (Chapter Six).

The aim of this study is to analyse the current UCP rules from two perspectives; practical framework and theoretical framework. Therefore, this part will evaluate these two grounds under the current rules from theoretical framework where the previous part dealt in more precise with the practical framework.

Although the fraud and nullity exceptions have been subject to much academic discussion, it is still necessary to examine them here in order to ensure that the thesis provides a well-rounded and inclusive discussion of the grounds that might postpone the right of payment under a letter of credit. Further, the scope and application of these two exceptions constitute a grey area of the law that remain subject to debate. As such, they warrant critical analysis.

Moreover, the issue of discrepancies, as examined in Part I, is inherently connected with the fraud and nullity exceptions. These three grounds all involve a misrepresentation regarding the shipment which relates either to the goods themselves, or more importantly, in the required documents.

## Chapter Five: Fraud Defence

Generally speaking, banks are not required to check whether the beneficiary has fulfilled its obligations in the underlying contract of sale. This is established in Article (4), which stipulates that letters of credit are isolated from the main transaction. This is known as the ‘Autonomy Principle’. As will be seen from the discussion of the case law in this area, the principle of autonomy has been used by dishonest sellers as a vehicle for fraud.

Fraud is one of the most common threats to international business transactions, especially when a mechanism such as documentary credit is utilised.<sup>571</sup> It is believed that letters of credit transactions are the ‘ideal vehicle for money laundering’.<sup>572</sup> Unfortunately, the UCP 600 do not address this issue.<sup>573</sup> The International Chamber of Commerce justified this omission by arguing that it should be left to national jurisdictions to fill the gap.<sup>574</sup> As such, most national jurisdictions recognise the ‘fraud exception rule’ as a caveat to the autonomy principle.<sup>575</sup> Although this exception is internationally accepted, there has been diversity among lawmakers and courts in relation to its interpretation. This has led to unconvincing judgments and a variety of outcomes.

The starting point of the fraud exception is the case of *Sztejn*, where there was both fraud in the documentation and fraud in the underlying contract. In this case, the plaintiff alleged that the beneficiary shipped cow hair and other rubbish instead of bristles as contracted. The court commented that in such a situation the autonomy principle should not protect the unscrupulous

---

<sup>571</sup> International Maritime Bureau of the ICC, *Trade Finance Fraud: Understanding the Threats and Reducing the Risk, A Special Report* (Paris 2002); Hamed Alavi, ‘Mitigating the Risk of Fraud in Documentary Letters of Credit’ (2016) 6 *Baltic Journal of European Studies* 139,140.

<sup>572</sup> Ademuni Odeke, ‘Double Invoicing in International Trade: The Fraud and Nullity Exceptions in Letters of Credit—Are the America Accord and the UCP 500 Crooks’ Charters!?’ (2012) 18 *The Denning Law Journal* 115,120.

<sup>573</sup> Kurkela (n 34) 174; Bridge (n 60) [6.78].

<sup>574</sup> Opinions (1980-1981) of the ICC Banking Commission, ICC publication No. 399 at R76, at 27; Mugasha (n 16) 137; Gao (n 53) 57.

<sup>575</sup> Mugasha (n 16) 137; Bridge (n 60) [6.85].

seller as the fraud was called to the bank's attention before the drafts and documents were presented for payment.<sup>576</sup>

Although the court in the *Sztejn* case did not explicitly state on which basis the fraud had been found, it is implicit that the fraud can be characterised as both fraud in the documents (where the documents did not represent the actual goods shipped) and fraud in the underlying transaction.

In contrast, in the benchmark case in England, *the American Accord*, the court held that the fraud exception can only be established if the fraud appears in the documents.<sup>577</sup> The facts of this case can be briefly summarised as follows: an English company entered into a contract to sell glass fibre making equipment to a Peruvian company named Vitrorefuerzos SA, and payment was to be made by an irrevocable letter of credit. Shipment was to be on or before 15 December 1976. However, shipment actually took place on 16 December, but the loading broker's employee, not acting for, and without the knowledge of, the sellers or the consignees of the letter of credit, fraudulently entered 15 December as the date of shipment on the bill of lading. Upon presentation, the bank refused such tender and held that the presentation was fraudulent because the goods were loaded on 16 December, not on 15 December as agreed.

From these landmark cases, it is clear that there is a dispute as to whether the fraud exception can be established if the fraud relates to the underlying transaction or in the documents.

Further, the judgment of the *American Accord* case opens the door in regard to another issue. Lord Diplock held that if the fraud was conducted with the beneficiary's knowledge, the fraud rule will be applied.<sup>578</sup> His Lordship stated: '*there is one established exception [to the principle of autonomy]: that is, where **the seller**, for the purpose of drawing on the credit, **fraudulently presents to the confirming bank documents that contain, expressly or by implication, material***

---

<sup>576</sup> *Sztejn* (n 52) 634.

<sup>577</sup> *United City Merchant* (n 6).

<sup>578</sup> *ibid* 188.

*representations of fact that to his knowledge are untrue*'.<sup>579</sup> From this passage it is clear that to establish the fraud exception, the beneficiary must commit the fraud or have awareness of it. This raises the question of whether the fraud exception should also be invoked when it is conducted by a third party but without the beneficiary's knowledge. It is clear that this is a grey area, subject to inconsistent interpretations across different jurisdictions.

Therefore, this chapter will deal with the issue of the implementation of the fraud exception rule from the two perspectives by answering the following two questions: 'should the fraud exception rule apply only to fraud in the documents presented, or should it be extended to fraud in the underlying transaction?' and 'will the fraud exception rule apply if the fraud was committed by a third party without the knowledge of the beneficiary?'

This chapter will be divided into two parts. First the autonomy principle and its relation to fraud will be evaluated. Following that, the chapter will examine the scope of the fraud exception by answering the two controversial questions raised above.

## **5.1 The autonomy principle: is it necessary?**

Article 4 stipulates one of the important principles in letters of credit. Known as the 'autonomy principle', it states that '*A credit by its nature is a separate transaction from the sale or other contract on which it may be based. Banks are in no way concerned with or bound by such contract, even if any reference whatsoever to it is included in the credit. Consequently, the undertaking of a bank to honour, to negotiate or to fulfil any other obligation under the credit is not subject to claims or defences by the applicant resulting from its relationships with the issuing bank or the beneficiary*'. In some common-law countries, it is better known as the 'independence principle'.<sup>580</sup>

---

<sup>579</sup> *ibid* 183.

<sup>580</sup> Roeland Bertrams, *Bank Guarantees in International Trade* (4<sup>th</sup> revised edition, Kluwer Law International 2013) 415.

Although this principle is not mentioned in English legislation, it has been recognised by the courts.<sup>581</sup> In contrast, it is embodied in the revised version of Article 5-103(d) of the UCC, which stipulates that ‘rights and obligations of an issuer to a beneficiary or a nominated person under a letter of credit are independent of the existence, performance... of a contract’. The words ‘*independent of the existence*’ affirm that the non-existence of the main contract will not stop payment. This principle, which is recognised in most jurisdictions,<sup>582</sup> is important in affirming the abstract right of payment as a primary function of a letter of credit. It guarantees the payment for the purchased goods irrespective of the performance of the underlying transaction to which they relate, even if the beneficiary did not perform his obligations satisfactorily.<sup>583</sup> This means that the right of payment is irrevocable; therefore, any disputes in relation to the underlying contract of sale will not prevent the beneficiary from enforcing their right to payment under the letter of credit.

In *Hamzeh Malas*, a Jordanian firm contracted to purchase a large quantity of reinforced steel rods, which were to be delivered in two instalments, from a British firm. However, on delivery of the first instalment, British Imex Industries complained that that instalment was defective and sought an injunction to bar the beneficiary from realising the second letter of credit. The court refused the application and held that ‘the opening of a confirmed letter of credit constitutes a bargain between the banker and the vendor of the goods, which imposes upon the banker an absolute obligation to pay, irrespective of any dispute there may be between the parties as to whether the goods are up to contract or not’.<sup>584</sup>

Therefore, if there is a breach of contract, the applicant cannot ordinarily stop the bank from fulfilling its primary obligation to honour the credit if the presented documents appear to comply with the credit requirements. Hence, any dispute over the nature and quality of the

---

<sup>581</sup> See *Urquhart Lindsay* (n 24); *Hamzeh Malas* (n 24); *Edward Owen Engineering* (n 24).

<sup>582</sup> Matthias Herdegen, *Principles of International Economic Law* (2<sup>nd</sup> edition, OUP Oxford 2016) 372; *Dulien Steel, Inc., of Washington v Bankers Trust Co*, 189 F Supp. 922 (1960), affd 298 F 2d 836 (1962); *Urquhart Lindsay* (n 24) 322-323.

<sup>583</sup> *Bridge* (n 1) [23-075]; *Mugasha* (n 16) 136; *Hamzeh Malas* (n 24).

<sup>584</sup> *Hamzeh Malas* (n 24) 129 (Jenkins LJ).

contracted goods is a matter for the seller and buyer that can be settled by litigation or arbitration without affecting the obligations of the bank or the seller's right of payment.<sup>585</sup> Pursuant to this, the documentary credit mechanism is known sometimes as 'pay now, argue later'.<sup>586</sup> Thus, any disputes that relate to the underlying contract of sale are outside the scope of the credit, meaning that neither the beneficiary's right of payment nor the bank's duty of payment will be affected. Once the applicant receives the goods, they will have the right to sue the beneficiary and not the bank regarding any problem related to the quality, quantity or breach of the main contract.

Another merit of this principle is that the cancellation of the underlying contract will not affect the payment, even if the buyer changes their mind for any reason.<sup>587</sup> Furthermore, Article 4(a) stipulates that any agreement in the contract that binds the bank with the main transaction will be null.<sup>588</sup> Consequently, any language referencing the underlying transaction as a condition for honouring the credit is expressly to be ignored. It must be borne in mind that, even if the buyer failed to deposit funds in the bank, the issuer is still obliged to honour the credit to the seller because the relationship between buyer and bank is separate.<sup>589</sup>

It appears that the need for this principle is important from the bank's perspective as it protects them from any disputes outside the scope of the credit, because they are not expert in such transactions. Furthermore, it provides them with immunity from any extra responsibility that is out of their scope, as banks do not want to take the risk of bearing responsibility for a failure to pay. It also affirms their duty to examine the documents, but not the goods. However, as it limits their responsibility under the credit, it will place the applicant in a passive position.

---

<sup>585</sup> *Ibrahim v Barclays Bank Plc* [2012] EWCA Civ 640, [2013] Ch 400 [60]; *Harbottle* (n 2) 155–156; *Bridge* (n 60) [6.77]; *Horowitz* (n 26) [2.14].

<sup>586</sup> *Dalhuisen* (n 26) 358; *Horowitz* (n 26) [2.18]; *McMeel* (n 26).

<sup>587</sup> *Bridge* (n 1) [23-075]; Margaret Moses, 'The Irony of International Letters of Credit: They Aren't Secure, but They (Usually) Work' (2003) 120 *Banking Law Journal* 479, 481.

<sup>588</sup> Article 4(a) states 'Banks are in no way concerned with or bound by such contract, even if any reference whatsoever to it is included in the credit'.

<sup>589</sup> *Burrows* (n 217) [6.119]; Andrew Burrows, *English Private Law: Oxford Principles of English Law* (3<sup>rd</sup> revised edition, OUP Oxford 2013) 840; *Mugasha* (n 16) 136.



Although it might be in favour of the beneficiary but not the applicant, it might create a risk that the issuing bank may honour the credit even if the beneficiary has failed to perform its obligations under the contract with the applicant.

Despite the autonomy principle's merit in securing the parties' rights, unscrupulous beneficiaries might abuse the system and defraud other parties involved by relying upon this principle.<sup>590</sup> The mechanism of this principle separates the documentary credit contract and the sale of goods contract. That is to say, it only requires the beneficiary to produce documents that conform with the terms and conditions of the letter of credit and does not have to show the issuer that it has properly performed its duties under the underlying transaction. Accordingly, Article 14 requires the bank to deal only with written details and not the facts.<sup>591</sup> A party can easily produce forged documents; therefore, the separation of these documents from the underlying transaction can be seen as an opportunity for the beneficiary to carry out fraud. As long as these documents comply with the terms of the credit, the bank must honour it, irrespective of whether the party demanding payment did not fulfil all of the obligations stipulated in the underlying contract. Consequently, from this point of view, the phenomenon of fraud has emerged.

## 5.2 Fraud in the documents or the underlying contract of sale?

Letters of credit are contracts that are independent to the contract of purchase. The law on this point is clear unless there is fraud on the part of the seller.<sup>592</sup> However, as mentioned earlier, the UCP rules do not address the fraud issue, meaning that there are no provisions in the rules

---

<sup>590</sup> Xiang Gao, 'The Identity of the Fraudulent Party under the Fraud Rule in the Law of Letters of Credit' (2001) 24 University of New South Wales Law Journal 119,122.

<sup>591</sup> Article 14 'a. A nominated bank acting on its nomination, a confirming bank, if any, and the issuing bank must examine a presentation to determine, on the basis of the documents alone, whether or not the documents appear on their face to constitute a complying presentation. d. Data in a document, when read in context with the credit, the document itself and international standard banking practice, need not be identical to, but must not conflict with, data in that document, any other stipulated document or the credit'.

<sup>592</sup> *Mugasha* (n 16) 137; *Power Curber International* (n 2); *United City Merchants* (n 6); *Sztejn* (n 52).

to deal with it, nor are there remedies. In this regard, national jurisdictions have established a ‘fraud exception rule’ as an exception to the autonomy principle. However, even though the fraud exception rule is the only exception to the autonomy principle and recognised by almost every jurisdiction in the world, it is a complicated rule and ‘riddled with many difficulties’.<sup>593</sup> This exception does not properly solve the problem as different legal jurisdictions have interpreted it in different ways, leading to a variety of outcomes.<sup>594</sup>

Nonetheless, it is necessary to clarify what the meaning of fraud is in relation to documentary credits and provide some examples to demonstrate how fraud might arise in practice. Some attempts to define such term have been made by many scholars. For instance, it was defined as where the beneficiary, by himself, or with the participation of a third party, intentionally either forges all or one of the required documents or inserts false facts in them in order to obtain the payment under the credit.<sup>595</sup> Another definition is that it refers to ‘an illicit activity in which either exporters or importers violate their obligations, such as shipping goods or making payment, to obtain a financial benefit by exploiting the loopholes of the L/C mechanism, thereby resulting in financial loss to either importers or exporters’.<sup>596</sup>

The following scenarios provide some examples of how fraud might operate in this context:

**First scenario;** the sale of contract is made for **100 Black PC**; in fact, 20 Black PC are shipped.

**Second scenario;** the sale of contract is made for 100 **Black PC**; in fact, 100 **White PC** are shipped.

**Third scenario;** the sale of contract is made for 100 Black PC; in fact, **no goods** are shipped.

**Fourth scenario;** the sale of contract is made for 100 Black PC; in fact, toothbrushes **are shipped**.

---

<sup>593</sup> See in general Burrows (n 217); Bridge (n 60); Horowitz (n 26); Low (n 25) 463.

<sup>594</sup> Gao (n 53) 50; Roy Goode, ‘Abstract Payment Undertakings in International Transactions’ (1996) 22 *Brooklyn Journal of International Law* 1,13.

<sup>595</sup> Tareq Al-Tawil, ‘Letters of Credit and Contract of Sale: Autonomy and Fraud’ (2013) 16 *International Trade & Business Law Review* 159,183.

<sup>596</sup> Chang-Ryung Han and Others, ‘Documentary Credit Fraud against Banks: Analysis of Korean Cases’ (2015) 18 *Journal of Money Laundering Control* 457, 458.

**Fifth scenario;** the date e.g, appeared in the bill of lading was different than the actual date of shipment.

Generally speaking, the most common forms of fraud in connection with letters of credit are when beneficiaries do not actually send goods<sup>597</sup> (as in the third scenario) or send useless goods instead of those required.<sup>598</sup> (as in the fourth scenario) that is to say, if the shipped goods do not exist or they are worthless, the beneficiary will be committing fraud. However, if the beneficiary did ship the goods but with a different quantity or quality, (as in the first and second scenarios) the question arises as to whether this will be considered fraud in the context of letters of credit. My opinion is that it will not.

Most courts refused to transfer the breach of contract claims to fraud claims,<sup>599</sup> which will not stop the payment,<sup>600</sup> merely because breach of contract is not part of fraud.<sup>601</sup> In *Cherubino Valsangiacomo v Americana Juice Imports INC*,<sup>602</sup> for instance, the shipped goods were not in the same quantity, the court, however, did not consider it as a fraud claim but instead a breach of contract. Likewise, in *Maurice O'Meara*, the National Park Bank refused to pay, claiming that there is a reasonable doubt regarding the quality of the newsprint paper. The court refused such claim and stated that 'If the [goods] when delivered did not correspond to what had been purchased, either in weight, kind or quality, then the purchaser had his remedy against the seller for damages'.<sup>603</sup>

It is clear that from the perspective of the courts, any dispute regarding the quality or quantity of the goods will not be considered as fraud unless they were worthless or not shipped at all, otherwise, it is out of the scope of the fraud exception. This means that any dispute regarding

---

<sup>597</sup> *CDN Research & Development Ltd v Bank of Nova Scotia* (1982) 136 DLR (3d) 656.

<sup>598</sup> *Sztejn* (n 52).

<sup>599</sup> Roy Goode and Others, *Transnational Commercial Law: Texts, Cases and Materials* (2nd edition, OUP 2015) 326, 331.

<sup>600</sup> John Dolan, 'Negotiation Letters of Credit' (2002) 119 *Banking Law Journal* 408, 420.

<sup>601</sup> *Sztejn* (n 52) 634.

<sup>602</sup> No. 13-99-587-CV, Court of Appeal Texas (2000).

<sup>603</sup> *Maurice O'Meara* (n 97) 639.

the quality or the quantity of the goods is only a breach of contract.<sup>604</sup> These disputes are not a valid reason for banks to refuse payment and are within the scope of the fraud exception; they are simply a breach of contract.

However, assume that documents are in compliance, but the goods are not. Meaning that, the documents describe the shipped goods as described in the sale of contract, which is contrary to the genuine status of the shipped goods. Will the fraud exception rule be applied here? In turn, assume that the documents are in not compliance where they described the shipped goods exactly as their status once shipped, will the fraud rule be applied?

Case law has shown that there are different views regarding the scope of the fraud exception rule, including the controversial question of whether the rule applies only if the fraud appears in the documents (the approach adopted in the UK), or if it will be extended to include fraud in the underlying transaction (the approach adopted in the USA). The following section will assess which approach should be preferred by answering the following question: ‘should the fraud exception rule apply only to fraud in the documents presented, or should it be extended to fraud in the underlying transaction?’ Therefore, this section will discuss previous findings, taking *Sztejn* and the *American Accord* cases as a starting point for the discussion and it will then go on to analyse the academic debate in this context.

### ***5.2.1 The alternative approaches in the UK and the USA***

In the case of *Sztejn*, the plaintiff applied for an injunction to prevent payment being made under a letter of credit. The plaintiff alleged that the documents accompanying the drafts were fraudulent in that they did not represent actual merchandise but instead worthless material had been shipped by the seller namely cow hair and other rubbish instead of bristles as contracted. The court emphasised that payment in a letter of credit transaction is made against documents

---

<sup>604</sup> *Phillips v Standard Bank of South Africa Ltd* [1985] (3) South Africa 301(W) at 304.

and not goods.<sup>605</sup> It also reiterated the principle of autonomy, highlighting that letters of credit are independent from the underlying contract. Nevertheless, the court commented that in such a situation the autonomy principle should not be used to protect the unscrupulous seller, particularly so where the fraud was called to the bank's attention before the drafts and documents were presented for payment.<sup>606</sup> Therefore, the court stated that 'no hardship will be caused by permitting the bank to refuse payment where fraud is claimed, where the merchandise is not merely inferior in quality but consists of worthless rubbish.'<sup>607</sup>

From the *Sztejn* case, it is presenting the fourth scenario mentioned above. In this case, it is apparent that the fraud can be characterised as both fraud in the documents (where the documents did not represent the actual goods shipped) and fraud in the underlying transaction. Although the court affirmed the necessity for the autonomy principle here, it also emphasised the need to recognize the fraud exception to that rule.

