THE FRAUD EXCEPTION IN DOCUMENTARY CREDITS:

A Global Analysis

Nevin MERAL*

* Info.

Abstract

The Autonomy Principle in documentary credits sometimes creates unwanted results like the system protecting fraudsters. As the UCP does not include any exception to this principle, common law courts have found a solution to this problem under the Fraud Exception Rule. So, this research considers that, due to the lack of certain scopes, the Rule is far from settled in cases related to the issue of fraud. Accordingly, national courts have applied this Rule in a very divergent manner so the Rule is not consistently implemented in each case. Hence, the underlying purpose of this research is first to argue the inconsistency in cases of the Fraud Exception Rule. Second, the research suggests solutions to this inconsistency with specific reference to the ICC which seems the most appropriate body to legislate the Fraud Exception Rule in the next revision of the UCP.

Keywords: *documentary credits, UCP 600, fraud exception, common law countries, autonomy principle, ICC, strict compliance principle, letters of credit.*

TABLE OF CASES

American Cases

1. American Bell International v Islamic Republic of Iran 474 F Supp 420 (SDNY 1979)
2. Asbury Park & Ocean Grove Bank v. National City Bank of New York 35 NYS 2d 985 (NY Sup Ct 1942)
3. Dynamics Corp of America v Citizens & Southern National Bank 356 F Supp 991 (ND Ga. 1973)
4. Ground Air Transfer v Westates Airlines 899 F 2d 1269 (1st Cir. 1990)
5. Grob v Manufacturers Trust Co 177 Misc. 45, 29 NYS 2d 916 (Sup Ct 1941)
6. Higgins v Steinhardter 106 Misc. 168, 175 NY Sup 279 (Sup Ct 1919)
7. Intraworld Industries Inc. v Girard Trust Bank 336 A 2d 316 (1975)
8. New Orleans Brass v Whitney National Bank and The Louisiana Stadium and Exposition District, 2002 LA App LEXIS 1764 (La Ct App 4th Cir. May 15, 2002)
9. New York Life Insurance Co. v. Hartford National Bank & Trust Co 378 A 2d 562 (Conn.1977)
10. NMC Enterprises Inc v Columbia Broadcasting System Inc 14 UCC Rep Serv. 1427 (NY Sup Ct 1974)
11. Maurice O'Meara Co v National Park Bank of New York, 146 NE 636 (NY 1925)
12. Metallurgique d'Aubrives & Villerupt v British Bank For Foreign Trade (1922) 11 Lloyd's L Rep 168 (KB)
13. Mid-America Tire v PTZ Trading Ltd Import and Export Agents, 43 UCC Rep Serv. 2d 964 (Ohio App Nov 20, 2002)
14. Old Colony Trust Co v Lawyers Title & Trust Co, 297 F 2d 152 (2d Cir. 1924)
15. Pillans v Van Mierop (1765) 97 ER 1035
16. R.D. Harbottle (Mercantile) Ltd v National Westminster Bank Ltd [1978] 1 QB 146
17. Sztejn v J. Henry Schroder Banking Corporation, 177 Misc. 719, 31 NYS 2d 631 (1941)
18. United Bank Ltd v Cambridge Sporting Goods Corp, 392 NYS 2d 265 (NY 1976)

English Cases

1. Banco Santander SA v Bayfern Ltd [2000] 1 All ER (Comm) 776, CA
2. Bass & Selve Bank v Bank of Australasia 90 LTR (ns) 618 (KB 1904)
3. Czarnikow-Rionda Sugar Trading Inc v Standard Bank London Ltd [1999] 1 All ER (Comm) 890
4. Deutsche Ruckversicherung AG v Walbrook Insurance Company Ltd [1996] 1 All ER 791
5. Discount Records Ltd v Barclays Bank Ltd and Barclays Bank International Ltd [1975] 1 All ER 1071
6. Edward Owen Engineering Ltd v Barclays Bank International Ltd [1978] 1 All ER 976
7. European Asian Bank AG v Punjab and Sind Bank [1983] 1 Lloyd's Rep 611
8. Kvaerner John Brown Ltd v Midland Bank Plc [1998] CLC 446
9. RD Harbottle (Mercantile) Ltd v National Westminster Bank Ltd [1978] 1 QB 146
10. Society of Lloyd's v Canadian Imperial Bank of Commerce [1993] 2 Lloyd's Rep 579 (QBD)
11. Standard Chartered Bank v Pakistan National Shipping Corp (No 2) [2000] 1 All ER (Comm) 1, CA
12. Themehelp Ltd v West [1996] QB 84
13. Tukan Timber Ltd v Barclays Bank Plc [1987] 1 Lloyd's Rep 171
14. United City Merchants (Investments) Ltd v Royal Bank of Canada [1982] 2 All ER 720
15. United Trading Corp SA v Allied Arab Bank Ltd [1985] 2 Lloyd's Rep 554

Australian Cases

1. Contronic Distributors Pty Ltd v Bank of New South Wales (1984) 3 NSWLR 110
2. Hortico Pty Ltd v Energy Equipment Co Pty Ltd (1985) 1 NSWLR 545
3. Inflatable Toy Co Pty Ltd v State Bank of New South Wales (1994) 34 NSWLR 243
4. Olex Focas Pty Ltd v Skoda Export Co (1996) 134 FLR 331

Canadian Cases

1. Aspen Planners Ltd v Commerce Masonry & Forming Ltd (1979) 100 DLR 3d 546
2. Bank of Nova Scotia v Angelica-Whitewear Ltd [1987] 1 SCR 59
3. CDN Research & Developments Ltd v Bank of Novia Scotia (1980) 18 CPC 62

Introduction

In financing international transactions, buyers and sellers can choose from among various different payment methods, like open account. Among all, Mautner points out the significant use of documentary credits in transactions, which assure payment to the seller after the shipment of the contracted goods.[1] This payment must be made under only one condition; that is, tendering the compliant documents required by the instructions of the buyer in the letter of credit. Basically, if the seller presents compliant documents, the corresponding bank has to pay against the presentation.

In this scenario, the lack of information at the beginning of the contract about the business condition and credibility of the other party can represent a problem for both parties, especially for sellers.[2] So, Mann argues that letters of credit best serve as a verification institution for this information asymmetry for three reasons.[3] First, due to this asymmetry between parties, the seller prefers to use documentary credits, as the bank will be able to successfully verify the information about the buyer. Secondly, the buyer cannot stop the payment to the seller for any reason since the obligation of the bank is unconditional. Finally, states also benefit from the use of letters of credit as they are able to keep their national currency under control and if necessary, they can prevent money laundering in time.[4] So, documentary credits are very important to international trade, and courts prefer to step back from the process, because 'It is only in exceptional cases that the courts will interfere with the machinery of irrevocable obligations assumed by banks. They are the lifeblood of international commerce.'[5]

Letters of credit currently operate under the Uniform Customs and Practice for Documentary Credits 600 (the UCP 600). The UCP 600 assigns banks to only check the conformity of documents on their face under the Strict Compliance Principle and to pay against the presentation regardless of what happens in the underlying contract under the Autonomy Principle. However, the Autonomy Principle sometimes may cause unfair results as it may conduce that banks should not be involved in the underlying contracts even when the

[1] Menachem Mautner, 'Letter-of-Credit Fraud: Total Failure of Consideration, Substantial Performance and the Negotiable Instrument Analogy' (1986) 18 Law and Policy In International Business 579, 581.