In contrast, in the *American Accord* case, which is an example of the fifth scenario, Diplock LJ stated: '*To this general statement of principle as to the contractual obligations of the confirming bank to the seller, there is one established exception: that is, where **the seller, for the purpose of drawing on the credit, fraudulently presents to the confirming bank documents that contain, expressly or by implication, material representations of fact that to his knowledge are untrue***'.<sup>608</sup> Diplock LJ was clearly in favour of restricting the scope of the fraud exception to documentary fraud alone. Having made that observation, his Lordship stated that banks were under a duty to honour the credit against apparently conforming documents.<sup>609</sup> It is clear from this statement that English courts will not extend the fraud rule to fraud in the underlying transaction.

---

<sup>605</sup> *Sztejn* (n 52) 634.

<sup>606</sup> *ibid* 634.

<sup>607</sup> *ibid* 635.

<sup>608</sup> *United City Merchants* (n 6) 183.

<sup>609</sup> *ibid* 188.

Similarly, in *Edward Owen Engineering*, which concerned a performance bond contract, rather than a letter of credit,<sup>610</sup> Brown LJ explained the implementation of the fraud exception rule under the English courts very precisely. His lordship stated: ‘that exception is that where the documents under the credit are presented by the beneficiary himself and the bank knows when the documents are presented that they are forged or fraudulent, the bank is entitled to refuse payment’.<sup>611</sup> As it stands, the position in the UK is that the exception is applied only if fraud occurs in the presented documents. The discussion that follows will explain why the UK has adopted this approach, focusing on the literal approach the courts have taken to interpreting the relevant provisions of the UCP 600. A letter of credit is defined as ‘an undertaking by the issuing bank’,<sup>612</sup> meaning that this special contract will give the beneficiary a ‘statutory right’ against the issuer.<sup>613</sup> Once a letter of credit is issued and confirmed by a bank, the bank must pay it if the documents are in order and the terms of the credit are satisfied.<sup>614</sup> That is to say, the obligation of the issuer bank is absolute and is meant to be absolute. This expression, ‘*an absolute obligation*’, is reflected in Article (3) of the UCP 600, which stipulates that ‘A credit is irrevocable’. Irrevocable means ‘a definite undertaking by the issuer’.<sup>615</sup> From the nature of these concepts (‘irrevocable’ and ‘absolute’), it follows that they will bind the English courts not to intervene in the bank’s duty. In other words, English courts apply the UCP rules literally even if it does not lead to justice. This approach regarding the scope of the fraud exception, despite criticism, secures the bank’s position and, most importantly, affirms the ‘irrevocable promise of payment’.

English courts have recognised the autonomy principle pursuant to Article 4 of the UCP 600.

In one of the early English cases that recognised the autonomy principle, *Hamzeh Malas*, the

---

<sup>610</sup> *Edward Owen Engineering* (n 24) 159.

<sup>611</sup> *ibid* 172.

<sup>612</sup> Martin Davies and David Snyder, *International Transactions in Goods, Global Sales in Comparative Context* (OUP 2014) 283.

<sup>613</sup> Lucien Dhooge, *International Business Law and Its Environment* (9<sup>th</sup> edition, South-Western College Pub 2014) 188.

<sup>614</sup> *Edward Owen Engineering* (n 24) 981; *Hamzeh Malas* (n 24) 129; *Stein v Hambro's Bank of Northern Commerce* [1921] 9 Ll L Rep. 507, 529.

<sup>615</sup> Ray August and Others, *International Business Law, Text Cases and Readings* (6<sup>th</sup> edition, Pearson 2013) 694.

court affirmed that the beneficiary's right of payment is legitimate only if the tendered documents are compliant with the terms of the credit. In contrast, any disputes between the parties in the underlying contract of sale will not affect such right.<sup>616</sup> Likewise, in *Harbottle* case it was affirmed that banks are not concerned with any disputes in the underlying contract between the parties; they are only concerned with the performance of obligations under the confirmed credit.<sup>617</sup> From these cases, it is submitted that, from the English courts' perspective, the entire commercial purpose of the irrevocable letter of credit is to give the beneficiary an assured right to be paid irrespective of any dispute with the buyer as to the performance of the contract as a ground for non-payment.

However, the Supreme Court of Canada extended the fraud scope to include fraud in the underlying transaction. In *Angelica-Whitewear*, the Court stated that 'the fraud exception to the autonomy of documentary letters of credit should not be confined to cases of fraud in the tendered documents but should include fraud in the underlying transaction of such a character as to make the demand for payment under the credit a fraudulent one'.<sup>618</sup> Furthermore, under the UCP rules, according to Article 14 a bank's obligation is to examine the documents only.<sup>619</sup> If the bank departs from the conditions laid down in the rule, it acts at its own risk.<sup>620</sup> This means that banks prefer the safest way, which is not to involve itself in the underlying transaction by checking the goods. However, if that condition is broken by forged or fraudulent documents being presented, the applicant will have a defence in point of law against being liable in respect of those documents and certainly, they have a claim.<sup>621</sup>

Moreover, some scholars noted that the relationship between the applicant and the issuing bank under a letter of credit contract is as a principal and not as an agent.<sup>622</sup> Therefore, due to this

---

<sup>616</sup> *Hamzeh Malas* (n 24) 129.

<sup>617</sup> *Harbottle* (n 2) 156.

<sup>618</sup> *Bank of Nova Scotia* (n 106) 83 (Le Dain J speaking for the Court).

<sup>619</sup> Article 14(a) 'A nominated bank acting on its nomination, a confirming bank, if any, and the issuing bank must examine a presentation to determine, on the basis of the documents alone, whether or not the documents appear on their face to constitute a complying presentation'.

<sup>620</sup> *Equitable Trust* (n 51) 56.

<sup>621</sup> *Esejka International Anstalt v Central Bank of Nigeria* [1979] 1 Lloyd's Rep. 445, 447.

<sup>622</sup> Roy Goode and Others, *Transnational Commercial Law: International Instruments and Commentary* (2nd edition, OUP 2012) 338.

relationship, as long as the presented documents are in order, the bank cannot accept any instructions from the applicant to stop payment if the fraud was in the goods.<sup>623</sup> That is to say, buyers should take the risk of fraud, not the banks; the banks should be liable only for failure to examine the relevant documents and should not be liable if they pay over fraudulent documents.<sup>624</sup> In other terms, English courts implement Article 5 of the UCP. This article stipulates that banks deal with a written presentation in the documents, not with the goods or the status of the sale of goods contract.

As it stands from these points, English courts have some reservations with regard to extending such an exception to fraud in the underlying transaction pursuant to three articles in the UCP rules: irrevocable credit (Article 3), autonomy principle (Article 4) and the fact that banks deal with documents only and not goods (Article 5). Notably, through analysing the language of the UCP 600 rules, in general, these rules are restricted to cases about documents only and not for the contracted goods. Most of these rules are concerned with documents, which are vital to the letter of credit contract, hence the expression ‘documentary credit’. Accordingly, when courts deal with any dispute in such a contract, they will postpone the payment if the dispute relates to the required documents only. This explanation clarifies why the mechanism of letters of credit is described as ‘pay now, argue later’.

Turning to the US approach, Section 5-114(2) of the previous version of the UCC 1978 states that ‘*Unless otherwise agreed, when documents appear on their face to comply with the terms of a credit but a required document does not, in fact, conform to the warranties made ... or is forged, there is **fraud in the transaction**...*’. This expression is controversial because of the meaning of the term ‘transaction’; the question is whether it refers to a letter of credit contract

---

<sup>623</sup> Goode (n 622) 338.

<sup>624</sup> Article 34 states: ‘A bank assumes no liability or responsibility for the form, sufficiency, accuracy, genuineness, falsification or legal effect of any document, or for the general or particular conditions stipulated in a document or superimposed thereon; nor does it assume any liability or responsibility for the description, quantity, weight, quality, condition, packing, delivery, value or existence of the goods, services or other performance represented by any document, or for the good faith or acts or omissions, solvency, performance or standing of the consignor, the carrier, the forwarder, the consignee or the insurer of the goods or any other person’. See also Dolan (n 81) 11.



or the main sale of goods contract.<sup>625</sup> It has been noted that such a concept has been used to indicate the letter of credit arrangement itself,<sup>626</sup> which arises once the applicant and the issuer agreed to open the credit. As such, it was used to distinguish the main contract from the letter of credit contract.<sup>627</sup> That is to say, the rule meant fraud in the presented documents rather than fraud in the underlying transaction. Accordingly, it will be applied only if it accords in a letter of credit, namely in documents and not the main transaction.

It is noteworthy that the Official Comment 1 and the revised Article 5-109 of the UCC 1995 make it clear that the fraud rule includes fraud in the underlying transaction.<sup>628</sup> In practice, the majority of US cases extended the scope and recognised the fraud rule as ‘fraud in the underlying contract’.<sup>629</sup> In *United Bank*, the court extended the scope of the exception where the beneficiary was guilty of fraud in shipping, not merely non-conforming merchandise, but worthless fragments of boxing gloves, which is similar to the *Sztejn* case.<sup>630</sup> The inspection revealed that the beneficiary had shipped ‘old, unpadded, ripped and mildewed gloves rather than the new gloves’.<sup>631</sup> The court in this case, which is presenting the fourth scenario, applied Section 5-114 of the revised version UCC and explicitly recognised fraud in the underlying contract through commenting that ‘fraud in the transaction is a valid defence to payment of drafts drawn under a letter of credit’.<sup>632</sup> That is to say, shipping ‘old, unpadded, ripped and mildewed gloves’ rather than the new gloves, even though the presented documents were compliant,<sup>633</sup> is fraud, and is thus established. An injunction is granted only if the beneficiary has no bona fide claim to payment under the lease.<sup>634</sup>

---

<sup>625</sup> Daniel Chow, *International Business Transactions: Problems, Cases and Materials* (3<sup>rd</sup> edition, Wolters Kluwer Law & Business 2015) 278.

<sup>626</sup> Gao (n 53) 55; Horowitz (n 26) [2.14].

<sup>627</sup> *FDIC v Bank of San Francisco*, 817 F 2d 1395 (9<sup>th</sup> Cir, 1987); Dolan (n 121) [6.05].

<sup>628</sup> See Mugasha (n 16) 145.

<sup>629</sup> For example, see *Itek Corp* (n 55); *Rockwell International Systems* (n 55).

<sup>630</sup> *United Bank* (n 51) 260.

<sup>631</sup> *ibid* 257.

<sup>632</sup> *ibid* 260.

<sup>633</sup> *ibid* 261.

<sup>634</sup> *Intraworld Industries, INC v Girard Trust Bank*, 336 A 2d 316, 325 (Pa, 1975).

This statement means that, although documents comply on their face, the beneficiary will be prevented from accessing the credit if the goods are not as stipulated in the documents. ‘Old gloves’ are not the same as ‘new gloves’, nor are ‘bristles’ the same as ‘cow hair’. It is neither about the goods’ quality nor their quantity. This is a clear point in the law, but what matters here is that the shipped goods are not as described in the documents. Therefore, US courts will apply the fraud rule if the beneficiary presents ‘compliant’ documents to describe an ‘untrue’ commodity.

From the US courts’ perspective, goods are a reflection of the presented documents. In *NMC Enterprises Inc v Columbia Broadcasting Systems*,<sup>635</sup> the beneficiary’s office had misrepresented the quality of the communications equipment and technical assistance and fraudulently induced the applicant to enter into the underlying transaction of sale which the beneficiary knew was false. The court believed that if the contract of sale was tainted with fraud, then any document that the contract required the beneficiary to present was also tainted with fraud.<sup>636</sup> One justification for the US courts extending the rule is to prevent the beneficiary from abusing the mechanism through the courts’ assistance to enforce a letter of credit while perpetrating fraud.<sup>637</sup> Consequently, the fraud exception must extend to fraud in the contract of sale since it will be difficult to determine whether the documents are fraudulent without inquiring into whether the contract of sale is fraudulent.<sup>638</sup>

According to the courts’ judgments, the conduct of fraud will affect the entire contract. Thus, it will justify why US courts apply the extended version of the exception rule. Notably, in *Old Colony Trust Co v Lawyers’ Title & Trust Co*,<sup>639</sup> the court applied the ‘fraud in documents’ rule as in the fifth scenario. It stated that ‘when the issuer of a letter of credit knows that a

---

<sup>635</sup> 14 UCC Rep Serv 1427 (NYSC, 1974).

<sup>636</sup> *ibid* 1435.

<sup>637</sup> Mugasha (n 16) 140; Gordon Graham and Benjamin Geva, ‘Standby Credits in Canada’ (1984) 9 Canadian Business Law Journal 180, 196-199.

<sup>638</sup> *NMC Enterprises* (n 635) 1436.

<sup>639</sup> 297 F 152 (2<sup>nd</sup> Cir, 1924).

document, although correct in form is, in point of fact, false or illegal, he cannot be called upon to recognise such a document as complying with the terms of a letter of credit'.<sup>640</sup>

Although they extend the fraud rule and go beyond the documents to investigate the sale of goods contract, the US courts did not consider disputes regarding the shipped goods as fraud in a few cases. That is to say, the US courts affirmed the necessity to distinguish between the fraud in goods and breach of the contract. If the status of the goods constitutes a suspicion, it might be dealt with as a fraud in the credit, otherwise it is only a breach of contract, which will not permit the bank to dishonour the credit. In *Maurice O'Meara*, the issuer bank refused to pay the drafts, claiming that the quality of the newsprint paper was not as required, as in the second scenario. However, the New York Court of Appeals rejected the issuing bank's defence and stated that the bank was concerned only with the drafts and the documents accompanying them.<sup>641</sup> In the view of this case, under the US regime, it is not every breach of contract or commercial dispute that renders the fraud exception applicable,<sup>642</sup> but the exception does apply where no goods are shipped or the shipped goods are of no use at all.

### ***5.2.2 Concluding remarks: fraud only in the documents***

Based on the above discussion of both the alternative approaches in the UK and the USA, it is my contention that the fraud exception rule should apply only to fraud in the tendered documents. That is to say, 'fraud in the underlying transaction' should not fall within the scope of the fraud rule. I make this judgement for the following reasons. The autonomy principle is the key element in such an instrument, meaning that if such cornerstone is affected, then the whole reliable system will collapse. Therefore, the autonomy principle should not be disregarded. By quoting from Bridge, 'it is arguable that where the dispute lies exclusively on

---

<sup>640</sup> *Old Colony Trust* (n 639) 158.

<sup>641</sup> *Maurice O'Meara* (n 97) 395-396.

<sup>642</sup> *Bertrams* (n 580) 369.

the underlying contract, the autonomy principle should prevail and the appropriate interim relief lies in the form of a freezing order against the proceeds of payment'.<sup>643</sup> That is to say, this commercial device is based on the independence from the main sale of goods contract; therefore, the underlying contract should not be questioned.<sup>644</sup>

Agreeing with the English approach, the obligation of the issuer bank is an absolute obligation. This absolute obligation', is reflected in Article 3. As long as the tendered documents comply with the credit terms, the bank is under an absolute duty to honour the credit. From the nature of these concepts ('irrevocable' and 'absolute'), it follows that courts should not intervene in the bank's duty. This approach will secure the bank's position and, most importantly, affirm the 'irrevocable promise of payment'. Importantly, courts need to take into account the importance of the documentary credit rules in protecting the commercial integrity of this independent device.<sup>645</sup> Meaning, courts should not postpone the payment on the ground of fraud defence because of a mere breach of contract. In essence, the beneficiary's right of payment should not be postponed if there was fraud in the underlying transaction. Consequently, the fraud defence is established only where fraud occurs in the documents.<sup>646</sup> Moreover, it is clear in the law that banks deal with documents only; therefore, it follows that they are not required to become engaged in the main transaction. Assume that the fraud defence will apply to fraud in the underlying contract, then the question as to how the bank can determine if fraud exists in the goods arises. This will be a hardship for banks, as it will overlap with the autonomy principle. Consequently, if the application of the fraud rule is extended to fraud in the underlying contract, according to Ellinger, it might damage the reputation of the banks.<sup>647</sup>

---

<sup>643</sup> Bridge (n 1) [24-035].

<sup>644</sup> John Dolan, 'Tethering the Fraud Inquiry in Letter of Credit Law' (2006) 21 Banking and Finance Law Review 479, 481.

<sup>645</sup> *ibid* 503.

<sup>646</sup> Horowitz (n 26) [2.27-28]; Goode (n 60) 234.

<sup>647</sup> E.P. Ellinger, 'Fraud in Documentary Credit Transactions' [1981] Journal of Business Law 258, 265.

Although restricting the application of the fraud exception to fraud in the documents seemingly protects the beneficiary over the applicant, it is necessary in order to maintain the utility of letters of credit and, most importantly, implement the UCP rules duly. To conclude, the fraud scope should be restricted to fraud in the documents only.

### **5.3 Third party fraud and the knowledge of the beneficiary**

It is established in the law that if the beneficiary himself commits the fraud, or has knowledge of the fraud, then the exception will apply.<sup>648</sup> This raises the question of whether the fraud exception should also bite where the fraud is committed by a third party but without the beneficiary's knowledge.

The judgment of the *American Accord* case has opened the door for such issue and has been a battleground for many studies. Accordingly, this section will answer this question; 'will the fraud exception rule apply if the fraud was committed through a third party without the beneficiary's knowledge?'

#### **5.3.1 The position in the UK**

The facts of the benchmark case, the *American Accord*, were that an English company entered into a contract to sell glass fibre making equipment to a Peruvian company named Vitrorefuerzos SA, and payment was to be made by an irrevocable letter of credit. Shipment was to be on or before 15 December 1976. However, shipment actually took place on 16 December, but the loading broker's employee, not acting for, and without the knowledge of, the sellers or the consignees of the letter of credit, fraudulently entered 15 December as the date of shipment on the bill of lading. In presentation, the bank refused such tender and held

---

<sup>648</sup> see in general *Standard Chartered Bank* (n 51) where the beneficiary was party to an agreement with the carrier and its brokers to antedated the bill of lading. See also *Edward Owen Engineering* (n 24) 984; *Sztejn* (n 52) 634; *Bush v National Australia Bank Ltd*, 35 NSWLR 390,402 (1992); *United City Merchants* (n 6) 187-188.

that the presentation was fraudulent in that the goods were loaded on board on 16 December, not on 15 December as agreed. As a result, the plaintiffs, brought an action against the defendant bank for the wrongful dishonour. The trial judge refused the bank's decision and stated that: '[H]ere I have held that there was no fraud on the part of the plaintiffs, nor can I, as a matter of fact, find that they knew the date on the bills of lading to be false when they presented the documents. Accordingly, I take the view... that the plaintiffs are... entitled to succeed'.<sup>649</sup>

Surprisingly, the judgment was reversed by the Court of Appeal, which held that the fact that the fraud had been committed by a third party could not prevent the bank from raising the defence of fraud against the beneficiary.<sup>650</sup> The Court held that 'it is the character of the document that decides whether it is a conforming document and not its origin, then it must follow that if the bank knows that a bill of lading has been fraudulently completed by a third party, it must treat that as a nonconforming document in the same way as if it knew that the seller was party to the fraud'.<sup>651</sup> However, the House of Lords unanimously reversed the decision of the Court of Appeal and reinstated the trial judge's decision.<sup>652</sup> The House of Lords held that the beneficiary should obtain the payment unless it was a party to the fraud.<sup>653</sup>

Notably, it can be seen that each of the courts that dealt with the *American Accord* case approached the issue of third party fraud from different points of view. From the trial judge's perspective, the fraud was neither conducted by the seller nor with his knowledge. In turn, the Court of Appeal pointed out that the case fell within the scope of the fraud exception because the document was forged, although without the beneficiary's knowledge. However, from Lord Diplock's perspective, besides the documents themselves, what is important in such

---

<sup>649</sup> *United City Merchants* (n 6) 278.