[2] Richard A Wiley, 'How to Use Letters of Credit in Financing the Sale of Goods' (1965) 20 Business Lawyer 495, 497. He calls it the credit risk.

[3] Ronald J. Mann, 'The Role of Letters of Credit in Payment Transactions' (2000) 98 Michigan Law Review 400, 404.

[4] ibid 404. He also considers these three arguments as the reasons for the common use of documentary credits.

[5] RD Harbottle (Mercantile) Ltd v National Westminster Bank Ltd [1978] 1 QB 146, at 870

seller acts in bad faith. Especially, the ease of obtaining payment may motivate sellers to make fraudulent documents or underlying contracts.[6] So, an unintended result could be that the system might appear to protect fraudster sellers.[7] Therefore, there emerged a gap in the system, which was the legal protection for buyers against fraudsters.

The cure was found to that problem by common law courts. An American court originated an exception to the Autonomy Principle, known as the 'Fraud Exception' in the famous case of Sztejn.[8] The exception entitles buyers either to restrain sellers from drawing the credit or to restrain banks from making payments to sellers. After a while, other common law countries approved the reasoning of the court in that case and the application of the Fraud Exception became a widespread phenomenon, being a rule in its own right rather than merely an exception to the Autonomy Principle.

The common law courts have argued several issues regarding the Fraud Rule, two of which are examined in this research as the main research questions. First is the scope of the Rule as to whether it should be limited to fraud in documents or extended to fraud in the underlying contracts. Secondly, another problem attached to the Rule is what standard of fraud was necessary to trigger the Rule. Each common law court answered these questions differently, thereby creating an inconsistency between the judgements of Fraud Exception Rule in documentary credits. This research comparatively examines the approaches of common law courts in four countries, the USA, the UK, Canada and Australia.

Apart from the US and the UK, other common law countries have approved or accepted the Rule rather than arguing it in further detail. This is because, in the field of letters of credit, the debate about the Rule has been discussed in the US and the UK enough to settle the main principles like, extending the Rule to fraud in the underlying contract, or seller's entitlement to payment in case of third party fraud. In this respect, Australia and Canada, for example, followed the English traditional approach to the Rule with some aspects of the American approach.

This research focuses mainly on the inconsistencies between the judgements of common law courts on the Rule, and upon solutions to prevent fraud in documentary credits. Firstly, this inconsistency arises from the fact that the UCP has so far not accepted or admitted this exception. The Interstate Commerce Commission (the ICC) has taken a neutral position in the UCP, letting municipal law regulate this issue.[9] Thus, national courts interpret the Rule in

[6] Yeliz Demir-Araz, 'International Trade, Maritime Fraud and Documentary Credits' (2002) 8(4) International Trade Law & Regulation 128,132

[7] Mautner (n 1) 592

[8] Sztejn v J. Henry Schroder Banking Corporation, 177 Misc. 719, 31 NYS 2d 631 (1941)

[9] Ross P Buckley and Xiang Gao, 'The Development of the Fraud Rule in the Letter of Credit Law: The Journey So Far and the Road Ahead' (2002) 23 University of Pennsylvania

accordance with their national understanding, which causes different implementations of the Rule around the world, even between civil law and common law countries. Since the UCP does not cover this Rule, when parties in civil law countries incorporate the UCP into their contract, they may be defenceless in the case of a fraud dispute.[10] So there has been a great inconsistency across borders.

In the literature, in order to stop fraud and build trust among parties, many solutions have been offered so far at the international level. The one suggested more is to revise the UCP to insert the Rule in it, as the UCP would be the proper place to regulate it, taking into account its worldwide success.[11] In the new version of the UCP, the ICC is expected to compromise the Fraud Rule of the UNCITRAL Convention and the UCC in nature.[12] Seemingly, the ICC has already taken steps towards resolving letters of credits disputes that arise from the UCP 600, by producing the DOCDEX Rules. However, the DOCDEX Panel based on these rules is not appropriate for resolving fraud disputes owing to its non-binding nature and its function being the interpretation of the UCP.[13] Hence, there are other solutions such as the use of inspection companies and certificates, the ICC services, the Lloyd's Shipping Intelligence or performance bonds. Consequently, one way or another, fraud in the credits should be deterred and reform in the UCP is needed.

Regarding the structure of this research; following the introduction in chapter one, the routine operation of letters of credit will be discussed in depth. After that, the reasons for the increased occurrence of fraud will be examined closely while pointing out that there is need for a rule regarding the fraud issue that is met by common law courts. In chapter two, the initiation of the Fraud Exception Rule and different applications of the Rule by common law courts will be presented in order to show the inconsistency in judgments of letters of credit. In chapter three, the causes of this inconsistency problem will be argued and possible solutions for preventing fraud will be offered. Finally, it is suggested that a reform is needed in this regard in the conclusion.

Journal of International Economic Law 663, 700

[10] Yanan Zhang, 'Approaches to Resolving the International Documentary Letters of Credit Fraud Issue' (PhD Thesis, University of Eastern Finland 2011) 62

[11] Buckley and Gao (n 9) 701

[12] Xiang Gao and Ross P Buckley, 'A Comparative Analysis of the Standard of Fraud Required Under the Fraud Rule in Letter of Credit Law' (2003) 13 Duke Journal of Comparative & International Law 293, 334

[13] Anthony Connerty, 'DOCDEX: The ICC's Rules for Documentary Credit Dispute Resolution Expertise' (1998) 13(11) Journal of International Banking and Finance Law 523, 524

1. Chapter 1: Letters of Credit

1.1. General Operation of LC

In international sale transactions, four legal relationships arise, as Schmitthoff categorises.[14] The first one is the sales transaction which a buyer has with a seller on specific goods, the second one is the credit agreement where the buyer goes to his bank and opens a credit account amounting to whichever price is agreed in the underlying contract, in favour of the seller as beneficiary. And the third one is between the buyer's bank and a third bank which the issuing bank instructs for advising the seller about the credit in the seller's country. The last one is between the advising bank and the seller where the advising bank notifies the seller that if he tenders compliant documents, then it will pay against these documents. Here, if the advising bank provides its own assurance of paying the credit, then it becomes the confirming bank for seller.

In sales transactions, the interests of buyers and sellers always conflict with each other, as Ryder pointedly argues.[15] Because, he continues, sellers would like to make sure that they get paid before they ship the goods ordered, whereas buyers would like to receive the goods before paying the price.[16] So, in this respect, banks take an intermediary role and provide the credit upon the request of their costumer, the buyer, if the seller tenders the necessary documents required by the credit.[17] So here, what sellers trust is the reputation of the bank, not the buyer himself. To make the system reliable for all parties, the ICC and its experts from banking practice accepted the UCP.

There are mainly two main types of documentary credits, namely, a commercial letter of credit and a standby letter of credit. The latter is commonly used like a bank guarantee for an obligation of a party in case of any breach.[18] So standby letters of credit are opened to guarantee the performance of an obligation. If the relevant party fails to perform its obligation, the other party, the beneficiary, becomes entitled to payment. As the UCP 600 regulates both and treats the standby letters of credit in a similar manner to the commercial one, to a degree,[19] in this research they are seen as one.

[14] Clive M Schmitthoff, 'The Export Trade and Practice of International Trade: Chapter 11 Letters of Credit' (3rd Edn. Stevens London 1975), para.11-005
[15] Frank R Ryder, 'Challenges to the Use of Documentary Credit in International Trade Transactions' (1981) 16(4) Columbia Journal of World Business 36
[16] ibid 36
[17] ibid 36-37
[18] Charles Proctor and Nabarro Nathanson, 'Enron, Letters of Credit and The Autonomy Principle' (2004) 19(6) Journal of International Banking and Finance Law 204, 204
[19] The UCP 600, art 1.

1.2. Two main principles

There are two principles in the UCP 600, namely, the Strict Compliance Principle,[20] requiring all documents presented by the seller to be in compliance with the predetermined terms of letters of credit, and the Autonomy Principle. This principle requires that a credit agreement between issuing banks and buyers is a separate agreement from the underlying contract between buyers and sellers, which means that banks have to honour the credit whatever happens in the underlying transaction.

In practice, before buyers see if the goods are really coming or not, sellers can demand payment under the credit. But then there is a risk of fraud from sellers in the documents or even in the underlying contract. If he forges or makes fraudulent documents to receive the payment, under the Autonomy Principle buyers can do nothing, as his bank has to honour the credit and cannot avoid it under any condition. Because in the UCP 600, Article 4 states: 'A credit by its nature is a separate transaction from the sale or other contract on which it may be based...'[21] This approach is further reinforced more in Article 5: 'Banks deal with documents and not with goods, services or performance to which the documents may relate'.[22] Hence, documentary credits are independent obligations and unconditional except for the tendering of compliant documents.[23]

1.3. Reasons for Fraud

It is a fact that there has never been a perfectly and entirely secure payment system in history, yet documentary credits seem reliable, which Demir-Araz disagrees with on the account of fraud.[24] Parties should be able to trust that if they perform their own responsibility, they will receive what is contracted, which is secured by the autonomy principle. It makes sure that sellers can receive the payment immediately after the shipment, regardless of buyers' allegations of fraud, meanwhile making sure that sellers can receive payment only if they present the complying documents required in the credit.

Courts have always preferred not to interfere with the process of documentary credits, sometimes even in cases of fraud, owing to the importance of this principle in letters of credit,[25] since they think that banks should honour the credit under every circumstance for the convenience of international commerce. However, the number of cases about the interpretation and implementation of letters of credit has risen recently.[26] So, as well as causing discrepancies in

[20] The UCP 600, art. 14.
[21] The UCP 600, art 4. (citations omitted)
[22] The UCP 600, art 5.
[23] Proctor and Nathanson (n 18) 205
[24] Demir-Araz (n 6) 129
[25] Batt J in Olex Focas Pty Ltd v Skoda Export Co (1996) 134 FLR 331, 354
[26] Midland Bank, Letters of Credit Management and Control (1985). It was reported that

documents, fraud begins to become a serious problem threatening the reliance of the whole system.[27]

Concerning the causes and easiness of this rise in fraud, several reasons have been put forward by Demir-Araz.[28] Of all these reasons, the ease of obtaining payment from the buyers' bank is the most important one, and sellers in general can easily forge the documents[29] because, the UCP releases banks from the liability of checking the authenticity and accuracy of presented documents.[30] Moreover, after the invention of containers, the goods being carried in them become unidentified. So even if sellers ship rubbish, this fact only comes to light at the destination, after sellers have been paid, because of delay due to geographical distance.[31] Furthermore, the fact that there is no international rule regarding the prosecution of fraudsters, a seller acting in bad faith can easily get away with it.[32]

The system appears quite open to abuse from fraudsters. At the same time it seems t favour sellers,[33] because under the current rules of the UCP 600, banks have no duty other than verifying the documents across the credit, so their duties correspondingly lay only in the physical verification of the documents.[34] Thus, in response to the need for a solution to balance the interests of the parties to documentary credits, courts have invented a tool called the Fraud Rule, which is widely accepted in the common law world.[35] The proper implementation of the Fraud Rule may reduce the unfairness created by the Autonomy Principle. Besides its necessity, having the Rule in place brings benefits with it as it can fill a gap in the law and enhance the utility of documentary credits, benefiting all parties.[36] However, a problem often arising is that courts apply the Fraud Exception Rule in only extraordinary circumstances such as fraud which is possibly also the only situation in which it is used.

---

the percentage of presenting the non-complied documents has been increasing from 45% to 60%

[27] Demir-Araz (n 6) 128

[28] Demir-Araz (n 6) 132

[29] ibid

[30] The UCP 600, art 34.

[31] Demir-Araz (n 6) 133. Zhang also supports this view, Zhang (n 10) 25

[32] Demir-Araz (n 6)133. Also, S Lin Kuo-Ellen, 'A Banker's Guide to the Prevention of Fraud and Money Laundering in Documentary Credit Transaction' (2002) 5(3) Journal of Money Laundering Control 189, 200

[33] Demir-Araz (n 6) 133. She argues that the lack of efficient prosecution causes the system to be unprotected against fraudsters.

[34] Ricky J Lee, 'Strict Compliance and the Fraud Exception: Balancing the Interests of Mercantile Traders in the Modern Law of Documentary Credits' (2008) 5 Macquarie Journal of Business Law 137, 153

[35] There are illegality and nullity exceptions as well, but their existence is being discussed. For example, see Lu Lu, 'Fraud Rule in Documentary Credits' (2009) 2 Plymouth Law Review 157, 164.