<sup>650</sup> *ibid* 239.

<sup>651</sup> *ibid* 248.

<sup>652</sup> *ibid* 183.

<sup>653</sup> *ibid* 183-184.

transactions is the knowledge of the beneficiary. His Lordship believed that the bank is under a duty to honour the credit if there is no knowledge on the part of the beneficiary in regard to fraud conducted by a third party.<sup>654</sup> This duty is based on the fact that ignoring the beneficiary's knowledge as a requirement for establishing the fraud exception rule might undermine the reliable system of letters of credit.<sup>655</sup>

A few years earlier, Brown LJ answered the question regarding fraud by a third party in *Edward Owen*, finding that the implementation of the fraud exception under the English courts could be applied if the beneficiary presented forged or fraudulent documents and knew that the presented documents were not true.<sup>656</sup> Therefore, the general rule is that if the seller fraudulently presents documents that contain, expressly or by implication, material misrepresentations of fact that to his knowledge are untrue to the confirming bank, the fraud exception will be applied. Consequently, to qualify the fraud rule, such conduct needs to be committed by the beneficiary<sup>657</sup> or with their intention and knowledge. Therefore, if the beneficiary is not aware, similar to the *American Accord* case, the rule will not be applied. On the grounds discussed above, it follows that if the fraud was committed through a third party without the beneficiary's knowledge, the fraud exception will not be applied. Therefore, the bank should honour the credit. The justification for such a ruling is because the beneficiary, on this occasion, is also the victim of the fraud; hence, it would not be appropriate to deny them the right of payment.<sup>658</sup>

Generally speaking, English courts focus more on the intention of the seller when looking at cases of fraud. As noticed above, the three courts did not accept the idea that the exception should be applied if the fraud was conducted by a third party without the knowledge of the

---

<sup>654</sup> *United City Merchants* (n 6) 184.

<sup>655</sup> *ibid* 184.

<sup>656</sup> *Edward Owen Engineering* (n 24) 984.

<sup>657</sup> see in general *Standard Chartered Bank* (n 51) where the beneficiary was party to an agreement with the carrier and its brokers to antedated the bill of lading.

<sup>658</sup> *Korea Industry Co Ltd v Andoll Ltd* [1990] 2 Lloyd's Rep. 183, 189; *Bridge* (n 1) [24-024].

seller. What is important is the knowledge of the seller. Consequently, the fraud rule will only be applied if the fraud act was conducted by the beneficiary or when the beneficiary has knowledge of a fraud committed by a third party. That is to say, the focus on the intention of the fraudster is the standard for the rule to be applied in England. This approach was justified as English courts retain the requirement of a beneficiary's knowledge to maintain the efficacy of the letter of credit as a system of payment.<sup>659</sup>

### ***5.3.2 The position in the USA***

In turn, in the US, although there are codified letters of credit rules in legislation and a specific provision for the fraud exception rule, Section 5-114 of the previous version of the UCC 1978 does not identify its position regarding the third party fraud issue. This matter was left to the courts to deal with. In the previous version, the UCC 1978 was concerned only with the nature of the documents, not the identity of the fraudulent party<sup>660</sup> meaning that the fraud exception rule was applied regardless of the identity of the perpetrator and the knowledge of the beneficiary.

After amending the UCC in 1995, the new standard is not concerned with the intentions of the seller but rather examines 'the severity of the effect of the fraud on the transaction'.<sup>661</sup> This means that the US legislation focuses more on the effect of the fraud, neither on the intention of the beneficiary nor on the identity of the fraudster.<sup>662</sup> This, implicitly, means that the fraud exception rule will apply if the fraud was committed by a third party, even without the seller's knowledge. From the US courts' perspective, the effect of such a matter on international trading is detrimental, regardless of who perpetrates the fraud or the knowledge of the beneficiary. Therefore, the effect of fraud on the right of payment should have no correlation to the identity

---

<sup>659</sup> *United City Merchants* (n 6) 185.

<sup>660</sup> Gao (n 590) 136.

<sup>661</sup> James Rosener, 'Recent Developments: Letter of Credit Transactions' (2005) 1 *Journal of Payment Systems Law* 627,636.

<sup>662</sup> Gao (n 53) 85; Odeke (n 572) 124; Gao (n 590) 124.



of the perpetrator or to the beneficiary's knowledge. Briefly, for US courts, fraud is fraud despite who commits it and whether the beneficiary has knowledge because bank and buyer will still be at risk as a result of such action. Moreover, what matters is the existence and the effect of the fraud, not the source or the knowledge and intentions of the parties.

### **5.3.3 Concluding remarks**

In my judgment, although fraud will still harm the utility of a letter of credit transaction, shifting the court focus from the illegal act to the identity of the fraudster or the beneficiary's knowledge will be ineffective. There is no merit in focusing on the identity of the fraudster or on the beneficiary's knowledge at this point. As it stands, a documentary credit is an independent contract between bank and beneficiary; consequently, fraud conducted by a third party without the beneficiary's knowledge, in my judgment, is not a relevant consideration when establishing the fraud rule. What is important here is the conduct of fraud and not the identity of the fraudster nor the knowledge of the beneficiary for these reasons.

Initially, the utmost principle in letters of credit is its autonomy and independence from any dispute in regard to the underlying transaction. That is to say, instead of examining the documents and their compliance, banks will be required to examine the intentions behind the documents. Or in other words, whether the beneficiary is aware of such fraud or not. This is not acceptable and contradicts with Article 5 of the UCP, which will bind banks to go beyond the documents. If the documents were in compliance 'on their face' but the applicant alleged that there is fraud, why should the bank stop the payment on this ground. Why should the bank postpone the payment until investigate whether if the beneficiary is aware of the fraud or not? According to Article 34 of the UCP rules '*A bank assumes no liability or responsibility ... for the good faith or acts or omissions, solvency, performance or standing of the consignor, the carrier, the forwarder, the consignee or the insurer of the goods or any other person.*' This

dispute of awareness between the applicant and the beneficiary, in my judgment, should be out the scope of the bank's authority and the autonomy principle. The most important condition when applying the fraud rule is to establish that fraud exists in the documents regardless the identity.

Further, as demonstrated above, the fraud rule will be applied if the fraud accords in the documents only. Moreover, it is the beneficiary's duty to present complying documents, therefore, the beneficiary is under a duty to check their compliance. In my judgment, I cannot see any merit in considering the beneficiary's knowledge a material condition when applying the fraud rule. Arguably, claiming that the beneficiary is not aware of the fraud in the required documents is, in my point of view, a 'release' key from such allegation. Such claim might create more hardship for the applicant through trying to prove first that fraud exist and later, that the beneficiary is aware of it. No doubt such point of view will not be welcomed from the innocent beneficiary, who might be a victim, yet it is the beneficiary's duty to check their compliance. Therefore, the only exception for this independent right is when the fraud is conducted in the documents regardless of the identity of the fraudster or the beneficiary's knowledge.

## **5.4 Conclusion**

There is no doubt that the autonomy principle is the cornerstone of the letters of credit mechanism. This principle aims to provide banks with immunity and affirm the unique character of letters of credit. Nonetheless, it could be considered as a double-edged sword, where relying on documents only will 'let the horses run freely'. In other words, such a principle might be seen as a device for the fraudster to manipulate the system. The idea of 'pay now, argue later' would not be helpful for the applicant and documents alone will not secure

the buyer's interest, nor will they guarantee that the seller has fulfilled their obligations under the contract.

Turning to the main questions, this chapter has analysed different views from different legal systems. In regard to the scope of the fraud defence, the United States' legal systems demonstrate that the scope of the fraud rule is extended and covers both fraud in documents and fraud in the underlying contract, while in contrast, in England the rule's scope is restricted to fraud in documents only. Such an approach is reasonable as it is justified by applying the UCP rules strictly. That is to say, English courts apply the rules literally, even if it does not lead to fair judgments, while in contrast, American courts seek to enforce justice even if it goes beyond the rules. In any case, restricting the fraud exception to fraud in the documents is the proper approach. The reason for such restriction, on the one hand, is to maintain the integrity of letters of credit and, on the other hand, to affirm the autonomy principle. Extending the scope of the fraud defence will require banks to go beyond the documents, which is not logical. Banks are not experts in such transactions, nor are they required to do so. Most importantly, banks are concerned with documents only; it is for the court to go beyond the documents. Although this approach could be criticised, it is important to ensure that the validity of the documentary credit instrument is not compromised. As established by academics, any argument need not engage the bank unless it is in respect of the presented documents. In short, 'pay now, argue later' is paramount to distinguish parties' litigations from banks v parties' litigations.

Conversely, with regard to third party fraud, the US extended the rule and included actions of third parties in the fraud exception rule regardless of the beneficiary's knowledge. England, in contrast, restricted application of the rule to cases of fraud either initiated by the seller, or where the beneficiary has knowledge of the third party's fraud. This approach is important to secure each party's interests. From the applicant's perspective, if the beneficiary committed the fraud, the beneficiary will lose their right of payment. In contrast, from the beneficiary's perspective,

it is not logical to include third parties' actions in the fraud exception rule where the beneficiary is a victim, especially when the act of fraud is committed without the knowledge of the beneficiary. From the banks' standpoint, they will suffer hardship when it comes to dealing with third party fraud as they are unable to determine if the fraud was committed by the beneficiary or someone else. In addition, if that is the case, the bank is unable to determine whether the beneficiary is aware of that bad conduct or not. Again, banks are not required to go beyond the documents in this mechanism. It is true that the applicant will not be pleased with this approach, yet this is how the autonomy principle works.

## Chapter Six: The Nullity Exception

It is well established that the right of payment under letters of credit is based upon presenting the required documents. These documents are the key for the demand of the credit. However, with the development of technology and printers, it is now easy to design and duplicate documents. Consequently, there is an increase in the number of instances of presenting forged documents.<sup>663</sup> Banks, who are responsible for examining the presented documents, are often faced with the issue of approving non-genuine or forged documents.<sup>664</sup> As a result, the applicant will sue the bank for wrongfully honouring a credit in favour of the beneficiary and refuse to reimburse them by alleging that documents might be null. The issue here is that banks are not required to go beyond the documents when examining their compliance.<sup>665</sup> Apparently, this is an issue where it is not an easy task to distinguish between forged and a null document. In practice, a document can be fraudulent, but not a nullity.<sup>666</sup> Equally, a document can be a nullity but not fraudulent.<sup>667</sup>

In the Singapore case of *Beam Technology*, the court accepted the existence of a nullity exception to the autonomy principle in contrast to other common law jurisdictions, as evidenced, for example, by the opposite view taken in the English *Montrod* case.<sup>668</sup> The debate with regard to a nullity exception began with the earlier *United City Merchants* case, which left the door open for a nullity defence to be recognised in documentary credits.<sup>669</sup> The facts of this case can be briefly summarised as follows: a broker antedated the bill of lading, and the applicant claimed that the bill of lading was forged and requested that the bank dishonour the

---

<sup>663</sup> Todd (n 57) [9.162].

<sup>664</sup> See in general *United City Merchants* (n 6); *Montrod* (n 59); *Heskell* (n 59); *Beam Technology* (n 59); see in general Todd (n 57) [9.143-166].

<sup>665</sup> Article 14(a) 'A nominated bank acting on its nomination, a confirming bank, if any, and the issuing bank must examine a presentation to determine, on the basis of the documents alone, whether or not the documents appear on their face to constitute a complying presentation'.

<sup>666</sup> *Kwei Tek Chao v British Trader and Shippers* [1954] 2 QB 459, 475; *Lombard Finance v Brookplain Trading* [1991] 2 ALL E.R. 762, 767-768; *Bridge* (n 60) [6.81-6.82]; *Horowitz* (n 26) [3.14].

<sup>667</sup> See *Heskell* (n 59) 455; *Kreditbank Cassel GmbH v Schenkers Limited* [1927] 1 KB 826.

<sup>668</sup> *Montrod* (n 59).

<sup>669</sup> *United City Merchants* (n 6) 187. Diplock LJ stated 'I prefer to leave open the question of rights of an innocent seller/beneficiary against the...bank when a document presented by him is a nullity'.

payment. Surprisingly, the court rejected the claim as the fraud exception did not apply (as discussed in Chapter 5). Further, Lord Diplock concluded that the document did not constitute a nullity since it remained a valid transferable receipt for the goods.<sup>670</sup>

The opportunity to recognise nullity as a separate ground to resist payment arose in the *Montrod* case, but the court held that English law does not recognise a ‘nullity’ exception.<sup>671</sup> This case concerned the sale of frozen pork, which was financed by a documentary credit. The credit provided for the presentation of a ‘certificate of inspection issued and signed by the credit applicant [Montrod] at his discretion on the quality and quantity of the goods quality and quantity in good order before shipment’. However, in the honest but mistaken belief that they were authorised to do so, the beneficiary signed the inspection certificate and presented it to the bank. After presentation of the documents, it was revealed that *Montrod* did not in fact authorise the beneficiary to sign on its behalf.<sup>672</sup> The issuing bank made payment despite *Montrod* alleging that the documents were a nullity. *Montrod*’s action was dismissed by the court which refused to accept the nullity claims.<sup>673</sup> As this chapter will show, the Singaporean regime, unlike the English regime, supports the existence of the ‘nullity exception’ as a separate exception to the principle of autonomy.<sup>674</sup>

It has been argued that null documents are non-complying documents.<sup>675</sup> Article 16(a) of UCP 600 states that ‘[W]hen a nominated bank acting on its nomination, a confirming bank, if any, or the issuing bank determines that a presentation does not comply, it may refuse to honour or negotiate.’ If this position is correct, then surely, as a non-complying document, the bank should be entitled to refuse to honour the credit if it is presented with a document that is a nullity. This raises a number of questions: How will the bank determine that the presented

---

<sup>670</sup> *United City Merchants* (n 6) 188.

<sup>671</sup> *Montrod* (n 59) 1992.

<sup>672</sup> *ibid* 1979.

<sup>673</sup> *ibid* 1992.

<sup>674</sup> see *Beam Technology* (n 59); *Lambias* (n 59).

<sup>675</sup> Goode (n 25) [35.115]; Horowitz (n 26) [3.05] and [3.29]; E.P. Ellinger, ‘Documentary Credits and Finance by Mercantile Houses’ in A G Guest and others, *Benjamin’s Sale of Goods* (7<sup>th</sup> edn Sweet & Maxwell, London 2009) [23-143]; Hooley (n 60) 280.

documents are null? Will this mean that they have to go beyond their duty of examination contrary to the UCP 600 rules? These issues will be addressed below at Section 6.4

If a nullity exception were recognised, something that would have to be considered by the court is the extent to which the application of the exception depended on the knowledge of the beneficiary (as per the application of the fraud exception in the UK, for example, which requires knowledge on the part of the beneficiary). In both English cases, there was neither intention by the seller to defraud nor awareness of that fact.<sup>676</sup> Remarkably, in the *Montrod* case, the required document was signed in the honest but mistaken belief that the beneficiary was authorised to do so.<sup>677</sup> Accordingly, the question to ask is whether knowledge of the nullity on the part of the beneficiary would or should have an impact on the application of any proposed nullity exception.

Considering these points as the subject for building the writer's argument, this chapter will assess whether the law should recognise a nullity exception as a legitimate ground for withholding payment and if so, how the exception should be shaped.

In order to do this, this chapter will be divided into four sections. The first section will define the term 'nullity' and explain how a document can become null. Next, in section two, the chapter will evaluate the nullity exception by considering arguments for and against its recognition. It will also examine whether the nullity exception will undermine the autonomy principle and it will evaluate whether the exception is indirectly recognised by the UCP 600 rules. Section three will analysis the contrasting Singaporean approach to the issue and finally, section four will analyse the scope of the proposed nullity exception from two perspectives; First it will consider the bank's duty of examination and their legal position when considering the presented documents as null, and second, it will examine whether the beneficiary's knowledge is required in order to establish the nullity exception.

---

<sup>676</sup> See in general, *United City Merchants* (n 6); *Montrod* (n 59).

<sup>677</sup> *Montrod* (n 59) 1979.

## 6.1 The definition of nullity

One of the strongest arguments against recognition of the nullity exception was exposed in the *Montrod* case: in addition to the lack of definition, there was a deficiency of knowledge as to what actually constitutes nullity in a document.<sup>678</sup> A consideration of how the term ‘nullity’ can be defined is significant for any discussion of the merits of such exception. Generally speaking, the term nullity can be involved in any aspect of law: it can be found in family law, property law, contract law, commercial law and others.<sup>679</sup> In any case, since this study is only concerned with documentary credits, what is important here is the concept of nullity in documents.

Nullity, in general, is a legal consequence of a failure to comply with the law,<sup>680</sup> depriving legal acts of their effects.<sup>681</sup> However, many studies have illustrated that neither courts or jurisdictions, nor any literature, have defined ‘nullity’ in documentary credits or at least, no proposed definition has been offered.<sup>682</sup> This is because such a concept is obscure and not yet developed in the case of documentary credits.<sup>683</sup> In the *Beam Technology* case, the court held that ‘there could be difficulties in determining under what circumstances a document would be considered... a nullity, such a question can only be answered on the facts of each case. One cannot generalise.’<sup>684</sup> This indicates that although the concept of nullity can be assessed on a case by case basis, it is difficult to establish a general definition. Since no general definition has emerged, it will be useful to understand how a required document becomes null or, in other words, what constitutes nullity in a document. Determining the elements that form nullity could help lawmakers understand what it means.

---

<sup>678</sup> *Montrod* (n 59) 1992; Antoniou (n 57) 234; Ren (n 59).

<sup>679</sup> Ronald J. Scalise Jr., ‘Rethinking the Doctrine of Nullity’ (2014) 74 Louisiana Law Review 664, 664.

<sup>680</sup> Kurkela (n 34) 198.

<sup>681</sup> Scalise Jr. (n 679) 664.

<sup>682</sup> Horowitz (n 26) [3.13]; Ren (n 59) 1; Xiaojiang Ren, ‘The Scope of the Fraud Exception in Letter of Credit Law’ (2010) 26 Journal of Contract Law 289,300; Antoniou (n 57) 233.

<sup>683</sup> *Montrod* (n 59) 1992; Donnelly (n 60) 317.

<sup>684</sup> *Beam Technology* (n 59) 610-611.



Arguably, under documentary credits, nullity might be connected with the phrase ‘forged’.<sup>685</sup> The term forgery means ‘a false making or alteration of a writing with the intent to defraud’.<sup>686</sup> Accordingly, the essence of forgery is ‘the making of a false document intending that it be used to induce a person to accept and act upon the message contained in it, as if it were contained in a genuine document’.<sup>687</sup> That is to say, a forged document can be defined as ‘a document which either contains a forged signature or issued in an unauthorised way’.<sup>688</sup>

For example, a bill of lading issued by a non-authorised party is forged and will also be considered a nullity.<sup>689</sup> In one case, the court considered the signature in the bill of lading as null because it was drawn in an unauthorised way.<sup>690</sup> Similarly, if a document is issued but with a wrong signature, such document will be considered as forged.<sup>691</sup> In *Gian Singh & Co Ltd v Banque de l'Indochine*,<sup>692</sup> the court ruled that due to the forged signature in the presented document (a certificate of quality) it was a forged document.<sup>693</sup> However, the court affirmed that the bank is still entitled to be reimbursed for the applicant against the documents which included a forged certificate where the forgery was not detected while examining the documents.<sup>694</sup> In contrast, if the bill of lading were issued and the goods were not shipped, or left behind mistakenly, such bill is not forged yet it is improper document.<sup>695</sup>

However, if the bill of lading indicates that the shipment is for apples, for instance, but the shipment is in fact of oranges, such a document will not be considered as a forgery. Instead it is a lie. Therefore, the bill of lading here will still retain its legal value because it is still issued from the authorised party. That is to say, if this document was issued from an authorised party

---

<sup>685</sup> *Ruben v Great Fingall Consolidated* [1906] AC 439, 441; *Bridge* (n 60) [6.81]; *Horowitz* (n 26) [3.10].