[36] Buckley and Gao (n 9) 665 and 711

2. Chapter Two: Development and Implementation of The Fraud Exception Rule

2.1 Fraud Rule in General

Upon the need for an exception to the Autonomy Principle in the UCP 600, common law courts have developed one, called the Fraud Exception. According to the exception, if there is a fraud allegation from buyers, banks should consider and assess it. If buyers can present sufficient evidence of material or established fraud, banks may withhold the payment to sellers. If buyers cannot, banks have discretionary power whether to pay. At this stage, the buyer should be able to obtain an injunction from a court in order to restrain the seller from drawing money from his account. However, if banks pay against documents and later in the court there turns out to be fraud in the documents or transaction, then that bank should be able to prove that there was not enough evidence to indicate fraud.[37] As a result, banks may risk losing their customer, the buyer. Or, if banks choose not to pay and in the trial, buyers cannot obtain an injunction, then their international reputation will be damaged heavily.[38] In this case, banks should investigate fraud allegations in detail, which Leacock argues, puts an unnecessary burden on banks[39] whereby international commerce can be damaged, so it should depend on a certain provision rather than on the banks' discretion.

When considering the inception and development of the Fraud Exception Rule in common law countries, only four countries will be discussed because the discussion about the standard of fraud and the extent of the Fraud Rule is significant for the purpose of presenting inconsistencies. However, in some cases, courts have argued these two main issues in these countries (the USA, the UK, Australia and Canada) where different approaches were taken into account according to circumstances. As the Rule was used in America first, American cases represent a fundamental source for the debate, so they are discussed most in detail.

[37] However, Smith claims that such cases are claimed to be impossible for buyers to establish, as the buyer has to prove that although the bank has paid the credit, it did not show the required care and skill. See Guy WL Smith, 'Irrevocable Letters of Credit and Third Party Fraud: The American Accord' (1983) 24 Virginia Journal of International Law 55, 79-80. This was also suggested in the case of Bass & Selve Bank v Bank of Australasia 90 L.T.R. (ns) 618 (KB 1904).

[38] Buckley and Gao (n 9) 683

[39] Stephen J Leacock, 'Fraud in the International Transaction: Enjoining Payment of Letters of Credit in International Transactions' (1984) 17 Vanderbilt Journal of Transnational Law 885, 922

2.2. The Fraud Rule in the USA

2.2.1. Before the UCC

In America, the Fraud Exception Rule has been recognised much earlier than other countries, as the Rule was first originated in America. America even has legislation regarding the fraud issue under documentary credits, which is the Uniform Commercial Code (the UCC). Before this legislation, courts mainly would have to discuss the existence and application of the Rule in cases until the UCC. Hence in terms of establishing the fundamentals of the debate about the Fraud Exception Rule, American courts have a vital role to play in this debate.

Historically, the development of the Fraud Rule started with the case of Pillans v Van Mierop.[40] The concept was first mentioned in this case, and Lord Mansfield did not explain the Fraud Exception in detail but only stated that the banks are obliged to honour the credit unless there is fraud.[41] After this, another similar case, Higgins v Steinhardter,[42] came in front of courts where the court granted an injunction in favour of the buyer. The seller failed to ship the contracted goods and so defaulted in his obligation, then forged the documents to make it seem that he had actually shipped the goods, to obtain payment. Bailhache J decided that the payment to the seller was unauthorised as the buyer only gave his permission to the bank to debit from his account until a certain date.[43] At the end, because the buyer sued the seller not on the grounds of fraud in documents but on defaulting in the contract, here again the court did not argue fraud in depth.[44] Thus, courts did not explore fraud in detail and for a while the judgements were based on legal issues other than fraud in the contract.[45]

As courts discussed it further, the significance of the inconsistencies between the judgements began to appear. For example, in Maurice O'Meara Co v National Park Bank of New York,[46] the paying bank refused to pay since it suspected the quality of the goods of being lower than what was ordered. After the seller sued the bank for damages, the Court of Appeal rejected the

[40] (1765) 97 ER 1035

[41] ibid 1036. The disturbance of fraud was recognised in another case, Old Colony Trust Co v Lawyers Title & Trust Co 297 F 152 (2d Cir. 1924). Here the court repeated that fraud might be an obstacle to the payment under documentary credits and banks 'cannot be called upon to recognise such a document as complying with the terms of a letter of credit', 158

[42] 106 Misc. 168, 175 NY Sup 279 (Sup. Ct. 1919)

[43] ibid 280

[44] The similar situation happened in Metallurgique d'Aubrives & Villerupt v British Bank For Foreign Trade, 11 Lloyd's List L Rep 168 (KB 1922), The paying bank rejected the presentation since the goods was not that of contracted. The seller sued bank on the ground of breach under the credit. Bailhache J clearly states that courts interfere with the process only in case of fraud that was not present there, at 170

[45] Buckley and Gao (n 9) 672

[46] 146 NE 636 (NY 1925)

claims the bank made since the bank's act meant 'to read into the letter of credit something which is not there'. [47] Whereas, Justice Cardozo expressed his disagreement with the final judgment stating that '[w]e lose the sight of the true nature of the transaction when we view the bank as acting upon the credit of its customer to exclusion of all else'.[48] Gao and Buckley think that in his understanding fraud meant the misrepresentation of the seller under the Fraud Rule; further they argue that modern commentators see this standard as a breach of warranty or innocent misrepresentation.[49]

The pioneer case in the field of fraud in letters of credit (or as Buckley and Gao[50] call it, the catalyst case) was Sztejn v J. Henry Schroder Banking Corporation[51] where the exception was first accepted and admitted. In this case, the seller did not send the contracted goods on purpose then tried to obtain payment from the paying bank. Justice Shientag decided that it was not a mere breach of the contract but fraud in the underlying contract. Justice Shientag also distinguished between fraud in the documents and fraud in the underlying contract, where the seller ships rubbish rather than the goods ordered. Accordingly, Justice Shientag announced that 'the letter of credit should not be extended to protect unscrupulous sellers' which is the essence of the Fraud Exception Rule today.[52]

The standard of fraud that was perceived as adequate in order to invoke the Fraud Exception Rule is said to be intentional fraud, while some argue that it was set in Sztejn case as egregious fraud.[53] For instance, in the interpretation of this case, Xiang and Buckley[54] claim that the case of Asbury Park & Ocean Grove Bank v. National City Bank of New York[55] may help us understand the standard of fraud settled in the Sztejn Case, because they conclude from the decision of the latter case that judges would apply the Rule under only strict conditions such as, where no goods were sent by seller.[56]

---

[47] ibid 640
[48] ibid 641
[49] Xiang and Buckley (n 12) 296
[50] Buckley and Gao (n 9) 676
[51] 177 Misc. 719, 31 NYS (2d) 631 (1941)
[52] ibid 634
[53] Henry Harfield, 'Enjoining Letter of Credit Transactions' (1978) 95 Banking Law Journal 596, 603
[54] Xiang and Buckley (n 12) 298
[55] 35 NYS 2d 985 (NY Sup. Ct. 1942). In this case, the corresponded bank asked the bank for the dishonor of the credit on the ground of fraud by the seller or the buyer or both. However, its demand was not accepted, as the bank did not find enough evidence to this allegation. The corresponded bank sued the paying bank for damages. The judge rejected the demand of the plaintiff, stating the autonomy principle.
[56] Xiang and Buckley (n 12) 298

What makes the Sztejn case significant and different from the other cases up to then is that the case clarified the major conditions of the Rule.[57] Hence, courts will intervene and interrupt the process of letters of credit when fraud is successfully established by the plaintiff and known to the paying bank before payment. Thus, the Rule applies where there is a clear evidence of fraud clearly known or notified to the paying bank. Additionally, there is another condition when considering injunctions, which is the timely awareness of the bank,[58] because in this case, the judge drew a line where the exception does and does not apply, although fraud is established in both situations. After payment, if fraud were found in documents, as long as the paying bank acted in good faith and took reasonable care, it would not be liable for fraud. That means the court recognised the immunisation to the Rule here.[59]

2.2.2. The UCC

The principles determined in the Sztejn case were codified into Article 5, Section 109 of the UCC in 1952 in America.[60] This legislation has been a very important step towards harmonisation in international commercial law since the UCC makes the Rule stronger by embodying it in spite of the area it is valid in. According to the first version of Article 5, the only way buyers could stop the payment to sellers was to obtain an injunction.[61] Additionally, it was not clear what standard of fraud was necessary to trigger the Fraud Rule and whether the Rule should extend to fraud in the underlying contract,[62] so several standards were proposed.

a. Constructive Fraud: This was first suggested in the case of Dynamics Corp of America v Citizens & Southern National Bank[63] where the United States District Court for the Northern District of Georgia offered the view that any serious misconduct of seller breaking an equitable duty invokes the Fraud Rule. In the case, the Indian Government contracted with Dynamics on the supply of some military equipment. Yet, owing to the war starting between India and Pakistan, Dynamics became unable to send the goods. Upon that, the Government demanded payment under the standby letter of credit. The

[57] Additionally, it was significant due to the fact that the court took into account the bank's security interest on the goods. The court argued that even though banks only deal with the documents, 'they are vitally interested in assuring itself that there are some goods represented by the documents' ibid, at 635

[58] Anthony Connerty, 'Fraud and Documentary Credits: The Approach of the English Courts' 2 <http://www.arc-chambers.co.uk/FRAUD%20AND%20DOCUMENTARY%20CREDITS.pdf> accessed on 21 June 2011

[59] Zhang (n 10) 73-74

[60] Mautner (n 1) 594

[61] Lee (n 34) 164

[62] ibid

[63] 356 F Supp 991 (ND Ga 1973)

court dismissed the claims of the plaintiff after setting the standard of fraud as breaking an equitable warranty since such a force majeure could release the seller from his obligation. According to the judgement, all requirements necessary for obtaining an injunction in monetary damages was not to be satisfied in equitable relief cases like that one.[64] However, this standard was criticised as being low[65] as it could cause the Rule to be applied excessively.

In contrast to the judgement on this case, the court in Grob v Manufacturers Trust Co[66] decided the letter of credit pays sellers on the shipment, so buyers bear the risk that the goods would never arrive in some situations, giving the example of the Pacific War. The war was taken as grounds for an injunction in the previous case while in this case, the court announced that buyers should bear the risk after the shipment and never called the war as impossible situation.[67]

b. Intentional Fraud: The New York Supreme Court offered this standard in NMC Enterprises Inc v Columbia Broadcasting System Inc[68] where there was fraud of the seller in the underlying transaction. In this case, the seller did not knowingly ship the contracted goods, as the quality of the goods was lower than determined. The Supreme Court granted an injunction, as there was intentional fraud of the seller; however, it noted that the low quality alone could not be grounds for obtaining an injunction.[69]

So, if a plaintiff can prove the fraudster's intention, then courts apply the Fraud Rule and banks do not honour their obligation. As an example, MacMahon J in American Bell International v Islamic Republic of Iran[70] decided that knowingly tendering fake documents to induce the buyer to pay was enough to indicate the fraudulent intention and could invoke the Rule.[71] Even though proving the evil intention of the seller for fraud seems unlikely in nature, this standard may apply if buyers succeed in proving sellers' misrepresentation was made knowingly and there was intention to induce another party.[72]

c. Flexible Standard: This means that the Rule can apply where there is misconduct of sellers deemed more serious than a mere breach of contract. However, in this type, defining the limits of this standard was considered difficult by the court in United Bank Ltd v Cambridge Sporting Goods Corp.[73] This standard

[64] ibid 998-999
[65] Grace L Kayembe,'The Fraud Exception in Bank Guarantee' (LLM Thesis The University of Cape Town 2008) 33. And Xiang and Buckley (n 12) 309
[66] 177 Misc. 45, 29 NYS 2d 916 (Sup Ct 1941)
[67] "Fraud in the Transaction': Enjoining Letters of Credit during the Iranian Revolution' (1980) 93(5) Harvard Law Review 992, 1010
[68] 14 UCC Rep 1427 (NY Sup Ct 1974)
[69] Xiang and Buckley (n 12) 302
[70] 474 F Supp 420 (SDNY 1979)
[71] ibid 425
[72] Xiang and Buckley (n 12) 303
[73] 392 NYS 2d 265 (NY 1976), 271

may misapply to the breach of contract as interpretation of misconduct can depend on the court's discretion.

d. Egregious Fraud: Another standard was set in the case of Intraworld Industries, Inc. v Girard Trust Bank[74] as being egregious fraud, which means that seller's misconduct violates the credit so seriously that the bank's independent obligation cannot be efficiently performed any more. In another case, New York Life Insurance Co. v. Hartford National Bank & Trust Co[75] the term itself was mentioned by name. This type of fraud sets the standard so high that courts may exclude some misconduct of sellers, as the misconduct may not be fit for this definition of fraud. On the other hand, this standard helps prevent buyers from unnecessarily triggering the Rule with the claim of sellers' mere breach of contract.