<sup>686</sup> *August* (n 615) 670.

<sup>687</sup> Law Commission, *Criminal Law: Report on Forgery and Counterfeit Currency* (Law Com No 55, 1973) para 22.

<sup>688</sup> *Byrne* (n 419) 854.

<sup>689</sup> *Malek* (n 76) [9.21].

<sup>690</sup> *Kreditbank Cassel* (n 667).

<sup>691</sup> *Malek* (n 76) [9.21].

<sup>692</sup> [1974] 2 Lloyd's Rep. 1.

<sup>693</sup> *ibid* 34; ‘As their Lordships have already pointed out, the divergence between that date and the date of issue of Balwant Singh's genuine passport gives rise to the inference that the passport handed to the notifying bank, and the signature of Balwant Singh on it, was a forgery.’

<sup>694</sup> *ibid* 37.

<sup>695</sup> *Hindley & Co v East Indian Produce Co* [1973] 2 Lloyd's Rep. 515.

but bears an incorrect detail, such a document will still enjoy its legal value and will therefore not qualify as a forgery.

It is well established in the law that no document can be legal, in essence, or at least have any legal value, if it was not issued by the authorised entity. For instance, the carrier is the only authorised party to issue a bill of lading, not the seller or the buyer.<sup>696</sup> Therefore, a bill of lading will be null, if it was issued in the name of a shipping company by a person who has no authority to do so; such a document will have no value.<sup>697</sup> Hence, such a document will not have any legal effect on either the shipper or on any party involved in such transaction if it was issued by a third party who is unauthorised or from a non-existent entity. This is also the case if the document bears an unauthorised signature.<sup>698</sup>

Singaporean courts, which are the only jurisdiction that has explicitly recognised the nullity exception, ruled in two remarkable judgments. In *Beam Technology* case, a required document that included the name of a non-existent entity was forged and therefore null.<sup>699</sup> Similarly, in *Lambias* case, a required document was signed and issued by an unauthorised party (the applicant), hence the court considered it as a null document.<sup>700</sup>

On the grounds discussed above, a document can either contain a lie but not be forged or it can amount to a forged document. Accordingly, a document will be forged and therefore considered a nullity in the following circumstances: if it was created without authority or permission; or if the signature is a forgery. Most importantly, what can be understood from these examples is that each of them would also be considered a nullity. Consequently, a null document is a forged document that is either issued in an unauthorised way or without permission. Permission here can be seen as an incorrect signature or a missing signature.

---

<sup>696</sup> See in general Todd (n 57) Chapter One; Richard Hooley, 'Fraud and Letters of Credit, Part 1' (2003) 3 Journal of International Banking and Financial Law 91, 93.

<sup>697</sup> Bridge (n 60) [6.81].

<sup>698</sup> Paul Todd, 'Non-Genuine Shipping Documents and Nullities' [2008] Lloyd's Maritime and Commercial Law Quarterly 547, 562. Therefore, according to this fact, in my judgment, the *Montrod* case should be within the nullity scope.

<sup>699</sup> *Beam Technologies* (n 54) 610.

<sup>700</sup> *Lambias* (n 59) 762-763.

Consequently, a null document is a non-complying document.

A further issue is whether a document that bears the incorrect date,<sup>701</sup> will be considered a forged and therefore null document? Admittedly, not every forged document can be considered as null.<sup>702</sup> If the document contains an untrue statement, this will not make it null.<sup>703</sup> A bill of lading with a wrong name or date is not null<sup>704</sup> because the holder still enjoys legal value.<sup>705</sup> In *Kwei Tek Chao* case, the court considered the misdated bill of lading as a legal document and not null.<sup>706</sup> This is logical, as misdating only will not affect the validity of the document which retains its commercial value and it can still be used to demonstrate title to the goods. This is also the case in regard to *American Accord* case. Although the said bill of lading was misdated, the document was still of legal value and therefore did not qualify as a null document.<sup>707</sup> Stephenson LJ, turning to the Forgery Act 1913, considered that a document will be null when such document tells a lie about the maker but not about the date.<sup>708</sup> Perhaps if the whole date was missed, the judgment would be different as such a document could be considered as discrepant.<sup>709</sup> Accordingly, there is a difference between the effect of a null document and a forged document. If such forgery has an effect on the legal value of the document, it will be considered as valueless and null. This is reasonable, because such a document will not provide the holder with any right to claim the goods. A null document is a worthless piece of paper that do not enjoy any legal value. Therefore, it can be concluded that a null document is a document where the forgery effects its legal value.

As discussed in chapter two and three, if a document bears wrong details about the transaction,

---

<sup>701</sup> As in the case of the *United City Merchants* (n 6).

<sup>702</sup> *United City Merchants* (n 6); *Kwei Tek Chao* (n 666) 475; Adodo (n 351) 57; Horowitz (n 26) [3.14]; Bridge (n 60) [6.82].

<sup>703</sup> *Kwei Tek Chao* (n 666) 475; *Lombard Finance* (n 666) 767-768; Bridge (n 60) [6.81].

<sup>704</sup> *ibid* [6.82]; Horowitz (n 26) [3.14].

<sup>705</sup> According to Lord Diplock, a 'bill of lading with the wrong date of loading... was far from being a nullity. It was a valid transferable receipt for the goods giving the holder a right to claim them'. *United City Merchants* (n 6) 188.

<sup>706</sup> *Kwei Tek Chao* (n 666) 476; 'Accordingly, in my judgment, the bills of lading in the present case were not a nullity'.

<sup>707</sup> According to Lord Diplock, a 'bill of lading with the wrong date of loading... was far from being a nullity. It was a valid transferable receipt for the goods giving the holder a right to claim them'. *United City Merchants* (n 6) 188.

<sup>708</sup> *United City Merchants* (n 6) 231.

<sup>709</sup> See chapter three.

it will be considered discrepant and therefore non-compliant. It could therefore be argued that a discrepant document containing incorrect details could also be considered as a nullity. From my own point of view, this is not always the case. If the alleged document included an incorrect detail, it will only be considered a nullity where it would deprive the document of its legal value. In the *Raffaella* case, the bill of lading was misdated and bore the wrong name of the vessel. Relying on these factors, the court considered the bill of lading a null document.<sup>710</sup> Since there is a misstatement of the vessel's name, that document became null. That is to say, the name of the vessel in the bill of lading is an important element for the legality of such a document, as is the case with other elements (e.g. missing signature, name of the parties, missing goods description). However, if the said document was only misdated, it might be accepted.

It follows from the preceding discussion that what is important in determining if the document is null or not is the effect of the incorrect data; i.e. misstated details, as some details might not affect the legal value of the document. Some details are material and essential requirements to establish the validity of the documents as set out in legislation. Generally, missing or even misstating details such as the name of the vessel, name of the holder, destination, signature and the quality of the goods will affect the value of the documents. These are important elements of the document, and would render the document useless if they do not appear on it or if they are presented incorrectly. Therefore, if the details were misstated or missed in the tendered document, it would be considered null. Consequently, the meaning of nullity rests on the legal value of the document amounting to 'worthless paper'<sup>711</sup>. What is essential in determining nullity is the effect of the defect, in particular, on the document (i.e., whether it will affect its legal value or not). If the misstated detail destroys the essence of the document, it is null,

---

<sup>710</sup> *Egyptian International Foreign Trade Co v Soplex Wholesale Supplies (The Raffaella)* [1984] 1 Lloyd's Rep 102, 116.

<sup>711</sup> Bridge (n 60) [6.82].

otherwise it is a valid document.<sup>712</sup> The factors that matter in determining if a document is null are the extent and the nature of the falsity. If the falsity is in such depth that it will affect the essence of the document, nullity will arise. The judgment on a null document is based on the facts of each individual case; if the misstated facts are material, such as signature, shipper's name, or the vessel's name, it could render the document null because it does not satisfy the requirements that a certain law sets out for a valid and legitimate document.

## 6.2 Evaluating the nullity exception

*'If a general nullity exception were to be introduced as part of English law, it would place banks in a further dilemma as to the necessity to investigate facts which they are not competent to do and from which UCP 500 is plainly concerned to exempt them. Further, such an exception would be likely to act unfairly upon beneficiaries participating in a chain of contracts in cases where their good faith is not in question. Such a development would thus undermine the system of financing international trade by means of documentary credits.'*<sup>713</sup>

These are the arguments introduced by Potter LJ in regard to recognising a nullity exception. His Lordship believed that a nullity exception would be difficult in relation to letters of credit, and particularly on the parties to a letter of credit. Therefore, there is no need to recognise such an exception. Arguably, many disagreed with his Lordship in respect of the impact of the recognition of the new exception on the parties to letters of credit, namely, the beneficiary and bank.<sup>714</sup> Therefore, this section will analyse the effect of the recognition of this exception.

---

<sup>712</sup> *Lombard Finance* (n 666) 769: the court ruled that if the forged act effect on the essence of the document it will be null; *Bridge* (n 60) [6.82]; Anna Antoniou, 'Fraud, Exceptions to Autonomy and the UCP 600' (2013) 28 *Journal of International Banking Law and Regulation* 339, 345; *Ren* (n 59) 7; *Donnelly* (n 60) 318.

<sup>713</sup> *Montrod* (n 59) 1992.

<sup>714</sup> *Horowitz* (n 26) [3.28]; *Bridge* (n 60) [6.82]; *Antoniou* (n 57) 234; *Donnelly* (n 60) 336-337.

### 6.2.1 Should the nullity exception be recognised?

There exists fierce debate between academics over the recognition of the nullity exception and the parameters of such exception, should it be recognised.<sup>715</sup> One of the arguments against the recognition of a nullity exception is that it will create a dilemma for the banks.<sup>716</sup> In the *Montrod* case, Potter LJ rejected the need for the nullity exception and commented that such an exception would place banks in a difficult position.<sup>717</sup> Meaning, if such an exception existed, banks would be bound to go beyond the face of the documents, which would create uncertainty and banks could be required to conduct further investigations.

Against this argument, banks are not required to investigate documents; their duty rests on examining the documents on their face.<sup>718</sup> This statement will be examined in more details later in section 6.4.1. More importantly, under documentary credits, banks are only concerned with the presented documents and not the goods.<sup>719</sup> Furthermore, nullity is also concerned with documents<sup>720</sup> as these documents are the subject of the payment. That is to say, recognition of such an exception will help the banks to ensure the compliance of the presented documents.

Conversely, others argued that the bank's security interest would be affected if such exception is not recognised.<sup>721</sup> From the point of view of the scholars supporting recognition of the nullity exception, the banks' security interest is an important consideration.<sup>722</sup> Generally speaking, although a bank is not party to a sale of goods contract, it still has an important role in such a transaction. The benefit that a bank gains from entering a letter of credit contract is a percentage of the fees.<sup>723</sup> As it stands, the policy of documentary credit is based on presenting documents

---

<sup>715</sup> **For recognition**, see Goode (n 60); Goode (n 25); Bridge (n 60); Todd (n 57) [9.152-159]; Horowitz (n 26); Neo (n 60); Chin (n 60); Hooley (n 60); Donnelly (n 60).

**Against recognition**, see Malek (n 76); Ren (n 59).

<sup>716</sup> *Montrod* (n 59) 1992.

<sup>717</sup> *ibid.*

<sup>718</sup> Article 14(a) 'A nominated bank acting on its nomination, a confirming bank, if any, and the issuing bank must examine a presentation to determine, on the basis of the documents alone, whether or not the documents appear on their face to constitute a complying presentation'.

<sup>719</sup> Article 5 'Banks deal with documents and not with goods, services or performance to which the documents may relate'.

<sup>720</sup> In most discussions, nullity in letters of credit is concern only with documents. For general discussion see Horowitz (n 26) [3.05]; Goode (n 20) [35.115]; Bridge (n 60) [6.81]; Nelson Enonchong, *The Independence Principle of Letters of Credit and Demand Guarantees*, (OUP 2011) 145–149; Antoniou (n 57) 232.

<sup>721</sup> *United City Merchants* (n 6) 254; Donnelly (n 60) 336-337.

<sup>722</sup> Antoniou (n 57) 237; Donnelly (n 60) 336-337; Neo (n 60) 61; Hooley (n 696) 97.

<sup>723</sup> Davies (n 612) 282.

to the bank, which will pay and hold these documents until reimbursement from the applicant. Among all the required documents, the bill of lading is the most valuable document as it is a document of title;<sup>724</sup> thus, it will strengthen a bank's position against the applicant.

Therefore, from this point, a bank prefers to take documentary credits as a pledge against reimbursement by the applicant. Holding the documents is a sensitive matter for the applicant because these documents are vital in the sale of goods as the holder will have the right to claim the shipped goods.<sup>725</sup> Professor Pennington also disagreed with the idea of accepting worthless documents:

*'It would be very odd indeed that an issuing bank should be obliged to take up shipping documents which to its knowledge are forgeries and worthless and do not represent the goods conforming to the terms of the credit, and that it should be obliged to pay or commit itself to pay the amount of the credit in return.'*<sup>726</sup>

That is to say, the bank should not to be under an obligation to pay upon a null document because it would deprive the bank of its security in the letter of credit contract.<sup>727</sup> Accordingly, if a document is null and cannot provide any legal value for the holder, a bank will be precluded from negotiation with the applicant in return for reimbursement. According to Richard Hooley, who supports the need for a nullity exception, a null document is a worthless piece of paper that will not secure a bank's position in seeking reimbursement from the applicant.<sup>728</sup> This point was also raised by the Singaporean High Court in *Mees Pierson NV v Bay Pacific (S) Pte Ltd*<sup>729</sup>, where it noted that requiring a bank to honour the credit against a null document is to require them to knowingly forgo their security.<sup>730</sup>

If a null document is treated as '*a sham piece of paper*', the value of the goods will be affected;

---

<sup>724</sup> Todd (n 57) [1.10] & [1.42]; Neo (n 60) 60.

<sup>725</sup> *United City Merchants* (n 6) 171; Todd (n 57) [1.10]; see in general Malek (n 76) Chapter 11 (Bank's Security).

<sup>726</sup> Robert Pennington, *Bank Finance for Companies* (Sweet & Maxwell, London 1987) 28.

<sup>727</sup> *United City Merchants* (n 6) 171.

<sup>728</sup> Hooley (n 696) 97.

<sup>729</sup> [2000] 4 SLR 393.

<sup>730</sup> *ibid* 408.

hence, such security will be of no worth to a bank. Banks should not take a worthless document as their security in turn for reimbursement.<sup>731</sup> Based on the above points, a nullity exception will, indeed, secure the banks' rights under documentary credit, while ignoring it might encourage banks to discontinue using such a method of payment.<sup>732</sup> This argument is sensible, especially if the applicant becomes insolvent; banks do not want to be confronted with this risk. The threat of non-participation will have an effect on the documentary credit system and ultimately, the system will collapse. It must be emphasised that banks are not interested in the documents, but are more concerned about the ability of the applicant to reimburse them; in this event, they will hold the documents as an interest.<sup>733</sup>

Potter LJ in *Montrod* further argued that the nullity exception would be unfair to beneficiaries participating in a chain of contracts.<sup>734</sup> Some scholars disagree with this argument, including Professor Goode. He criticises the idea that banks need to honour the credit for an innocent seller who presents a null document because the innocent party is not aware or did not participate in the act of forgery.<sup>735</sup> The knowledge of the beneficiary will be highlighted in more details in section 6.4.2.

From Goode's point of view, the applicant needs genuine documents as evidence of the transaction, not worthless papers.<sup>736</sup> A forged document cannot be considered as conforming because it was forged by third party and not the beneficiary.<sup>737</sup> There is no justification for considering the forged document as compliant with the terms of the credit, regardless of its nullity, just because the seller is not aware of its falsity. Another argument against Potter LJ's judgement that banks are only interested in documents is that it does not matter to them who

---

<sup>731</sup> *United City Merchants* (n 6) 254.

<sup>732</sup> *Antoniou* (n 57) 237.

<sup>733</sup> see in general Malek (n 76) Chapter 11 (Bank's Security).

<sup>734</sup> *Montrod* (n 59) 1992: his Lordship commented 'such an exception would be likely to act unfairly upon beneficiaries participating in a chain of contracts in cases where their good faith is not in question. Such a development would thus undermine the system of financing international trade by means of documentary credits.'

<sup>735</sup> Goode (n 25) [35.116].

<sup>736</sup> *ibid* [35. 116].

<sup>737</sup> *ibid* [35. 115-116]; Chin (n 60) 16.



conducted the forgery, what matters is whether these documents conform or not.<sup>738</sup>

To conclude, the nullity exception will not harm banks; instead, it will build more security and trust between all parties involved. In turn, a null document, which is a worthless piece of paper, will not offer any kind of security to the bank. This worthless document will not guarantee a bank's right of reimbursement because the holder of such a document will not be in a better position to negotiate and *bargain* with the applicant. From this point, it is clear that there is a need to secure both the banks and the beneficiary. It is not fair to secure the beneficiary without providing the banks with a secure environment; thus, the nullity defence is required. Conversely, ignoring the nullity exception will encourage the circulation of a forged document in the documentary credit system.<sup>739</sup> Therefore, resorting to the 'lifeblood of international commerce'<sup>740</sup> might be less preferred. The lack of a 'nullity' defence will have an effect on the trust between the documentary credit parties.<sup>741</sup> It might be a wrong approach to reject a nullity exception on the ground that it will lead to difficulty in documentary credit. That is to say, such an exception will be an important device in letters of credit as it will maintain the system and will, indeed, secure the parties' interests under commercial transactions.

### ***6.2.2 Will the nullity exception undermine the autonomy principle?***

Potter LJ, who does not support recognition of the nullity exception, believes that such an exception will make undesirable inroads into the principle of autonomy.<sup>742</sup> His Lordship states that the exception will cause an issue for the documentary credit system as it will overlap with the autonomy principle. Eventually, it will undermine the documentary credit system. Therefore, the second part of the debate on the nullity exception focuses on its impact on the

---

<sup>738</sup> Odeke (n 572) 125.

<sup>739</sup> Hooley (n 60) 281; Antoniou (n 57) 237.

<sup>740</sup> Several judges have referred to this statement including Kerr L.J. in *Harbottle* (n 2); Griffiths L.J. in *Power Curber International* (n 2) 400; Donaldson L.J. in *Intransco Ltd v Notis Shipping Corp of Liberia* [1981] 2 Lloyd's Rep. 256, 257.

<sup>741</sup> Donnelly (n 60) 334.

<sup>742</sup> *Montrod* (n 59) 1992.

autonomy principle or, in other words, if the nullity exception is recognised, whether the autonomy principle would be undermined.

In my view, this would not occur. There are two main reasons for the autonomy principle: to provide the beneficiary with immunity from any external disputes that are relevant to the underlying transaction,<sup>743</sup> which might interrupt their right of payment. Further, the autonomy principle means that the duty of the bank will not be interrupted despite any external disputes that arise in relation to the underlying transactions. The aim of this principle is to protect the bank from any external disputes in regard to the underlying contract. Notably, the nullity exception is only concerned with the documents,<sup>744</sup> which constitute a vital part of the beneficiary's duty. Hence, if the nullity exception applied, there would be no conflict with the autonomy principle.<sup>745</sup> Such argument is similar to the implementation of the fraud exception but from the English courts perspective where the said rule will apply only if fraud accords in the presented documents.<sup>746</sup> That is to say, establishing the nullity defence will be similar to the English version of the fraud rule exception. These two defences are concerned with disputes regarding the documents only and not with any disputes that are concerned with the underlying transaction. Any disputes over the presented documents are not part of the autonomy principle's aim, which is more concerned about external disputes emerging from the underlying transaction. Therefore, such an exception will work in the same way as the autonomy principle. Moreover, the autonomy principle is more prejudicial for the applicant than for other parties<sup>747</sup> because such a principle could be operated to deprive the buyer of the self-help option of rejecting the payment if the goods are defective.<sup>748</sup> Therefore, recognising a nullity exception might balance each party's rights. At least a nullity exception will be for the benefit of the

---

<sup>743</sup> Neo (n 60) 67.