2.1.3. After Revision

The first UCC Article 5 settled the on-going dispute, by codifying the exception into a rule, but it was not perfect. It contained some ambiguous points as it left some issues unanswered and unregulated.[76] Thus, the US authorities called for a group of experts in order to reduce the issues attached to the first version, in 1995 August. This group, namely the Task Force, made some recommendations after revising the UCC and studying the previously decided cases.[77] Although these cases were settled on the basis of different standards, the Task Force came to the conclusion that the standard should be equal to serious misconduct, so-called material fraud.[78]

After the revision, the Fraud Rule could apply in two different situations where either the buyers might enjoin paying banks from honouring the credit or issuing banks might choose to dishonour it themselves. In either way, fraud refers to both fraud in the underlying transaction and in the documents and it should be established. Here although fraud should be material, there is no given definition of what material means.[79] Here, the Official Comment on Section 109[80] gives some explanations to help the term be understood as such that fraudulent action should be material to the other party. In the explanation, it is quoted from the case of Ground Air Transfer v Westates Airlines that, 'beneficiary's conduct has so vitiated the entire transaction that the legitimate purposes

[74] 336 A 2d 316 (1975)
[75] 378 A 2d 562 (Conn.1977). The judge stated that even when egregious fraud was established, the rule might not apply, 567.
[76] For instance, it was unclear if fraud in the transaction refered to fraud in the underling contract or to fraud in documents. Leacock raised this issue. See Leacock (n 39) 919-920
[77] Xiang and Buckley (n 12) 315
[78] Report of the Task Force on the Study of U.C.C. Article 5, An Examination of UCC Article 5 (Letters of Credit) (1990) 45 Business Lawyer 1521, 1614
[79] Xiang and Buckley (n 12) 317
[80] Official Comment to Article 5 of the Uniform Commercial Code, para 2

of the independence of the issuer's obligation would no longer be served.'[81] Though this standard seems to fit for egregious fraud as pointed out above, this was named as material fraud in the Official Comment. This decision on the standard of fraud has been also quoted in later cases like the New Orleans[82] case and Mid-America Tire[83] case within the meaning of egregious fraud.

2.3. The Fraud Rule in the UK

2.3.1. The Traditional Approach

England followed a narrow approach for applying the Fraud Rule and was very strict on the high conditions of the Rule. According to the conditions, buyers have a very heavy burden of proof, by which buyers are required to establish a clear or obvious fraud known or notified to paying banks under documentary credits. It should not be a mere allegation of fraud for banks to consider it. Additionally, granting an injunction should not harm all parties more than its absence could have done, so the balance of convenience should be in favour of granting an injunction. In relation to the banks' liability, the ICC Banking Commission identified that a bank is liable if it is involved in fraud, or if it fails to exercise reasonable care, or if it has knowledge of fraud before paying the credit and fraud is obvious to the bank.[84]

The first case that fraud exception was mentioned in the UK was Discount Records Ltd v Barclays Bank Ltd and Barclays Bank International Ltd.[85] In this case, the buyer sought an injunction since the seller only shipped a small quantity of the required goods. The injunction was demanded against the paying bank so that it would not honour the credit. However, the bank had already paid the discounting value of the credit though that was not due at that time. It was suggested that the buyer should prove the balance of convenience being in favour of granting injunction. Although the buyer had an inspection certificate evidencing the incompliance, the court surprisingly decided that the buyer could not prove the established fraud by the seller. Megarry J said that because the injunction would only restrain the bank from honouring its obligation, the balance of convenience was not in favour, so the demand was

[81] 899 F 2d 1269, 1272-73 (1st Cir. 1990)
[82] New Orleans Brass v Whitney National Bank and The Louisiana Stadium and Exposition District, 2002 LA. App. LEXIS 1764 (La. Ct. App. 4th Cir. May 15, 2002)
[83] Mid-America Tire v PTZ Trading Ltd Import and Export Agents) 43 UCC Rep Serv. 2d. 964, (Ohio App. Nov. 20, 2002
[84] 'Opinions of the ICC Banking Commission 1980-1981' ICC Publication No. 399, 27
[85] [1975] 1 All ER 1071

rejected.[86] The decision was criticised by Buckley and Gao,[87] as they argue that an inspection certificate should have been enough to evidence incompliance but with the court's approach, it would become impossible for buyers to obtain an injunction.

In another case, United Trading Corp SA v Allied Arab Bank[88] the Court of Appeal announced necessary evidence as being in the form of a contemporary document. Such a document should be present to prove fraud and the bank must know this established fraud at the same time for the claiming party to obtain an injunction. Along the same lines, in RD Harbottle (Mercantile) Ltd v National Westminster Bank Ltd[89] Kerr J repeated the autonomy of the credit and the traditional English approach. The buyer sued the seller, as the latter demanded all payment under guarantee fraudulently. The claims were rejected, which was a classic example that English courts would not normally grant an injunction.

Among all cases, the case of United City Merchants (Investments) Ltd v Royal Bank of Canada[90] has been accepted as a leading case of the fraud issue in England. It is also called as The American Accord Case since this case has some similar features to the Sztejn case. Lord Diplock commented that the Sztejn Case was a cornerstone since it constituted a foundation for the implementation of the Fraud Rule in letters of credit under English law. In this case, the seller used an independent agent to tender the documents under the letter of credit. However, the bank refused payment in the first presentation due to among other discrepancies, a blank left for the date of shipment in the Bill of Lading. In the second tender, the bank realised that the bill of lading was antedated so it refused to pay on the grounds of fraud. Following that, the seller sued the bank for defaulting on its obligations. Mocotta J found the bank right to refuse payment as any inaccuracy justified its refusal to the seller. Then on appeal, Lord Diplock in this case concluded that '[f]raud unravels all. The courts will not allow their process to be used by a dishonest person to carry out a fraud.'[91] The case though was dismissed in the Court of Appeal; the House of Lords approved Lord Diplock's decision, as a seller cannot have any liability in the third party fraud. If any connection cannot be made to the seller, that is, if the fraud is third party's fraud and the seller is not aware of fraud, then the seller

[86] ibid 1074. Another case requiring the buyer to prove the balance of convenience being in favour was Czarnikow-Rionda Sugar Trading Inc v Standard Bank London Ltd [1999] 1 All ER (Comm) 890 where the buyer sought an injunction against the bank to prevent it form paying the advising banks.
[87] Buckley and Gao (n 9) 691
[88] [1985] 2 Lloyd's Rep 554
[89] [1978] 1 QB 146
[90] [1982] 2 All ER 720
[91] ibid 184

is certainly entitled to payment, because the seller is innocent.

Still, this decision was criticised by Guest since the bank would have rejected the documents with a true date on the ground of incompliance whereas antedating made it acceptable in this case.[92] But here, the reasoning of judge about the third party fraud was quite logical besides it is in the same line with the traditional approach.[93] Another issue Lord Diplock solved in this case as in the Sztejn case was the security interest of a bank as a security holder over the goods that the documents represent. Security holders should be able to defend their own interests if there is any fraud allegation or fraud. After this case, courts have started to quote Lord Diplock's judgement. Though there are still only a small number of cases where the injunction was granted, in many, courts did discuss the Rule and its scope.

After this case, it was approved that the balance of convenience should be in favour of granting an injunction in Tukan Timber Ltd v Barclays Bank Plc.[94] The buyer tried to prevent the bank permanently from paying out to the seller who was fraudulent, though the bank had already rejected the payment twice on the grounds of fraud. Consequently, Hirst J discharged the case emphasizing that there was no danger that the seller would be fraudulent again and even if so, the bank would pay at the next presentation.[95] Hence, the balance of convenience was in favour of rejecting the injunction, which was seen as necessary for the implementation of the Rule.