<sup>744</sup> Horowitz (n 26) [3.06]; Bridge (n 60) [6.81].

<sup>745</sup> *ibid* [3.14-3.20]; Neo (n 60) 60.

<sup>746</sup> See chapter 5, section 5.2.

<sup>747</sup> Neo (n 60) 66.

<sup>748</sup> *ibid* 66.

applicant and will provide more security and relief as to the validity of the documents. The aim of the autonomy principle is to ensure that the beneficiary's right of payment should be independent from any disputes with regard to the underlying contract. However, this does not mean independent from any dispute relevant to the presented documents.<sup>749</sup> Consequently, it is not fair to protect the beneficiary from defences that are related to the documents because the beneficiary is protected under the autonomy principle from any defence in the underlying sale contract.

In short, as seen from the preceding discussion, most arguments against the recognition of a nullity exception might not be convincing. A nullity exception will not undermine the autonomy of the credit as the matter will still be concerned with the documents and not with the underlying contract. Nor will this exception create a dilemma for the banks. Therefore, a nullity defence is required in documentary credit law to maintain international trade.

### **6.2.3 UCP 600: visualising the nullity exception**

It was argued that one of the obstacles to applying the nullity exception is that the UCP rules, which outline the operation of letters of credit, do not recognise nor make any reference to nullity.<sup>750</sup> Nor it is recognised in any other legal instrument.<sup>751</sup> In *Montrod*, it was noted that there is no nullity exception in English law.<sup>752</sup> Such an argument is not convincing enough to prevent the recognition of the nullity exception. The fraud exception is the best example for the rejection of these claims as it is recognised worldwide, although it is not supported by the UCP rules.<sup>753</sup> It could be argued that the nullity exception exists under the UCP rules in an indirect way.

---

<sup>749</sup> Horowitz (n 26) [3.20]; Neo (n 60) 60.

<sup>750</sup> Donnelly (n 60) 326.

<sup>751</sup> *Montrod* (n 59); Neo (n 60) 54; Ren (n 59); Donnelly (n 60) 325.

<sup>752</sup> *Montrod* (n 59) 1992

<sup>753</sup> Neo (n 60) 54; Antoniou (n 57) 233; Donnelly (n 60) 325.

For example, you could argue that Article 2 of UCP 600, which provides the definition of a complying presentation, implicitly recognises the nullity exception.<sup>754</sup> It states: ‘Complying presentation means a presentation that is in accordance with the terms and conditions of the credit, the applicable provisions of these rules and international standard banking practice.’ On the grounds discussed earlier, null documents are non-compliant and should be treated the same as a discrepant document. Therefore, it could be argued that the nullity exception is implicitly recognised in Article 2.

Further, Article 34 states that ‘A bank assumes no liability or responsibility for the form, sufficiency, accuracy, *genuineness*, *falsification* or legal effect of *any document*, or for the general or particular conditions stipulated in a document’. The use of the words ‘genuineness’ and ‘falsification’, in my view, can be understood to mean that the nullity exception could be implicitly recognised by the UCP 600. These two terms, which are not defined in the rules, are related to a forged document, and might also be related to nullity. These terms need to be read together; a false document does not mean that it is not genuine, while in contrast, a non-genuine document could be a false one.

Despite the lack of any legal instrument explicitly supporting the nullity exception, it is not logical to ignore the need for one. If there is a need for such an exception, it is appropriate to establish one despite the fact that no legal instrument recognises it.<sup>755</sup> Remarkably, the Singaporean courts recently explicitly recognised the nullity defence in documentary credit. Therefore, this recognition could open the door for possible recognition in other jurisdictions in the future. Normally, most legal exceptions emerge from the idea that the ‘legal environment’ needs these rules to maintain the integrity of the system and to reinforce its aim. In general, legal aspects, especially in the commercial area, are changeable as rules might change from time to time to keep pace with the development of the business world. Therefore,

---

<sup>754</sup> Horowitz (n 26) [3.26]; Antoniou (n 57) 235.

<sup>755</sup> Donnelly (n 60) 326; Neo (n 60) 54.

it is important to introduce new legal provisions in line with such development to maintain effectiveness. Hence, the nullity exception is required, even though legal systems (except Singapore) and the UCP do not recognise it explicitly.

### 6.3 Lessons from Singapore

The Singaporean law, unlike the English law, supports the existence of the ‘nullity exception’ as a separate exception to the principle of autonomy.<sup>756</sup> In establishing this exception, the Singaporean courts ruled in two remarkable judgments; the *Beam Technology* case and the *Lambias* case.

In *Beam Technology* case, the nullity allegation was in regard to an air waybill, which was issued by a non-existent entity described as ‘Link Express (S) Pte Ltd’.<sup>757</sup> The court held that the required document that included the name of a non-existent entity was forged and therefore null.<sup>758</sup>

In turn, in *Lambias* case, a required document was signed and issued by an unauthorised party (the applicant), hence the court regarded it as a null document.<sup>759</sup> In establishing the court’s judgement, Goh J analysed the elements that ‘might’ constitute nullity of a required document. In this case, a weight and quality inspection certificate were required. Unfortunately, it was issued by a party who was unauthorised to do so.<sup>760</sup> The judge stated: ‘*The QWI certificate cannot be said to be anything but null. First, it was issued by the beneficiary instead of the applicant as required by the letter of credit. Secondly, it failed to state the necessary particulars to relate it to the goods which were the subject of the letter of credit. Thirdly, it failed to contain the necessary statement as to the quality or weight of the goods ostensibly inspected, and most*

---

<sup>756</sup> see *Beam Technology* (n 59); *Lambias* (n 59).

<sup>757</sup> *Beam Technology* (n 59) 599.

<sup>758</sup> *ibid* 610.

<sup>759</sup> *Lambias* (n 59) 762-763.

<sup>760</sup> *ibid*.

*important of all, it had been counter-signed by an imposter... All these elements taken together make the QWI certificate a nullity ab initio.*<sup>761</sup>

As observed, the judge explained why that document was null by defining four components. First, it was issued by a different party than required (not authorised). Secondly, it failed to clarify its relation to the goods. Thirdly, it did not mention any details about the weight of the goods nor the quality, and fourthly, it bore an unauthorised signature. From these components, it is clear that the judge focused on two elements: the **authority** of the person/body issuing the QWI and the **details** of the said document.

Apparently, in *Beam Technology* case, it was necessary to rule whether this was a nullity because it was issued from a non-existent company. In this case, the airway bill included the name of a non-existent shipping company, which qualified the tendered document as a nullity. Therefore, it can be seen as a document that is null because it lacks a vital element that would give the document its legal value and authority. In *Lambias* case, the presented certificate, besides the fact of being issued by a non-authorised party, neither clarified the shipped goods nor determined their quality as required. Consequently, such a document would not be useful for the buyer (applicant) with regard to the sale of goods transaction. Hence, the said document is qualified to be considered as a null document, which lacks legal value. The same position will be if the document missed a signature; it would be considered as invalid document and therefore null.

It can be understood from these cases that the occasions described above are the same with regard to nullity, or at least will constitute a null document. Remarkably, the Singaporean courts believed that a nullity exception is only a third party forgery exception regardless the knowledge of the beneficiary.<sup>762</sup> Meaning, the substance of the exception is based on third party forgery. Notably, this observation is repeating the echo of the judgments of both

---

<sup>761</sup> *Lambias* (n 59) 762-763.

<sup>762</sup> *Ren* (n 59) 7.

Stephenson LJ and Ackner LJ in *American Acord* case. Both judges relied on the proposition that a beneficiary was not entitled to payment if a document was forged by a third party. The court stated ‘If a document false in the sense that it is forged by a person other than the beneficiary can entitle a bank to refuse payment, I see no reason why a document in any way false to the knowledge of a person other than the beneficiary should not have the same effect.’<sup>763</sup> Consequently, Singapore support the need for a nullity exception but under the name of ‘third party forgery’ exception.

In short, from these Singaporean cases a null document is a forged document that is either issued in an unauthorised way or without permission. As mentioned elsewhere, a null document is a worthless piece of paper that is also a non-conforming document. From this point, a non-conforming document will be rejected by the bank and, as a result, the bank will refuse to honour the credit. In short, whatever the case is, such defaults will render the document non-conforming.

#### **6.4 Scope and application of the proposed nullity exception**

As mentioned in section 6.2, there are two core arguments often cited against the recognition of the nullity defence. First, it will put banks in further dilemma, which might require the examiner to investigate beyond the documents. Second, the said nullity defence will not protect the innocent beneficiary. Therefore, if there is a need to recognise the nullity exception, some matters need to be clarified i.e. the bank’s duty of examination and the position of the beneficiary.

---

<sup>763</sup> *United City Merchants* (n 6) 239-247.

#### 6.4.1 Nullity exception from the bank's perspective

Article 14(a) states that a bank must examine the tendered documents on their face to determine whether or not they constitute a complying presentation.<sup>764</sup> This is relevant to the argument raised that the recognition of a nullity exception will create a dilemma for the banks.<sup>765</sup> Potter LJ argued that *'If a general nullity exception were to be introduced as part of English law, it would place banks in a further dilemma as to the necessity to investigate facts which they are not competent to do and from which UCP 500 is plainly concerned to exempt them.'*<sup>766</sup>

As established in section 6.1, null documents can be qualified as a non-complying document. Article 16(a) states that a bank must refuse to honor the credit if the presentation is not complying.<sup>767</sup> Assuming that this the case, apparently, the bank's duty is to examine the tendered documents on their face in order to determine their compliance. Yet, the question arises as to whether the bank should be required to go beyond checking whether the documents are compliant on their face.

From my point of view, such an argument is not convincing because contrary to Potter LJ's view, it is arguable that no such dilemma arises. As the law stands, banks are not required to investigate documents; their duty rests on examining the documents on their face.<sup>768</sup> More importantly, under documentary credit, banks are only concerned with the presented documents and not the goods.<sup>769</sup> The nullity defence, however, is only concerned with documents<sup>770</sup> as these documents are the subject of the payment. Therefore, banks are still within their duty to examine the documents. Consequently, the nullity exception will not

---

<sup>764</sup> Article 14: 'a nominated bank acting on its nomination, a confirming bank, if any, and the issuing bank must examine a presentation to determine, on the basis of the documents alone, whether or not the documents appear on their face to constitute a complying presentation.'

<sup>765</sup> *Montrod* (n 59) 1992.

<sup>766</sup> *ibid.*

<sup>767</sup> Article 16(a) state 'When a nominated bank acting on its nomination, a confirming bank, if any, or the issuing bank determines that a presentation does not comply, it may refuse to honour or negotiate.'

<sup>768</sup> Article 14(a).

<sup>769</sup> Article 5 'Banks deal with documents and not with goods, services or performance to which the documents may relate'.

<sup>770</sup> In most discussions, nullity in letters of credit is concern only with documents. For general discussion see Horowitz (n 26) [3.05]; Goode (n 25) [35.115]; Bridge (n 60) [6.81]; Enonchong (n 720) 145–149.



require any further obligation other than examination of the documents as banks are still under the limitation of document examination only.<sup>771</sup>

The principle is that the examining bank should not investigate whether the tendered document is null or not. In *Gian Singh* case, it was held that the duty of the bank was to examine the documents tendered and determine only if they appeared on their face to be in accordance with the credit. The court stated: ‘visual inspection of the actual documents presented is all that is called for. The bank is under no duty to take further steps to investigate the genuineness of a signature which, on the face of it, purports to be the signature of the person named or described in the letter of credit.’<sup>772</sup>

Yet, it is a different position to say that the bank should ignore what is clearly a null document. Ackner J affirmed that banks need not be under an obligation to pay upon a null document because it would deprive the bank of its security in the letter of credit contract.<sup>773</sup> *‘It would be very odd indeed that an issuing bank should be obliged to take up shipping documents which to its knowledge are forgeries and worthless and do not represent the goods conforming to the terms of the credit, and that it should be obliged to pay or commit itself to pay the amount of the credit in return.’*<sup>774</sup> That is to say, recognition of such an exception will help the banks to ensure the compliance of the presented documents.

In fact, if the bank becomes aware that a presented document is conforming on its face, yet it was issued through an illegal method or it indicates false details, it must reject such document. In *Old Colony Trust* the court stated: ‘Obviously, when the issuer of a letter of credit knows that a document, although correct in form is, in point of fact, false or illegal, he cannot be called upon to recognize such a document as complying with the terms of the credit.’<sup>775</sup> It is logical

---

<sup>771</sup> Enonchong (n 720) 235.

<sup>772</sup> *Gian Singh* (n 145) 34.

<sup>773</sup> *United City Merchants* (n 6) 171.

<sup>774</sup> Pennington (n 726) 28.

<sup>775</sup> *Old Colony* (n 639) 158.

that if a bank becomes aware of a nullity it should reject the documents.<sup>776</sup> Again, in *Beam Technology*, the court held that the ‘confirming bank is not obliged to pay if it has established within the seven-day period that a material document required under the credit is forged and null and void and notice of it is given within that period.’<sup>777</sup> If the bank is able to establish within the prescribed examination limit that a tendered document is a forgery, being null and void, then the bank is obliged to refuse.

This leads to the question of how the bank will know that a presented document is a nullity. Maybe it is possible with the cooperation of other institutions which provide such service for the banks. Meaning, banks can empower other institutions, who can check the validity of the documents without the need to get involved in the main transaction. For instance, the International Maritime Bureau can provide banks with a service to check the validity and legality of the documents.<sup>778</sup> Overall, banks need not go beyond their duty of examining the documents on their face.

Where the bank fulfilled the duty of examination without negligence and made the payment, the applicant must reimburse the bank. That is to say, a nullity exception can be established in the same manner as the fraud exception,<sup>779</sup> although with some reservations in regard to the beneficiary’s knowledge requirement.<sup>780</sup> Potter LJ stated: ‘*In the context of the fraud exception, the courts have made clear how difficult it is to invoke the exception and have been at pains to point out that banks deal in documents and questions of apparent conformity. In that context they have made clear that it is not for a bank to make its own inquiries about allegations of fraud brought to its notice; if a party wishes to establish that a demand is fraudulent it must place before the bank evidence of clear and obvious fraud*’.<sup>781</sup> Accordingly, banks will not be

---

<sup>776</sup> *Beam Technology* (n 59) 609; Horowitz (n 26) [3.23].

<sup>777</sup> *ibid* 610.

<sup>778</sup> Report Prepared by The UNCTAD Secretariat, ‘A Primer on New Techniques Used by The Sophisticated Financial Fraudster with Special Reference to Commodity Market Instruments’ (2003) p.11, para 24.

<sup>779</sup> Horowitz (n 26) [3.28]; Neo (n 60) 58; Antoniou (n 57) 234.

<sup>780</sup> See section 6.4.2 for more details.

<sup>781</sup> *Montrod* (n 59) 1992.

required to investigate nor to act on any allegations of nullity. Any allegation will not force the bank to reject the documents. In this respect, the claimant party will bear the risk of providing the evidence of such an allegation. Based on the above points, the bank will not be required to go beyond the documents. Their duty of examination will not be affected and nor will establishing the nullity defence put the bank in further dilemma. The nullity exception will, indeed, secure the banks' rights under the documentary credit. Such an exception will not put the bank in a difficult position. The beneficiary's knowledge will be discussed in the next section.

#### ***6.4.2 Should the nullity exception require knowledge on the part of the beneficiary?***

In *Montrod* case, the required document was signed by the beneficiary in the honest but mistaken belief that they were authorised to do so.<sup>782</sup> As a result, Potter LJ refused to recognise a nullity exception because of its unfairness to beneficiaries participating in a chain of contracts.<sup>783</sup> This raises the question of whether the court would have decided differently had the beneficiary not been mistaken. Assuming that the nullity exception is established and recognised, the question is whether it should be established in the same manner as the fraud exception in regard to the beneficiary's knowledge, i.e., whether the beneficiary's knowledge is material.

As a starting point, Professor Enonchong divided null documents into two types: forged documents that were created with a fraudulent intent and those created innocently.<sup>784</sup> In regard to the situation where the beneficiary is aware of the nullity, in my view, such a presentation should be rejected.

A letter of credit contract is based on presentation of specified documents in return for payment,

---

<sup>782</sup> *Montrod* (n 59) 1979.

<sup>783</sup> *ibid* 1992: his Lordship commented 'such an exception would be likely to act unfairly upon beneficiaries participating in a chain of contracts in cases where their good faith is not in question. Such a development would thus undermine the system of financing international trade by means of documentary credits.'

<sup>784</sup> Enonchong (n 720) 145–149.

and these presented documents must be compliant with the credit terms. Therefore, it is the beneficiary's duty to present a conforming document in order to get paid.

In this respect, null documents are non-complying documents, since a valueless document cannot be treated as compliant.<sup>785</sup> Hence, if the beneficiary presented a required document, which to his knowledge is a null document,<sup>786</sup> the bank must reject the said document, and dishonour the credit.

Since a letter of credit has been described as a promise of payment for the beneficiary against presenting a conforming document, it would not be fair to include a forged document under this promise.<sup>787</sup> This statement affirms the responsibility of the beneficiary to present truthful documentation. In *Lambias* case, the judge stated: '*The QWI certificate cannot be said to be anything but null. First, it was issued by the beneficiary instead of the applicant as required by the letter of credit.*'<sup>788</sup> Apparently, the beneficiary knowingly prepared the required document, which was against the credit terms, which required the document to be issued not through the beneficiary. Therefore, if the beneficiary took part in or had knowledge of the forgery, the bank can deny payment on the ground of a nullity exception. However, in the *Beam Technology* case, the court assumed that the beneficiary had no knowledge of the forgery at the time of presenting the document to the bank.<sup>789</sup> Despite that, the court held that the presented document is null. Apparently, the Singaporean court implicitly disregarded the lack of awareness by the beneficiary in *Beam Technology* case when it delivered its judgment.

From these two cases, the Singaporean courts were confronted with the two scenarios of the beneficiary's knowledge and importantly, accepted the nullity defence in both. That is to say, Singaporean courts do not require the beneficiary's knowledge as a material requirement for the nullity defence.

---

<sup>785</sup> Horowitz (n 26) [3.05]; Goode (n 25) [35.115].

<sup>786</sup> As in the *Lambias* case. *Lambias* (n 59) 762-763.

<sup>787</sup> Neo (n 60) 59.

<sup>788</sup> *Lambias* (n 59) 762-763.

<sup>789</sup> The assumption is clearer in the High Court's judgment: *Beam Technology* (n 59) 157.

In this respect, in relation to the second scenario which concerns an innocent beneficiary who is not aware of the null presentation, the correct position is that the bank must still deny payment.<sup>790</sup> That is to say, banks should not always bow to the demands of the innocent beneficiary presenting a null document simply because the forgery was committed without his knowledge.<sup>791</sup>

Generally speaking, the applicant needs genuine documents as evidence of the transaction, not worthless papers.<sup>792</sup> Therefore, a forged document cannot be considered as conforming because it was forged by a third party and not the beneficiary or by a third party without the beneficiary's knowledge.<sup>793</sup> There is no justification for considering the forged document as compliant with the terms of the credit, regardless of its nullity, just because the seller is not aware of its falsity. As Stephenson LJ believed in the *American Accord* 'If a document false in the sense that it is forged by a person other than the beneficiary can entitle a bank to refuse payment, I see no reason why a document in any way false to the knowledge of a person other than the beneficiary should not have the same effect.'<sup>794</sup>

Further, banks are only interested in documents meaning that it does not matter to them who conducted the forgery, what matters is whether these documents conform or not.<sup>795</sup> It is not for the bank to check if there is a connection between the forgery and the beneficiary as it will require them to go beyond the details of the documents. Such inquiry as to why, whom, and where is not bound upon banks, since their only duty is to check the compliance of the document, not to check the connection between the forgery act and the beneficiary.

Moreover, the beneficiary has a proper opportunity to check the legality of these documents before any other parties. Sometimes, these documents are issued by a third party who is in

---

<sup>790</sup> Goode (n 25) [35.116].

<sup>791</sup> Chin (n 60) 18

<sup>792</sup> Goode (n 25) [35. 116].

<sup>793</sup> *ibid* [35. 115-116]; Chin (n 60) 16.

<sup>794</sup> *United City Merchants* (n 6) 239.

<sup>795</sup> Odeke (n 572) 125.

contact with the seller and not with the buyer; hence if there is any problem with the documents, the beneficiary can require the parties who issued the documents to amend the fault. That is to say, in the case of defective documents, the beneficiary will be precluded from their right of payment. Moreover, the applicant will be the ultimate holder of the documents; thus, it will be too late for the applicant to amend them. More importantly, the value of the goods will also be affected if the document referred to is not valid.<sup>796</sup> In other words, if the said document is not a valid document in that it lacks legal elements such as signature, authority and name, it is worthless, as are the goods referred to. These documents are the key of title for the holder (applicant); consequently, the applicant will suffer from a null document. In short, beneficiary has the opportunity to check the legality and validity of the documents than other included parties.

Moreover, in my point of view, in order to maintain balance between letters of credit parties, it is not fair for the applicant to bear the risk of nullity. According to the fraud defence, the risk will be upon the applicant and not upon the beneficiary. Protecting the beneficiary from defences based on the underlying transaction does not mean that the beneficiary should also be protected from defences that are related to the documents themselves.<sup>797</sup>

That is to say, the nullity defence should be treated in the same manner as the fraud exception but from the US perspective in regard to the beneficiary's knowledge. Simply because these two defences are similar regarding the substance. Meaning, the nullity defence is concerned only when the tendered documents are forged. In turn, the fraud defence arise when the beneficiary tries to defraud the applicant or abuse the system to gain payment through illegal way. This can be either through providing non complying goods, where no goods exist or through presenting non complying documents.

Further, in international commercial transactions, a beneficiary will have more recourse than

---

<sup>796</sup> Neo (n 60) 61.

<sup>797</sup> *ibid* 60.

the buyer. As observed in *Lambias* case, there are many options for the seller to obtain the price of the goods, unlike the buyer who will be at risk.<sup>798</sup> Besides losing their money, the only option left for the applicant is to litigate against the beneficiary. This option is not preferred by the applicant because it is a time-consuming process and they will incur expensive fees, and the need to deal with an unfamiliar jurisdiction. Therefore, the beneficiary should bear the loss if the document was rejected due to a nullity. There is no doubt that both parties (applicant and beneficiary) will be at risk, but the beneficiary will be less affected. Hence, to affirm the balance of interest and fairness, the beneficiary should bear the risk of loss due to nullity; either aware of such fact or not, more than any other party. If the loss of fraud is upon the applicant, then it is more convenient to let the beneficiary to bear the loss of nullity. In my view, Potter LJ is correct regarding the effect of the nullity exception upon the innocent seller. However, this does not mean that the nullity defence is inappropriate. There is a necessity to recognise the nullity defence. From these comments, the nullity exception needs to be applied despite the awareness of the beneficiary of the nullity or their participation in such conduct or not.

## 6.5 Conclusion

A nullity exception will remain a questionable subject for scholars for years to come. However, it might be a wrong approach to reject a nullity exception on the ground that it will lead to difficulty in documentary credit. That is to say, such an exception will be an important device in letters of credit as it will maintain the system and will, indeed, secure the parties' interests under commercial transactions. As observed in the preceding discussion, there is one common factor regarding a null document; namely, the legal value of such a document. If the presented document was issued illegitimately or was missing a vital element that provides it with legal value, it is a null document. Consequently, a nullity defence is based on the fact that, once the

---

<sup>798</sup> *Lambias* (n 59) 751.

presented documents are forged, in essence they will become useless. As such, banks need not accept the document. However, if the details in the said document are misstated, the position is different depending upon the effect of such misstatement. That is to say, not every forgery will make a document null and invalid. As it stands in the law, under the compliance principle, the issuer has the right to dishonour the credit if it included discrepancies. However, ignoring the nullity exception means that if the forged document did not include any discrepancies and complied with the terms of the credit, regardless of its nullity, it will be considered valid and eligible for payment. This is not fair.

The debate between the Singaporean courts, who supported such exception, and the English courts, who argued strongly that such a ground for rejection is not accepted, is logical from their opposing points of view. Yet, there is a need to recognise the exception. The fact that fraud defence in England rests on documents means that the nullity defence is also there. As observed, the nullity exception is more concerned with the legality of the presented documents, not the underlying transaction. Therefore, the nullity defence does exist. Although the nullity defence does not exist in English law, this absence does not necessarily mean that the nullity defence is inappropriate.

Furthermore, the recognition will not overlap with the autonomy principle nor will it harm the banks' duties, as banks can empower other institutions, who can check the validity of the documents without the need to get involved in the main transaction. However, if the banks' duty by virtue of the UCP rules is restricted to examining the documents only, such an exception will reinforce their duty and will not impose any further duties upon them.

In the final analysis, it is important to recognise the nullity exception to maintain the integrity of the letters of credit system. Bearing in mind that a nullity defence will indeed secure banks' interests, such an exception will be a new weapon to reinforce the banks' role in such a payment method. They will not be in hardship as their main duty will remain untouched. Conversely, it



is unfair to protect the seller from defences that are relevant to the documents just because the autonomy principle secures their right of payment from any defences related to the underlying transaction or because the beneficiary has no knowledge. There is no doubt there are some disadvantages in establishing the nullity exception, particularly upon the beneficiary. Nonetheless, neither position is perfect but establishing the nullity exception is clearly the lesser of the 'two evils'.<sup>799</sup>

---

<sup>799</sup> Donnelly (n 60) 343.

## Chapter Seven: Conclusion

Despite the important role of letters of credit in facilitating payment in international contracts for the sale of goods, they are confronted with many obstacles that contribute to a delay in payment. This thesis focused on three grounds of practical significance, which are fraud, nullity and discrepancies in the presented documents. Each ground has been examined from a legal and practical perspective, and solutions to problems have been suggested.

### 7.1 Chapter Two

Firstly, the Chapter illustrated how a presentation will be considered as non-complying presentation. It explored the question of what is the proper standard for the compliance principle that should be applied when examining the documents. Such principle has been implemented by courts with different views, where some courts have preferred to apply a ‘strict’ standard, while others have applied a ‘substantial’ standard or sometimes both.

This thesis rejects an application of a single standard in all cases, as neither standard is solely capable to address satisfactorily all the issues that banks may face. Therefore, it is suggested that both standards need to be recognised and implemented. The applicable standard depends upon the context. This proposed approach takes into consideration the legal value of the required documents in international trade as well as the enforceability of the UCP and banking standards.

Each standard has been criticised. For example, the strict standard is unhelpful when a credit requirement is fulfilled but in a different manner. This can be observed in the *Equitable Trust* case, where the credit asked for a certificate of quality to be supplied by ‘experts’ and signed by the Chamber of Commerce of Batavia.<sup>800</sup> However, there was no Chamber of Commerce in

---

<sup>800</sup> *Equitable Trust* (n 51) 49.

Batavia but rather a Commercial Association of Batavia, which was in every respect, including legal status, the functional equivalent of chambers of commerce elsewhere.<sup>801</sup> Application of the mirror image standard would not be helpful here. If the condition under the credit is the presentation of a certificate signed by the commercial chamber, regardless of the name of the entity, this condition could be considered fulfilled. In fact, the tendered certificate was signed by one expert and countersigned by the Commercial Association of Batavia. According to the court, the evidence indicated that the Commercial Association of Batavia could be regarded as the equivalent of a chamber of commerce.<sup>802</sup>

Another critical case is *Tosco Corp*, in which the court applied the strict standard. The appeal was on the change of 'L' in 'Letter' to 'I', the use of 'No.' instead of 'Number' and the addition of the words 'Clarksville, Tennessee'.<sup>803</sup> These minor changes are not by themselves sufficiently vital to warrant rejection of the presentation. These cases indicate that the strict standard might not be preferable in situations involving unexpected facts that are outside the scope of correction by the beneficiary.

Furthermore, the buyer and the bank might abuse the strict principle of compliance. But the substantial standard has its own problems, because it requires the examiner to become involved in the underlying transaction, contrary to the aim of UCP rules. Such determination of compliance requires skill and in-depth knowledge to decide which error to accept and which to disregard.

The second part of the chapter analysed each type of discrepancy that might appear in a presentation. The general rule that if the presentation include discrepancies bank must reject such presentation, thus, dishonour the credit. This rule seems understandable; however, cases show that banks most of the time have failed to consider whether the errors in the presented

---

<sup>801</sup> *Equitable Trust* (n 51) 52.

<sup>802</sup> *ibid* 55.

<sup>803</sup> *Tosco Corp* (n 134) 1247.

documents are a genuine discrepancy or not. This thesis divides discrepancies into three groups according to a common element between them, such as errors in time, errors in documents or others.

An error that affects the legal value of the documents should be considered a material discrepancy. Some errors do not affect the legal value of the documents. From the banker's perspective they are 'banking' discrepancy. What matters here is that banks cannot distinguish between commercial discrepancies and non-commercial ones. Courts, on the other hand, are no doubt aware of such differences. The question that remains is how the UCP rules can ensure that examiners are able to distinguish between commercial and non-commercial discrepancies without requiring examiners to go beyond their prerogatives.

Therefore, the thesis suggests that it is very important to educate banks and provide them with more knowledge and understanding of the difference between these two terms. This initiative will contribute to decreasing the high percentage of rejection and thus to guarantee that documentary credit remains an important instrument in international transactions.

## **7.2 Chapter Three**

This Chapter dealt more precisely with discrepancies in the presented documents. Throughout the Chapter, it showed that the banks' refusal to pay has mostly been due to errors in details in the presented documents. In many cases, the courts have held that the bank should not have refused to pay. The courts have claimed that banks might have prejudiced their duty of examination and interpreted the 'compliance principle' from a different view than was expected to be achieved.

The Chapter's main question was, *'how can the examiner distinguish between misspelling or typographical errors and valid discrepancies if there is an inconsistency between the data in the credit and the presented documents?'*

In order to answer this question, the Chapter focused on five types of data that can be discrepant: numbers, date, address, names and description of the goods. As for the issue of determining how to distinguish between typographical error and a genuine discrepancy, the Chapter suggested some hypothesis regarding each different type of data. These suggested hypotheses are based on the two standards of the compliance principle alongside the UCP 600 rules and the ISBP 2013 rules.

It is suggested that the reasons behind the high percentage of rejections as well as the conflict of decisions regarding discrepancies is due to three main reasons: the banks, the UCP rules and the contracting parties.

Firstly, most banks do not have any knowledge in letters of credit aspect where most of their knowledge is based on the standard procedures of the credit and how to issue it. In contrast, banks lack the ‘next step’ knowledge, in particular, the examination process. Taking the observations from the banks’ interviews into consideration, it showed that their staff were not qualified well enough in documentary credits area, and there was a lack of legal and practical procedures. Examiners did not give a logical excuse for either rejecting or accepting a presentation which on its face appears non-compliant. Moreover, examiners are not aware of the necessity of the ‘linkage’ when examining the documents. When reading the presented documents together, all of the details inserted will help the examiner to identify each credit and its parties as well as distinguishing between different credits issued by the bank each time.

On the other hand, banks will always prefer to be on the safe side to maintain their reputation. Once they are confronted with an issue in the examination, they will apply the rules strictly even if the errors are merely typographical. It is suggested that bank’s staff must be trained by, for example, explaining to them the importance of the ‘linkage’ between the presented documents and how they should check for any linkage.

Secondly, the UCP rules lack clarity regarding the bank's duty to examine the presented documents. The current version of these rules stipulate the duty to examine the documents by reference to the compliance principle and leave the precise method of examination open to the bank. The UCP rules should provide more detail by illustrating the important elements that the examiner needs to focus on and how each element should be treated.

Finally, some parties involved in international transactions could misunderstand the rules. Due to this misunderstanding, some of the required documents could be issued improperly or might include some errors. Moreover, parties in sales contracts sometimes misunderstand the documentary credit mechanism. The applicant may insert some terms that are not understood by the beneficiary or can be interpreted in a different way. In turn, the beneficiary may not understand what is really required under the credit and, as a result, present non-complying documents. Therefore, it is recommended that the buyer should set out clear instructions when opening the credit in order to reduce ambiguity and confusion.

Some documents enjoy an important role due to their legal significance, in particular the bill of lading, the commercial invoice and the insurance certificate. Although it may be difficult to set out all types of error in letters of credit, the following passage will try to explain what is the legal position for the said three documents according to the type of error in the presented documents.

\* **Error in name:** where the error is in the **bill of lading** and/or **insurance certificate**: even if the error is cured in the remaining documents, because this document has an important legal value, it should be considered as a discrepancy.

\* **Error in name:** where the error was in the **commercial invoice**: if it is cured in the remaining documents it shall not be considered a discrepancy but a misspelling. Otherwise, discrepancy.

\* **Error in the description of the goods:** where the error is in the **commercial invoice: even if the** error is cured in the remaining documents, because this document has an important legal value, it should be considered as a discrepancy.

\* **Error in the description of the goods:** where the error is in the **bill of lading and/or insurance certificate:** if it is cured in the remaining documents it shall not be considered a discrepancy but a misspelling. Otherwise, discrepancy.

What can be drawn from the above is that the best approach for banks when examining the documents is as follow. First, evaluate the value of the discovered error. Secondly, find linkage between the tendered documents. Finally, find any exceptions in the UCP rules such as: bill of lading, commercial invoice and insurance certificate. These three steps (elements) can help the bank to evaluate the volume of the discovered error in order to decide whether the error is merely typographical or a genuine discrepancy.

### 7.3 Chapter Four

This Chapter it analysed the issuer bank's duty under Article 16(c) UCP 600 to issue a notice of refusal once it has decided to reject the document and ultimately refuse to honour the credit. Such duty is problematic for banks where they face many issues regarding its formality, more precisely the three specified conditions in the provision. Some cases show that banks have failed over the years to act in accordance with Article 16(c) and, as a consequence for such failing, have not been able to rely on the rejection notice as a 'document of justification' for the rejection. As a result, banks were forced, sometimes, to honour the credit. The current rules aim to provide a proper guide for banks when issuing the refusal notice through stipulating three conditions.

With regard to the first condition, namely 'refuse', the study showed that some banks did not clarify their decision to refuse clearly. Even though the Article does not require any specific

form or language for the notice, banks still did not fulfil the aim of the notice properly. What is important here is that the bank declares its refusal decision clearly with no preference manner. On the other hand, Article 16 affirms that the issuer bank is solely responsible to decide whether to accept or reject the submitted documents. It is not the responsibility of any other involved banks or of the applicant. The issuer bank must not transfer the duty to examine the tendered documents to the applicant. This condition, therefore, affirms the 'autonomy' principle in documentary credit and, indeed, the banks' role in such contract.

The second condition in Article 16(c) is that the bank state 'each discrepancy in respect of which the bank refuses to honour'. Cases show that banks have sometimes failed to follow such condition properly. It is controversial whether the bank, once it has issued the rejection notice, can raise further discrepancies or issue a subsequent notice. Where the examiner failed to mention some discrepancies in the initial notice, which are the proper ground for rejection, would it be fair to prevent the bank from correcting such mistake? Failing to issue a proper notice will prevent the bank from any defence and may force it to honour the credit as a sanction for its misconduct. It is suggested that issuing a following letter, which includes further discrepancies, will be a valid notice if it is given within the time limit stipulated in Article 14(b). This interpretation protects the bank from liability towards the applicant if a court orders the bank to honour the credit as a penalty.

The third requirement of the notice, which is concerned with the 'status of the rejected documents', is also a controversial subject. Despite the fact that this condition aims to secure the documents and the beneficiary's interest, it is exaggerated. The new Article provides the bank with four options as to the rejected documents. The two new options in Article 16 (c) (iii) (a) & (d) cannot be seen as a proper decision. Waiting to receive any further instructions from the parties will overlap with the bank's right of autonomy. Importantly, in this type of transaction documents will be the key for claiming the possession of the goods. By insisting



on two options only similar to the previous rule in the UCP 500, it will give all parties the opportunity to recover from this ‘unfortunate’ bargain.

On the other hand, the option of returning the document is also problematic. Some cases show that banks have abused the general language of the sub-article and taken longer time to return them. Article 16 should be amended so as to stipulate a time frame for the option of returning documents.

## **7.4 Chapter Five**

Chapter Five examined the second ground of withholding the payment under letters of credit; namely ‘fraud’.

The autonomy principle is the cornerstone of documentary credit, as it maintains the integrity of the credit and secures the banks’ position, which can be seen as ‘immunity’ for them. However, ‘bad intentions’ parties may exploit this principle and defraud others, as the bank is only a ‘financial entity’ without experience in contracts for the international sale of goods or in the goods themselves.

This Chapter tried to answer two main questions in this regard. The first question concerned the scope of the fraud rule exception: Will the fraud exception rule be applied if fraud occurs in the presented documents or in the underlying transaction?

Different jurisdictions have taken different approaches. While English law restricts the fraud exception to fraud in the documents, the Unites States law applies the rule to fraud in the underlying transaction too. Both approaches are logical, but in order to maintain the ultimate aim of the documentary credit, which is to secure both parties’ interests, it is preferable to restrict the scope of the exception to fraud in the documents. This restriction is important as it affirms the importance of the autonomy principle, which is the key feature of documentary credit.

Moreover, the UCP rules provide that the right of payment is based upon presenting complying documents. The interpretation of these rules accordingly demonstrates that the obligation of the issuer bank is an absolute obligation which is reflected in Article 3 of UCP 600. This approach will secure the bank's position and, most importantly, affirm the 'irrevocable promise of payment'. Moreover, it is clear in the law that banks deal with documents only according to Article 5 of UCP. Therefore, it follows that they are not required to become engaged in the main transaction.

The second part of the Chapter discusses fraud by a third party without the beneficiary's knowledge. It is well established in the law that if the beneficiary himself commits the fraud, or has knowledge of the fraud, then the exception will apply. United States courts have extended the fraud exception to include third parties' conduct without the beneficiary's knowledge. In contrast, English courts do not apply the fraud exception where the beneficiary has no knowledge of the third party's fraud. The Chapter argued that the beneficiary's knowledge should not be material, as banks would otherwise be required to investigate the beneficiary's knowledge. This would conflict with Article 5 of UCP, which absolves banks from going beyond the documents.

Moreover, it is the beneficiary's duty to present complying documents, therefore, the beneficiary is under a duty to check their compliance. Most of the times, the third parties are 'subordinate' to the beneficiary, who must be responsible for their actions.

## **7.5 Chapter Six**

This Chapter discussed the existence and efficiency of the controversial 'nullity exception'.

The nullity defence is based on the fact that banks are not required to accept documents that are forged and invalid. The Singaporean courts have recognised this exception, but the English courts have argued strongly that such ground for rejection should not be accepted.

Most jurisdictions suffer from lack of a definition of nullity, therefore, the Chapter proposed a definition, which might be useful in determining the occasions that will form ‘nullity’ under letters of credit. As observed in the preceding discussion, there is one common factor regarding a null document; namely, the legal value of such a document. If the presented document was issued illegitimately or missed a vital element that provides it with legal value, it is a null document. Consequently, the nullity defence is based on the fact that, once the presented documents are forged, in essence they will become useless.

The Chapter provides many arguments in regard to recognising a nullity exception. These arguments can be addressed as to the effect of recognition a nullity exception in regard to the autonomy principle, the beneficiary and the bank. First, the recognition of a nullity exception will not be in conflict with the autonomy principle. The nullity exception is within the scope of the cornerstone principle, as it is dealing with documents and has no concern with the underlying transaction.

Secondly, in regard to the bank, even if the nullity defence is recognised, the bank will not be required to go beyond examining the documents on their face. Therefore, such an exception will reinforce the bank’s duty and will not impose any further duties upon it for the reasons explained in the Chapter.