2.3.3. The Move Away From the Traditional Approach

According to English law's new approach, the evidence required to invoke the Rule seems to be lowered to the seriously arguable case of fraud at the pre-trial stage, to grant an injunction.[96] Phillips J confirmed this idea in Deutsche Ruckversicherung AG v Walbrook Insurance Company Ltd [97] clarifying that the buyer is obliged to persuade courts of the existence of a seriously arguable case of fraud to obtain an injunction at a pre-trial stage.[98] These kinds of cases, though very limited in number, are the products of the so-called 'new approach' in English law, a move away from the traditional approach. In these cases, English law relaxed its strict requirements so its outcomes are becoming more consistent with the rest of the common law world. So, these cases show that English law is changing its traditional approach to a modern one.

---

[92] Guest AG (Ed), Benjamin's Sale of Goods, London: Sweet&Maxwell, 6th ed, para. 23,140
[93] Zhang (n 10) 86-87
[94] [1987] 1 Lloyd's Rep 171
[95] ibid 171
[96] Lu (n 35) 163
[97] [1996] 1 All ER 791, 1030
[98] Charles Chatterjee and Anna Lefcovitch, 'The Principle of Autonomy of Letters of Credit is Sacrosanct in Nature' (2003) 5(1) Journal of International Banking Regulation 72,76

The first case to be affected by this direction, Themehelp Ltd v West,[99] was concerned with a third party performance guarantee, where the same principles apply as letters of credit, so it presented a valuable example. In this case, the parties agreed on instalment payment and a performance guarantee was agreed to secure the last instalment. The seller made a serious misrepresentation about his business at the time, so the buyer managed to prove the established fraud, and the demand was not made under the guarantee. So the balance of convenience was in favour of granting an injunction, as it would not harm the guarantee. Thus, Waite LJ found an arguable case of fraud that to him was adequate to grant an injunction.[100] But this case is also remarkable in terms of discussion made about the difference between demanding an injunction against the seller and against the bank. Because, when fraud is established, if the plaintiff demands the injunction against the fraudulent seller, the test of balance of convenience will be different and most likely to be in favour of granting injunction.[101]

The second case concluded according to the new approach was Kvaerner John Brown Ltd v Midland Bank Plc[102]. The seller fraudulently informed the paying bank that he had given the required notice to the buyer when he had not, therefore an injunction was granted to prevent the bank from paying the credit.

2.3.4. Back to The Traditional Approach

The move away from the traditional approach did not last long and ended with the case of Czarnikow-Rionda Sugar Trading Inc v Standard Bank London Ltd.[103] In this case, the buyer sought an injunction to restrain the bank from reimbursing two Swiss advising banks that had already paid upon the presentation. Rix J did not grant an injunction reasoning that the balance of convenience was not in favour of granting an injunction and the banks did not have any knowledge of fraud before payment.

The approach continued further with another significant case, Banco Santander SA v Bayfern Ltd[104] where the issuing bank instructed another bank, Santander, to be the advising and confirming bank for a deferred letter of credit.[105] When the defendant seller, Bayfern, demanded a discounting sum of the credit before its maturity date, the confirming bank paid him without the authorisation of the issuing bank. When the confirming bank tried to be

[99] [1996] QB 84
[100] ibid 100-101
[101] Zhang (n 10) 89
[102] [1998] CLC 446
[103] [1999] 1 All ER (Comm) 890
[104] [2000] 1 All ER (Comm) 776, CA
[105] Deferred payment letters of credit are kinds of credits paid at maturity date after certain days of shipment. When it is available, banks have to honour the credits, the UCP 600 art 2

reimbursed, the issuing bank claimed the fraud of the seller against the confirming bank and refused the reimbursement. The Court of Appeal ruled that the issuing bank might refuse to reimburse the confirming bank as the confirming bank had failed to follow the instructions of the issuing bank. Waller LJ found trial judge, Langley J, right and approved that the assignment between the confirming bank and the seller had no effect on the rights of the bank.[106] The confirming bank acted at its own liability by paying the sum before the maturity so it would be entitled to reimbursement at the maturity date, after the seller's fraud became known to the bank. But at that time, if fraud had been established, there would have been no obligation for the confirming bank to pay, or the issuing bank to reimburse. Langley J had already rejected the second argument of the bank defending that there was a routine banking practice to discount the credit before its maturity date upon a request of the seller, by stating that there was insufficient practice to indicate so.[107]

The difference of the Banco Santander case from European Asian Bank AC v Punjab and Sind Bank [108] where a negotiating credit was discounted by the confirming bank which had the authorization of the issuing bank, is that the issuing bank did not give its permission to the confirming bank.[109] So this case was crucial in the field of deferred letters of credit as it ruled that without the authority or approval of the issuing bank, it was no longer safe for advising/confirming banks to pay a discounted sum of the credit before the maturity date of the credit.[110] So it became certain that discounting the credit could be seen as a risk that a paying bank might bear in the case of fraud of seller therefore banks should be careful.

Another case conceived as important is Standard Chartered Bank v Pakistan National Shipping Corp (No 2)[111]. When the seller tendered the documents, the advising bank, Standard did not notice fraud in the documents and paid to the seller. Although it did realise that the date on bill of lading was falsely dated by the carrier, Pakistan National Shipping, the confirming bank, sent the discrepant documents with a letter indicating that the documents were presented in time, to the issuing bank. However, the issuing bank rejected reimbursement owing to the discrepancies in the documents and the expired

[106] Banco Santander (n 105) 780
[107] ibid 32a
[108] [1983] 1 Lloyd's Rep 611
[109] Daniel Aharoni and Adam Johnson, 'Fraud and Discounted Deferred Payment Documentary Credits: The Banco Santander Case' (2000) 15(1) Journal of International Banking Law 22, 24. They argue that the judgment of Langley J was sound, as it does not conflict with the previously established case law in the field of deferred payments.
[110] Connerty (n 59) 13. Allen and Overy expressed this view as well. Allen and Overy, 'Banking and Insolvency Law' (1999) 14(7) Journal of International Banking and Finance Law 317, 318
[111] [2000] 1 All ER (Comm) 1, CA

letter of credit. But still, the fact that the confirming bank had tried to deceive the issuing bank but failed, did not relate to its claim against the carrier and the seller.[112] However, on appeal, Ward LJ decided that the seller could not benefit from its own action and could not claim contributory negligence against the confirming bank.[113] Ward LJ also added that the confirming bank was not innocent, but still entitled to recover its damages.[114] So in this case, a remedy for the confirming bank that was not innocent, was developed in tort, and the bank came to claim damages from the fraudster. Here the seller's fraud was grounds for the entitlement of the confirming bank to claim damages in tort rather than obtaining an injunction.[115]