Thirdly, the beneficiary is solely responsible for presenting the required documents in order to obtain payment. The beneficiary is the party expected to be in contact with the third parties, who issue these documents most of the time. Any errors should be corrected by the beneficiary and not by the ultimate holder of the documents, for whom it might be too late to do so. This opinion is against the view that the nullity exception might harm the beneficiary in case of any conduct of third parties. There is no justification for considering the forged document as compliant with the terms of the credit, regardless of its nullity, just because the beneficiary is not aware of its falsity. The nullity exception should be applied regardless of whether the

beneficiary was aware of the nullity or participated in such conduct.

Consequently, the thesis suggests that there is a need to recognise this defence in letters of credit for many reasons. In the final analysis, it is important to recognise the nullity exception to maintain the integrity of the letters of credit system. Bearing in mind that a nullity defence will indeed secure the banks' interests, such an exception will be a new weapon to reinforce the banks' role in such payment method. They will not be in hardship as their main duty will remain untouched. Conversely, it is unfair to protect the seller from defences that are relevant to the documents just because the autonomy principle secures their right of payment from any defences related to the underlying transaction or because the beneficiary has no knowledge.

## Bibliography

### Cases

#### United Kingdom:

*Astro Exito Navegacion S.A. v Chase Manhattan Bank N.A. (the Messiniaki Tolmi)* [1988] 1 Lloyd's Rep. 455; [1988] 2 Lloyd's Rep. 217.

*Bank of Baroda v Vysya Bank Ltd* [1994] 2 Lloyd's Rep 87 (QB) 91.

*Bank Melli Iran v Barclays Bank* [1951] 2 Lloyd's Rep. 367.

*Bankers Trust Co v State Bank of India* [1991] 2 Lloyd's Rep. 443.

*Banque de L'ndochine et de Suez S. A. v J H Rayner (Mincing Lane) Ltd* [1983] 3 QB 711.

*Bayerische Vereinsbank AG v National Bank of Pakistan* [1996] CLC 1443 ; [1997] 1 Lloyd's Rep. 59.

*Bulgrains & Co Ltd v Shinhan Bank* [2013] EWHC 2498 (QB).

*Commercial Banking Co of Sydney Ltd v Jalsard Pty Ltd* [1973] AC 279.

*Co-operative Centrale Raiffeisen-Boereleenbank v Sumitomo Bank Ltd (The Royan)* [1988] 2 Lloyd's Rep. 250.

*Credit Agricole Indosuez v Chailease Finance Corp* [2000] CLC 754.

*Credit Agricole Indosuez v Muslim Commercial Bank Ltd* [2000] 1 Lloyd's Rep. 275.

*Credit Industriel et Commercial v China Merchants Bank* [2002] EWHC 973 (Comm); [2002] CLC 1263.

*Deutsche Bank AG, London Branch v CIMB Bank Berhad* [2017] EWHC 3380 (Comm).

*Discount Records Ltd v Barclays Bank Ltd* [1975] 1 Lloyd's Rep. 444.

*Donald H Scott & Co Ltd v Barclays Bank Ltd* [1923] 2 KB 1.

*Edward Owen Engineering Ltd v Barclays Bank International Ltd* [1978] QB 159; [1978] 1 All ER 976.

*Egyptian International Foreign Trade Co v Soplex Wholesale Supplies (The Raffaella)* [1984] 1 Lloyd's Rep 102.

*English, Scottish and Australian Bank v Bank of South Africa* [1922] 13 LI L Rep. 21.

*Equitable Trust Co of New York v Dawson Partners, Ltd* [1927] 27 LI L Rep. 49.

*Esefka International Anstalt v Central Bank of Nigeria* [1979] 1 Lloyd's Rep. 445.

*Forestal Mimosa Ltd v Oriental Credit Ltd* [1986] 2 ALL E.R. 400.

*Fortis Bank SA/NV v Indian Overseas Bank* [2011] EWCA Civ 58.

*Gian Singh & Co Ltd v Banquede l'Indochine* [1974] 2 Lloyd's Rep. 1.

*Glencore International AG v Bank of China* [1996] 1 Lloyd's Rep. 135; [1996] CLC 95.

*Guaranty Trust of New York v Van Den Berghs Ltd* [1925] 22 LI L Rep. 447.

*Hamzeh Malas & Sons v British Imex Industries Ltd* [1958] 2 QB 127.

*Harbottle (RD) (Mercantile) Ltd v National Westminster Bank* [1978] QB 146.

*Heskell v Continental Express Ltd* [1950] 83 LI 1 Rep 438.

*Hindley & Co v East Indian Produce Co* [1973] 2 Lloyd's Rep. 515.

*Ibrahim v Barclays Bank Plc* [2012] EWCA Civ 640; [2013] Ch 400.

*Intransco Ltd v Notis Shipping Corp of Liberia* [1981] 2 Lloyd's Rep. 256.

*JH Rayner & Co Ltd v Hambros Bank Ltd* [1943] KB 37.

*Kredietbank Antwerp v Midland Bank plc* [1999] CLC 1108.

*Kreditbank Cassel GMBH v Schenkers Limited* [1927] 1 KB 826.

*Kwei Tek Chao v British Trader and Shippers* [1954] 2 QB 459.

*Kydon Compania Naviera SA v National Westminster Bank Ltd (The Lena)* [1980] Com LR 12; [1981] 1 Lloyd's Rep. 68.

*M. Golodetz & Co Inc v Czarnikow-Rionda Co Inc* [1980] 1 Lloyd's Rep 453.

*Montrod Ltd v Grundkötter Fleischvertriebs-GmbH* [2000] All ER (D) 2011; [2001] CLC 466; [2002] 1 WLR 1975; [2002] 1 All ER (Comm) 257 (CA).

*Moralice (London) Ltd v E.D & F Man* [1954] 2 Lloyd's Rep. 526.

*Lombard Finance v Brookplain Trading* [1991] 2 ALL E.R. 762.

*Power Curber International Ltd v National Bank of Kuwait S.A.K.* [1981] 2 Lloyd's Rep. 394.

*Royal Bank of Scotland plc v Cassa di Risparmio delle Provincie Lombarde* [1992] 1 Bank L.R. 251.

*Ruben v Great Fingall Consolidated* [1906] AC 439.

*Seaconsar Far East Ltd v Bank Markazi Jomhouri Islami Iran* [1997] 2 Lloyd's Rep. 89.

*Soproma S.p.A. v Marine & Animal By-Products Corporation* [1966] 1 Lloyd's Rep. 367.

*Standard Chartered Bank v Dorchester LNG (2) Limited* [2013] EWHC 808 (Comm).

*Standard Chartered Bank v Pakistan National Shipping Corp (No 1)* [1998] 1 Lloyd's Rep 684.

*Stein v Hambro's Bank of Northern Commerce* [1921] 9 Ll L Rep. 507.

*United City Merchants (Investments) Ltd v Royal Bank of Canada* [1979] 1 Lloyd's Rep 267; [1982] QB 208 (CA); [1983] 1 AC 168 (HL).

*Urquhart Lindsay & Co Ltd v Eastern Bank Ltd* [1922] 1 KB 318.

*Uzinterimpex JSC v Standard Bank Plc* [2008] EWCA Civ 819, [2008] 2 Lloyd's Rep 456.

*WJ Alan & Co Ltd v El Nasr Export and Import Co* [1972] 2 QB 189.

## **United States:**

*All-American Semiconductor Inc v Wells Fargo Bank, Minnesota N.A.*, 105 Fed. Appx. 886 (8<sup>th</sup> Cir, 2004).

*Amwest Surety Insurance Company v Concord Bank*, 248 F. Supp. 2d 867 (E.D. Mo., 2003).

*Banco Espanol de Credit v State Street Bank & Trust Co Ltd.* 266 F. Supp. 106 (D Mass, 1967).

*Bank of Cochín Ltd v Manufacturers Hanover Trust*, 612 F. Supp. 1533 (SD NY, 1985).

*Bank of Italy v Merchants National Bank*, 236 N.Y. 106 (NY, 1923).

*Beyene v Irving Trust Co*, 762 F.2d 4 (2<sup>nd</sup> Cir, 1985).

*Breathless Associates v First Savings & Loan Association of Burkburnett*, 654 F. Supp. 832 (ND Tex, 1986).

*Cherubino Valsangiacomo v Americana Juice Imports, Inc*, No 13-99-587-CV, Court of Appeals of Texas (2000).

*City of Coachella v Harbor Real Asset Fund LP*, 359 F. App'x 713 (9<sup>th</sup> Cir, 2009).

*Courtaulds North America Inc v North Carolina National Bank*, 387 F. Supp. 92 (M.D.N.C, 1975); 528 F.2d 802 (4<sup>th</sup> Cir, 1975).

*Crocker Commercial Services, Inc v Countryside Bank*, 538 F. Supp. 1360 (ND Ill, 1981).

*Dulien Steel, Inc, of Washington v Bankers Trust Co*, 189 F Supp. 922 (1960), affd 298 F 2d 836 (1962).

*E & H Partners v Broadway National Bank*, 39 F.Supp.2d 275 (SD NY, 1998).

*Esso Petroleum Can, a Div of Imperial Oil Ltd v Security Pac Bank*, 710 F. Supp. 275 (D. Or., 1989).

*FDIC v Bank of San Francisco*, 817 F 2d 1395 (9<sup>th</sup> Cir, 1987).

*First Nat'l Bank of Atlanta v Wynne*, 256 S.E.2d 383 (Ga. App., 1979).

*Flagship Cruises, Ltd v New England Merchants Nat'l Bank of Boston*, 569 F.2d 699 (1<sup>st</sup> Cir, 1978).

*Hamilton Bank, NA v Kookmin Bank*, 44 F. Supp. 2nd. 653 (SD NY,1999).

*Hanil Bank v PT Bank Negara Indonesia*, No. 96 Civ. 3201, 2000 WL 254007 (SD NY, 2000).

*Intraworld Industries, INC v Girard Trust Bank*, 336 A 2d 316 (Pa, 1975).

*Itek Corp v First National Bank*, 730 F 2d 19 (1<sup>st</sup> Cir, 1984).

*Kerr-McGee Chemical Corp v Federal Deposit Insurance Corp*, 872 F. 2d 971 Courts of Appeals (11<sup>th</sup> Cir, 1989).

*Lamborn v National Park Bank of New York*, 240 N.Y. 520 (NY, 1925).



- Manitoba Ltd v National Bank of Canada*, 33 A.C.W.S. (3d) 200 (Man. C.A., 1992).
- Marino Industries, Inc, v Chase Manhattan Bank*, 686 F.2d 112 (2<sup>nd</sup> Cir, 1982).
- Maurice O'Meara Co v National Park Bank of New York*, 239 NY 386 (NY, 1925).
- MRM Security Systems Inc v Citibank NA*, No.96 Civ. 3721 (KMW), 1997 U.S Dist. LEXIS 5360 (S.D.N.Y, 1997).
- Mutual Export Corporation v Westpac Banking Corporation*, 983 F.2d 420 (2<sup>nd</sup> Cir, 1993).
- New Braunfels National Bank v Odiorne*, 780 S.W.2d 313 (Tex. App.-Austin 1989).
- NMC Enterprises Inc v Columbia Broadcasting Systems*, 14 UCC Rep 1427 (NYSC, 1974).
- Ocean Rig ASA v Safra National Bank of New York*, 72 F.Supp.2d 193 (SD NY, 1999).
- Oei v Citibank, NA*, 957 F Supp 492 (SD NY, 1997).
- Old Colony Trust Co v Lawyers' Title & Trust Co*, 297 F 152 (2<sup>nd</sup> Cir, 1924).
- Old Republic Surety Co v Quad City Bank & Trust Co*, 681 F. Supp. 2d 970 (CD Ill, 2009).
- Philadelphia Gear Corp v Central Bank*, 717 F2d 230 (5<sup>th</sup> Cir, 1983).
- Piaggio & C.S.p.A. v Bank of Nova Scotia*, 2011 ONSC 2567 Carswell Ont 5698 (Ont. S.C.J. 2012).
- Richard v Royal Bank of Canada*, 23 F. 2d 430 (2<sup>nd</sup> Cir, 1928).
- Rockwell International Systems Inc v Citibank NA*, 719 F 2d 583 (2<sup>nd</sup> Cir, 1983).
- Rudy T. Oei and M.J.F.M. Kools, d/b/a Kools de Visser v Citibank, N.A. and Citibank International*, 957 F. Supp. 492 (S.D.N.Y., 1997).
- Sunlight Distribution Inc v Bank of Communications*, WL 46636 (SD NY, 1995).
- Sztejn v Henry Schroder Banking Corp*, 177 Misc. 719, 31 NYS (2d) 631 (NY, 1941).
- Tosco Corp v Federal Deposit Insurance Corp*, 723 F.2d 1242 (6<sup>th</sup> Cir, 1983).
- Toyota Tsusho Corp v Comerica Bank*, 929 F. Supp. 1065 (E.D. Mich., 1996).
- Uniloy Milacron Inc v PNC Bank*, U.S. Dist. LEXIS 33063 (WD Ky, 2008).
- United Bank Ltd v Cambridge Sporting Goods Corp*, 392 N.Y.S. 2d. 265 (NY, 1976).

*Voest-Alpine International Co v Chase Manhattan Bank, N.A.*, 545 F. Supp. 301 (SD NY, 1982).

*Voest-Alpine Trading USA Co v Bank of China*, 142 F. 3d 887 (5<sup>th</sup> Cir, 1998), 167 F. Supp. 2d 940 (SD Tex, 2000).

*Wood v State Bank of Long Island*, 203 A.D 2d 278 (NY, 994).

### **Australia:**

*Bush v National Australia Bank Ltd* (1992) 35 NSWLR 390.

*Simic v New South Wales Land and Housing Corp* [2016] HCA 47, (2016) 260 CLR 85.

### **Canada:**

*Bank of Nova Scotia v Angelica-Whitewear Ltd* [1987] 1 SCR 59.

*CDN Research & Development Ltd v Bank of Nova Scotia*, CarswellOnt 1298, (1982) 136 DLR (3d) 656.

*Gook Country Estates Ltd v Toronto Dominion Bank* [2001] BCCA 578.

### **China:**

*South Korean Hyosung Corp v China Everbright Bank*, Civil Judgement (2003) Min Jing Zhong Zi Bo. 069; Fujian High People's Court.

### **Hong Kong:**

*Cooperative Centrale Raiffeisen-Boerenleenbank BA (Rabobank) v Bank of China* [2004] 3 HKLRD 477.

*Hing Yip Hing Fat Co Ltd v Daiwa Bank Ltd* [1991] 2 HKLR 35.

*NEC Hong Kong Ltd v Industrial and Commercial Bank of China* [2006] 2 HKLRD 645.

*Netherlands Trading Society v Wayne and Haylitt Co* (1952) 36 Hong Kong LR 109 (1952).

### **Italy:**

*Adriacommerce Koper v Credito Italiano*, Tribunale di Brescia (1973).

*Credito Italiano v Banco di Sicilia*, Corte di Appello di Palermo (1951), Corte di Cassazione (1953).

*Spa Riserie Virginio Curti v BNL and Banque Nationale de Paris “Intercontinentale”* (1981)

Tribunale di Roma, Corte di Appello di Roma (1985).

### **Singapore:**

*Amixco Asia (Pte) Ltd v Bank Bumiputra Malaysia Bhd* [1992] 2 SLR 943.

*Beam Technology (Manufacturing) Pte Ltd v Standard Chartered Bank* [2002] 2 SLR 155; [2003] 1 SLR 597.

*Korea Industry Co v Andoll* [1990] 2 Lloyd's Rep 183.

*Kumagai-Zenecon Construction Pte Ltd v Arab Bank Plc* [1997] 2 SLR 805.

*Lambias (Importers and Exporters) Co PTE Ltd v Hong Kong & Shanghai Banking Corporation* [1993] 2 SLR 751.

*Mees Pierson NV v Bay Pacific (S) Pte Ltd* [2000] 4 SLR 393.

*United Bank Ltd v Banque Nationale de Paris* [1992] 2 SLR 64.

### **South Korea:**

South Korea Supreme Court, 2005 da 63227, 2006.

### **South Africa:**

*Phillips v Standard Bank of South Africa Ltd* [1985] (3) South Africa 301(W).

## Books

Adodo E, *Letters of Credit: The Law and Practice of Compliance* (Oxford University Press 2014).

August R and Others, *International Business Law, Text Cases and Readings* (6<sup>th</sup> edition, Upper Saddle River, NJ: Pearson 2013).

Bertrams R, *Bank Guarantees in International Trade* (4<sup>th</sup> revised edition, Kluwer Law International 2013).

Burrows A, *Principles of English Commercial Law* (Oxford, United Kingdom: Oxford University Press 2015).

--, *English Private Law: Oxford Principles of English Law* (3<sup>rd</sup> revised edition, OUP Oxford 2013).

Bridge M, *Benjamin's Sale of Goods* (10<sup>th</sup> edition, Sweet & Maxwell 2017).

--, *The International Sale of Goods* (4<sup>th</sup> edition, Oxford University Press 2017).

Byrne J, *International Letter of Credit Law and Practice* (2016 edition, Thomson West 2016).

--, *UCP 600: An Analytical Commentary* (IIBLP 2010).

-- and Byrnes C, *2006 Annual Survey of Letter of Credit Law & Practice Handbook*, abstracted by JIN Saibo and YANG Wantao of Zhonglun Law Firm (The Institute of International Banking Law & Practice 2006).

Chow D, *International Business Transactions: Problems, Cases and Materials* (3<sup>rd</sup> edition, Wolters Kluwer Law & Business 2015).

Chuah J, *Law of International Trade* (5<sup>th</sup> revised edition, Sweet & Maxwell 2013).

Clarke M and Others, *Commercial Law: Text, Cases, and Materials* (5<sup>th</sup> edition, Oxford University Press 2017).

Collyer G, *Commentary on UCP 600* (ICC Publication No.680E 2007).

--, *Opinions of the ICC Banking Commission 1995-1996: Responses to Queries on UCP 400, UCP 500 and URC 322* (ICC Publishing S.A. 1997).

Cranston R and Others, *Principles of Banking Law* (3<sup>rd</sup> edition, Oxford University Press 2017)

Dalhuisen J, *Dalhuisen on Transnational Comparative, Commercial, Financial and Trade Law: Volume 3: Financial Products, Financial Services and Financial Regulation* (6<sup>th</sup> revised, Hart Publishing 2016).

Davies M and Other, *International Transactions in Goods, Global Sales in Comparative Context* (Oxford University Press 2014).

Debattisa C, *Bills of Lading in Export Trade* (3<sup>rd</sup> Revised edition, Tottel Publishing 2009).

Dhooge L, *International Business Law and Its Environment* (9<sup>th</sup> edition, South-Western College Pub 2014).

Dolan J, *The Law of Letters of Credit* (Arlington, VA: AS Pratt & Sons 2001).

Ellinger P and Neo D, *The Law and Practice of Documentary Letters of Credit* (Hart Publishing 2010).

Enonchong N, *The Independence Principle of Letters of Credit and Demand Guarantees* (Oxford University Press 2011).

Gao X, *The Fraud Rule in the Law of Letters of Credit: A Comparative Study* (Kluwer Law International 2003).

Goode R, *Goode on Commercial Law* (5<sup>th</sup> edition, Penguin 2017).

-- and Others, *Transnational Commercial Law: Texts, Cases and Materials* (2nd edition, Oxford University Press 2015).

-- and Others, *Transnational Commercial Law: International Instruments and Commentary* (2nd edition, Oxford University Press 2012).

Herdegen M, *Principles of International Economic Law* (2<sup>nd</sup> edition, OUP Oxford 2016).

Horowitz D, *Letters of Credit and Demand Guarantees 'Defences to Payment'* (Oxford University Press 2010).

International Chamber of Commerce, *International Standard Banking Practice for the Examination of Documents under Documentary Credits*, 2007 Revision for UCP 600, ICC Publication No. 681E (ICC 2007).

International Maritime Bureau of the ICC, *Trade Finance Fraud: Understanding the Threats and Reducing the Risk, A Special Report* (Paris 2002).

Kurkela M, *Letters of Credit and Bank Guarantees Under International Trade Law* (2<sup>nd</sup> edition, Oxford University Press 2007).

Malek A and Quest D, *Jack: Documentary Credits: The Law and Practice of Documentary Credits Including Standby Credits and Demand Guarantees* (4th revised edition, Bloomsbury Professional 2009).

Mugasha A, *The Law of Letters of Credit and Bank Guarantees* (Federation Press 2003).

International Maritime Bureau of the ICC, *Trade Finance Fraud: Understanding the Threats and Reducing the Risk, A Special Report* (Paris 2002).

Pennington R, *Bank Finance for Companies* (Sweet & Maxwell, London 1987).

Schaffer R and Others, *International Business Law and Its Environment* (9<sup>th</sup> edition, Stamford, CT : Cengage Learning 2015).

Taylor D, *The Complete UCP* (ICC Publication No.683 2008).

Todd P, *Bills of Lading and Bankers' Documentary Credits* (4<sup>th</sup> edition, Informa Law 2007).

--, *Cases and Materials on International Trade Law* (Sweet & Maxwell 2003).

Wunnick B and Others, *Standby and Commercial Letters of Credit* (3<sup>rd</sup> Updated edition, Aspen Publishers 2000).

## Articles

Adodo E, 'Conformity of Presentation Documents and a Rejection Notice in Letters of Credit Litigation: A Tale of Two Doctrines' (2006) 36 Hong Kong Law Journal 309.

--, 'A Presentee Bank's Duty When Examining a Tender of Documents Under the UCP 600' (2009) 24 Journal of International Banking Law & Regulation 566.

--, 'Letters of Credit: Existence of a Duty to Return Documents Listed in a Rejection Notice' (2012) 27 Journal of International Banking Law and Regulation 456.

Antoniou A, 'Fraud, Exceptions to Autonomy and the UCP 600' (2013) 28 Journal of International Banking Law and Regulation 339.

--, 'Nullities in Letters of Credit: Extending the Fraud Exception' (2014) 29 Journal of International Banking Law and Regulation 229.

Al-Tawil T, 'Letters of Credit and Contract of Sale: Autonomy and Fraud' (2013) 16 International Trade & Business Law Review 159.

Alavi H, 'Mitigating the Risk of Fraud in Documentary Letters of Credit' (2016) 6 Baltic Journal of European Studies 139.

--, 'Documentary Letters of Credit, Principle of Strict Compliance and Risk of Documentary Discrepancy' (2016) 19 Korea University Law Review 1.

Arban E, 'The Doctrine of Strict Compliance in the Italian Legal System' (2005) 23 Arizona Journal of International and Comparative Law 77.

Barnes J and James Byrne, 'Letters of Credit: 2000 Cases' (2001) 56 The Business Lawyer 1805.

--, 'Letters of Credit' (2010) 65 The Business Lawyer 1267.

Bergami R, 'UCP 600 Rules – Changing Letter of Credit Business for International Traders?' (2009) 1 International Journal of Economics and Business Research 191.

Chin L and Wong Y, 'Autonomy-A Nullity Exception at Last?' [2004] Lloyd's Maritime and Commercial Law Quarterly 14.

Conley T, 'Hanil Bank v. Pt. Bank Negara Indonesia: The Problem with Form over Substance in Documentary Compliance Rules' (2001) 50 Catholic University Law Review 977.

Chew W, 'Strict Compliance in Letters of Credit: The Banker's Protection or Bane' (1990) 2 Singapore Academy of Law Journal 70.

Chhina R, 'The Uniform Customs and Practice for Documentary Credit (the UCP): Are They Merely a Set of Contractual Terms?' (2015) 30 Banking & Finance Law Review 245.

Davidson A, 'Fraud; The Prime Exception to the Autonomy Principle in Letters of Credit' (2003) 8 International Trade and Business Law 23.

Doise D, 'The 2007 Revision of the Uniform Customs and Practice for Documentary Credits (UCP 600)' [2007] International Business Law Journal 106.

Donnelly K, 'Nothing for Nothing: A Nullity Exception in Letters of Credit?' [2008] Journal of Business Law 316.

Dolan J, 'Negotiation Letters of Credit' (2002) 119 Banking Law Journal 408.

--, 'Tethering the Fraud Inquiry in Letter of Credit Law' (2006) 21 Banking and Finance Law Review 479.

--, 'Documentary Compliance in Letter of Credit Law: What's in a Name, and What Need for an Original? Case Notes and Comments [*Piaggio & C.S.p.A. v. Bank of Nova Scotia*]' (2011) 28 Banking and Finance Law Review 121.

--, 'Letter of Credit Litigation Under UCC Article 5: A Case of Statutory Preemption' (2011) 57 The Wayne Law Review 1269.

Downes P, 'UCP 600: Not So Strict Compliance' (2007) 4 Journal of International Banking and Financial Law 196.

Ellinger P, 'Fraud in Documentary Credit Transactions' [1981] Journal of Business Law 258.



- , 'Use of Some ICC Guidelines' [2004] Journal of Business Law 704.
- , 'Documentary Credits and Finance by Mercantile Houses' in A G Guest and others, Benjamin's Sale of Goods (7<sup>th</sup> edition Sweet & Maxwell, London 2009).
- , 'Case and Comment; Rejection of Documents Tendered Under A Letter of Credit: *Fortis Bank V Indian Overseas Bank*' [2013] Lloyd's Maritime And Commercial Law Quarterly 1.
- Enonchong N, 'The Autonomy Principle of Letters of Credit: An Illegality Exception?' [2006] Lloyd's Maritime and Commercial Law Quarterly [2006] 404.
- Ferrero S, 'Some Considerations on the Doctrine of Strict Compliance and the Autonomy Principle in Documentary Credit' (2013) 4 Business JUS 25.
- Gao X, 'The Identity of the Fraudulent Party under the Fraud Rule in the Law of Letters of Credit' (2001) 24 University of New South Wales Law Journal 119.
- Goode R, 'Abstract Payment Undertakings' in Peter Cane and Jane Stapleton, *Essays for Patrick Atiyah* (Oxford University Press 1991).
- , 'Abstract Payment Undertakings and the Rules of the International Chamber of Commerce' (1995) 39 Saint Louis University Law Journal 725.
- , 'Abstract Payment Undertakings in International Transactions' (1996) 22 Brooklyn Journal of International Law 1.
- Graham G and Geva B, 'Standby Credits in Canada' (1984) 9 Canadian Business Law Journal 180.
- Han C and Others, 'Documentary Credit Fraud against Banks: Analysis of Korean Cases' (2015) 18 Journal of Money Laundering Control 457.
- Hao J, 'Refusal Notice as a Shield or as a Sword: A Comprehensive Analysis of the Validity of a Refusal Notice Under UCP 500 and Letter of Credit Law' (2007) 2 Journal of Payment System Law 287.

Hare C, 'Not So Black and White: The Limits of the Autonomy Principle' (2004) 63 The Cambridge Law Journal 288.

Hwaidi M, 'The Story of the English Strict Compliance Principle in Letters of Credit and Its Consistency with the UCP' (2014) 29 Journal of International Banking Law and Regulation 71.

Hashim R, 'Principle of Strict Compliance in Letter of Credit (LC): Towards A Proper Standard of Compliance' [2013] CLI Law: Legal Network Series 1.

Hooley R, 'Fraud and Letters of Credit: Is There a Nullity Exception?' [2002] The Cambridge Law Journal 279.

--, 'Fraud and Letters of Credit, Part 1' (2003) 3 Journal of International Banking and Financial Law 91.

Isaacs M and Barnett M, 'International Trade Finance - Letters of Credit, UCP 600 and Examination of Documents' (2007) 22 Journal of International Banking Law and Regulation 660.

Kang J, 'What Should Be the Limitations of the Doctrine of Strict Compliance' (2008) 1 Asian Business Law 91.

Karim R and Zahidul Islam, 'Critical Analysis of the Principle of Strict Compliance in Letter of Credit Operation with Relation to the UCP 600' (2016) 2 Journal of Asian and African Social Science and Humanities 105.

Kozolchyk B, 'Strict Compliance and the Reasonable Document Checker' (1990) 56 Brooklyn Law Review 45.

--, 'Drafting Commercial Practices and the Growth of Commercial Contract Law' (2013) 30 Arizona Journal of International & Comparative Law 423.

Low H, 'UCP 600: The New Rules on Documentary Compliance' (2010) 52 International Journal of Law and Management 193.

--, 'Confusion and Difficulties Surrounding the Fraud Rule in Letters of Credit: An English Perspective' (2011) 17 *International Journal of Law and Medicine* 462.

Manganaro N, 'About-Face: The New Rules of Strict Compliance under the Uniform Customs and Practice for Documentary Credits (UCP 600)' (2011) 14 *International Trade and Business Law Review* 273.

Mann R, 'The Role of Letters of Credit in Payment Transactions' [2000] *Michigan Law Review* 2494.

McMeel G, 'Pay Now, Argue Later' [1999] *Lloyd's Maritime and Commercial Law Quarterly* 5.

Moses M, 'The Irony of International Letters of Credit: They Aren't Secure, but They (Usually) Work' (2003) 120 *Banking Law Journal* 479.

Mugarura N, 'The Letter of Credit, Its Resilience and Viability in Securing International Commercial Transactions' (2014) 13 *Journal of International Trade Law and Policy* 246.

Murphy J, 'Documentary Credits and Rejected Documents' [1992] *Lloyd's Maritime And Commercial Law Quarterly* 26.

Neo D, 'A Nullity Exception in Letter of Credit Transactions?' [2004] *Singapore Journal of Legal Studies* 46.

Odeke A, 'Double Invoicing in International Trade: The Fraud and Nullity Exceptions in Letters of Credit--Are the America Accord and the UCP 500 Crooks' Charters!?' (2012) 18 *The Denning Law Journal* 115.

Özkan Ö, Oğuzhan Özçelik and Serpil Kılıç 'Important and Critical Issues of Complying Presentation Based Upon Letter of Credit (L/C) Payment' (2016) 2 *Journal of International Trade, Logistics and Law* 73.

Pifer T, 'The ICC Publication of International Standard Banking Practice (ISBP) and the Probable Effect on United States Letter of Credit Law' (2006) 12 Texas Wesleyan Law Review 631.

Ren J, 'A Nullity Exception in Letter of Credit Law?' [2015] Journal of Business Law 1.

Ren X, 'The Scope of the Fraud Exception in Letter of Credit Law' (2010) 26 Journal of Contract Law 289.

Roane K, 'Hanil Bank v. Pt. Bank Negara Indonesia (Persero): Continuing the Quandary of Documentary Compliance under International Letters of Credit' (2004) 41 Houston Law Review 1053.

Rosener J, 'Recent Developments: Letter of Credit Transactions' (2005) 1 Journal of Payment Systems Law 627.

Scalise Jr. R, 'Rethinking the Doctrine of Nullity' (2014) 74 Louisiana Law Review 664.

Schmitthoff C, 'Discrepancy of Documents in Letter of Credit Transactions' [1987] Journal of Business Law 94.

Schulze W.G, 'The UCP 600: A New Law Applicable to Documentary Letters of Credit: Analysis' (2009) 21 SA Mercantile Law Journal= SA Tydskrif vir Handelsreg 228.

Song C, 'Sectoral Dispute Resolution in International Banking (Documentary Credit Dispute Expertise: DOCDEX)' (2013) 30 Arizona Journal of International and Comparative Law 529.

Sotiri V and Others, 'Documentary Credits and the Necessity of Recognition of Some Legal and Financial Aspects in Their Use of the Albanian Traders' (2013) 1 International Journal of Interdisciplinary Research SIPARUNTON 536, 540.

Sutton W, 'The Documentary Credit Phoenix: UCP 600 Boasts Fair Rules for Trade Customers, Hard Rules for Banks' (2012) 37 DAJV Newsletter 62.

Takahashi K, 'Original Documents in Letters of Credit in the Era of High-Quality Photocopiers and Printers' (2004) 121 Banking Law Journal 613.

Todd P, 'Non-Genuine Shipping Documents and Nullities' [2008] *Lloyd's Maritime and Commercial Law Quarterly* 547.

Ulph J, 'The UCP 600: Documentary Credits in the Twenty-First Century' (2007) 4 *Journal of Business Law* 355.

Wood J, 'Drafting Letters of Credit: Basic Issues Under Article 5 Of the Uniform Commercial Code, UCP 600, and ISP98' (2008) 125 *Banking Law Journal* 103.

### **PhD Theses:**

Alavi H, 'Exceptions to the Principle of Independence in Documentary Letters of Credits' (DPhil thesis, University of Autonomia de Barcelona 2018).

Antoniou A, 'Complying Shipping Documents Under UCP 600' (DPhil thesis, Southampton University 2011).

Bergami R, 'Risk Management in Australian Manufacturing Exports: The Case of Letters of Credit to ASEAN' (DPhil thesis, Victoria University 2011).

Corne C, 'Rethinking the Law of Letters of Credit' (DPhil thesis, University of Sydney 2003).

Sakchutchawran S, 'The Problem of Presentation of Discrepant Export and Import Documents against Letter of Credit for Payment and Financing' (DPhil thesis, Union Institute and University Cincinnati, 2005).

Zhang J, 'Document Examination and Rejection under UCP 600' (DPhil thesis, University of Southampton 2015).

### **United States Legislation:**

The Uniform Commercial Code (UCC), Article 5 (Letters of Credit 1978).

The Uniform Commercial Code (UCC), Article 5 (Letters of Credit 1995).

### **United Nations Legislation:**

International Standard Banking Practice (ISBP) 2013 edition, International Chamber of Commerce Publication No. 745.

The Uniform Customs and Practice for Documentary Credits (UCP 500) 1993.

The Uniform Customs and Practice for Documentary Credits (UCP 600) 2007.

### **United Nations Documents:**

Commission on Banking Technique and Practice, 'Discrepant Documents, Waiver and Notice'  
An ICC Banking Commission Recommendation, Department of Policy and Business Practices (2002).

ICC Banking Commission, Collected DOCDEX Decisions 1997-2003.

ICC Banking Commission, Collected DOCDEX Decisions 2009-2012, (Publication (International Chamber of Commerce) No. 739E. Edited by Gary Collyer & Ron Katz, 2012.

ICC Banking Commission Collected Opinions 1980-1981, (ICC Publication No.399, 1982).

ICC Banking Commission Collected Opinions 1995-2001, edited by Gary Collyer & Ron Katz, 2002 (from 1997 volume).

ICC Banking Commission Collected Opinions 2005-2008.

ICC Banking Commission Policy Statement 12 July 1999.

ICC Banking Commission Unpublished Opinions 1995–2004.

ICC China Collected Opinions 1998-2003.

ICC Document 470/TA. 390, Inquiry Answers to Questions 6-7, 2012.

International Chamber of Commerce, Banking Comm'n, Publication No. 371, Decisions (1975-1979) of the ICC Banking Commission R. 12 (1980).

International Chamber of Commerce, Issues Papers\_ Notes on the Principle of Strict Compliance, prepared by the Executive Committee of the ICC Banking Commission 2016.

Report Prepared by The UNCTAD Secretariat, 'A Primer on New Techniques Used by The Sophisticated Financial Fraudster with Special Reference to Commodity Market Instruments' (2003).

### **Other Sources:**

Chae J, 'The Reality and Practical Application of a Compliance Standard for Examination of Documents', from the Selected Works of Jin Ik Chae (2011).

Dolan J, 'A Principled Exception to the Strict Compliance Rule in Trilateral Letter of Credit Transactions' Papers posted in the Wayne State University Law School Legal Studies Research Paper Series (2003) <http://www.ssrn.com/link/Wayne-State-U-LEG.html>.

Shen L, 'Effective Notice of Refusal in Letter of Credit Transaction' (2005) Research Paper, University of Southampton, 39

<[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1335800](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1335800)>.

SITPRO, Report on the Use of Export Letters of Credit 2001/2002, published on <https://www.scribd.com/document/43959409/lettcredr> (need subscription).

The Law Commission, (No. 55), House of Commons, Criminal Law, Report on Forgery and Counterfeit Currency 1973.

Youssef F, 'Documentary Risk in Commodity Trade' (UNCTAD 1998) <[http://unctad.org/en/Docs/itcdcommisc31\\_en.pdf](http://unctad.org/en/Docs/itcdcommisc31_en.pdf)>.

## Appendix 1

### Banks Questionnaire

1. Percentage of issuing and advising? (The bank role under the credit)
2. What types of discrepancies do you found, in general?
3. How do you deal with them, for instance; names, numbers, description etc.?
4. Which type of discrepancies do you struggle with? **[Explain]**
5. What is the applicant responding or react about them?
6. For whom you do the duty of reasonable care, why?
7. Is there under the bank policy or bank customs something known as
8. **“discrepancy fees”**?
9. How many times do you check the documents, if you could within the time limit?
10. How much qualified the staff who deal with the documentary credit are? **[Educational qualifications and Workshops]**
11. How many member staff contribute when examine the documents? **(How many individuals)**
12. How does the process for examining the documents go? Is it checked by a member then another one will re-check his review **(Group)** or the member who check it has the last word to say?
13. Any suggestions



## Appendix 2

### Discrepancies Survey

1. If the presented document **did not include number** as the credit required; (the whole number is missing) will the bank: (check the appropriate box)

☐

Honour the Credit

☐

Dishonour the Credit

Why: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

2. If the presented document included number as the credit required; but the number was **missing a digit**, will the bank: (check the appropriate box)

☐

Honour the Credit

☐

Dishonour the Credit

Why: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

3. If the presented document included number as the credit required; but the number included **an extra digit**, will the bank: (check the appropriate box)

☐

Honour the Credit

☐

Dishonour the Credit

**Why:** \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

4. If the presented document included number as the credit required; but the number included **a letter instead of a digit**, will the bank: (check the appropriate box)

☐

Honour the Credit

☐

Dishonour the Credit

**Why:** \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

5. If the presented document included number as the credit required; but the whole number was **different number**, will the bank: (check the appropriate box)

☐

Honour the Credit

☐

Dishonour the Credit

**Why:** \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

6. If the presented document **did not include name** as the credit required; (the whole name is missing) will the bank: (check the appropriate box)

☐

Honour the Credit

☐

Dishonour the Credit

**Why:** \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

7. If the presented document included name as the credit required; but the name was **missing a letter**, will the bank: (check the appropriate box)

☐

Honour the Credit

☐

Dishonour the Credit

**Why:** \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

8. If the presented document included name as the credit required; but the name included **an extra letter**, will the bank: (check the appropriate box)

☐

Honour the Credit

☐

Dishonour the Credit

**Why:** \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

9. If the presented document included name as the credit required; but the whole name was a **different name**, will the bank: (check the appropriate box)

☐

Honour the Credit

☐

Dishonour the Credit

**Why:** \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

10. If the presented document included an address as the credit required; but the addresses was **different**, will the bank: (check the appropriate box)

☐

Honour the Credit

☐

Dishonour the Credit

**Why:** \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

11. If the presented document **did not include an address** as the credit required; (the address is missing), will the bank: (check the appropriate box)

☐

Honour the Credit

☐

Dishonour the Credit

**Why:** \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

12. If the presented document included a date as the credit required; but the date was **different**, will the bank: (check the appropriate box)

☐

Honour the Credit

☐

Dishonour the Credit

**Why:** \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

13. If the presented document **did not include the date** as the credit required; (the date is missing),  
will the bank: (check the appropriate box)

☐

Honour the Credit

☐

Dishonour the Credit

**Why:** \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

14. If the presented document **did not include the description of the goods** as the credit required;  
(the whole description or a phrase in the description is missing), will the bank: (check the  
appropriate box)

☐

Honour the Credit

☐

Dishonour the Credit

**Why:** \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

15. If the presented document included the description of the goods as the credit required; but the description included **an extra phrase**, will the bank: (check the appropriate box)

☐

Honour the Credit

☐

Dishonour the Credit

**Why:** \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

16. If the presented document included the description of the goods as the credit required; but the description was **different**, (the whole description or a phrase in the description is different), will the bank: (check the appropriate box)

☐

Honour the Credit

☐

Dishonour the Credit

**Why:** \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_