Similarly, there is another case, Society of Lloyd's v Canadian Imperial Bank of Commerce[116] where the court discussed about fraud but did not grant an injunction. In this case, upon the request coming from the buyer, the banks did not honour the credit so got sued by the seller, Lloyd's. However, the banks did not allege fraud against the seller but they defended themselves that as they had been informed about fraud of the seller, they acted as reasonable banks and rejected the documents. Lloyd's claimed that if they had not had any defence, then they should have honoured the credit, which was approved by the court. In the comment, Saville J explained his own opinion that when a bank receives evidence of fraud, the bank should assess it and decide if it can constitute to fraud by seller. If the bank thinks it cannot, then the bank would pay and if a court also decides so, the buyer has to reimburse the bank. From this comment, it is clear that the court actually emphasised that what really mattered was a court's approval of the bank's decision.[117] So concluding from this case, the assessment of the evidence by the bank for fraud seemed to be an inefficient requirement. On the other hand, it was aimed at protecting the system from the buyer's abuse by alleging fraud of seller to stop the payment.

2.4. The Fraud Rule in Australia

In Australia, as in England, the requirements were said to be very strict to apply the Fraud Rule. In order to obtain an injunction to enjoin banks from paying out to sellers, buyers must prove the established fraud. It was suggested by Australian courts that intentional fraud should be established and known to the paying bank before payment. Because Australian courts entered into the

[112] Connerty (n 59) 14
[113] Standard Chartered (n 112) 1575
[114] ibid 1602-1603
[115] Buckley and Gao (n 9) 671
[116] [1993] 2 Lloyd's Rep 579 (QBD)
[117] Caroline Baggs, 'Case Comment: Letters of Credit-Knowledge of Fraud' (1993) 8(11) Journal of International Banking Law N216, N216-N217. However, Baggs alleges that because the comment was not related to the case, they are not binding.

exiting debate later, the field of letter of credit was already full of fairly divergent rules and standards. Consequently Australia has taken its position without any struggle to define the Fraud Exception or to discuss whether it should exist against the autonomy of the credit. Rather, they admitted or accepted the Rule and accordingly an approach, which they say is the English approach.

The first case that approved the existence of the Fraud Rule and followed the principles of the Sztejn case was Contronic Distributors Pty Ltd v Bank of New South Wales[118] where the court searched for the fraudulent intention of the seller. Though it was said in the case that they were following the settled area of letter of credit law in England,[119] by applying the standard of intentional fraud, Helsham J in the Supreme Court granted an injunction even without demanding an obvious or established fraud.[120] More similar to the American approach, they did not even distinguish the cases where the seller sues the paying bank and where buyer sues the paying bank,[121] so the inconsistency was very apparent in this case.

Another standard for fraud; gross equitable fraud; was proposed in Hortico Pty Ltd v Energy Equipment Co Pty Ltd[122] where Young J stated that the misconduct of the seller could be so gross that the court chose to apply the Rule.[123] The same judge repeated this standard again in Inflatable Toy Co Pty Ltd v State Bank of New South Wales.[124] Though, Batt J in the Supreme Court of Victoria rejected this view in Olex Focas Pty Ltd v Skoda Export Co[125]. As a result, Australian courts have so far successfully applied the Fraud Rule in intentional fraud cases.

2.5. The Fraud Rule in Canada

Like Australia, Canada entered the debate later on, and has only taken a side, and followed the existing established rules in the field of letters of credit. Canada generally follows the English approach with the effect of the American position. Canadian cases have focused more on the standard of evidence instead of standard of fraud that is strong prima facie case of fraud.[126] So according to this standard, if there is a seriously arguable case of fraud at the pre-trail stage, then courts will provide an injunction as long as the other requirements are met by buyers. Saying that, here the standard is lowered from the obvious, clear and established fraud that is also known to the paying bank, to a seriously

[118] (1984) 3 NSWLR 110
[119] ibid 114-116
[120] Buckley and Gao (n 9) 699
[121] ibid
[122] (1985) 1 NSWLR 545
[123] ibid 554
[124] (1994) 34 NSWLR 243, 251
[125] (1996) 134 FLR 331, 348
[126] Xiang and Buckley (n 12) 325

arguable case of fraud. So this is not intentional fraud totally from the English approach but there is also here some influence from the American approach.

The leading case was Bank of Nova Scotia v Angelica-Whitewear Ltd[127] where the court agreed to follow the principles of the Sztejn Case and discussed several issues. Of other issues, firstly it was suggested that the Fraud Rule could extend to apply to the fraud in underlying contract since sellers would be able to take advantage of the results of the fraud otherwise. Secondly sellers would still be entitled to payment in the case of the third party fraud because sellers would be innocent here. Regarding this leading case, the fact that Le Dain J in this case required the strong prima facia case of fraud in this case also indicates that the Canadian courts applied the Rule in broader manner.[128]

The case where the strict English tradition was followed was Aspen Planners Ltd v Commerce Masonry & Forming Ltd.[129] In this case, the buyer and the seller contracted to make payments on a construction project through a standby letter of credit but the construction collapsed. So here although the buyer sued the seller for damages not on the grounds of fraud and also sued the bank to stop the payment, Henry J determined by quoting from an English case, the Edward Owen Case[130] that there should be an obvious or established fraud to obtain an injunction.[131] Thus the court dismissed the case. However this case does not reflect the overall situation in Canada, as Canadian courts have not been as strict as English courts in applying the Rule, accepting the standard to apply the Rule as seriously arguable case of fraud.[132] This view was supported in the case of CDN Research & Developments Ltd v Bank of Nova Scotia[133] where Galligan J granted an injunction on the basis of the existence of seriously arguable case of fraud.[134]

From these cases, it can be confirmed that the Canadian approach is similar to the English one as both make a distinction between the cases where sellers sue paying banks for damages and where buyers sue paying banks for stopping payment. However, the American approach does not distinguish between these cases and treats both in a similar way.[135]

---

[127] [1987] 1 SCR 59

[128] ibid 177. Also Cal Johnson, 'Case Comment Letter of Credit: Fraud Exception/Rule of Documentary Compliance' (1987) 2(2) Journal of International Banking Law N52, N53

[129] (1979) 100 DLR 3d 546

[130] Edward Owen Engineering Ltd v Barclays Bank International Ltd [1978] 1 All ER 976, CA. In this case the court strictly followed the English traditional approach and rejected to grant an injunction, as the buyer could not establish the fraud due to the insufficient evidence.

[131] Aspen Planners (n 130) 65

[132] Buckley and Gao (n 9) 694-695

[133] 18 CPC 62 (1980)

[134] CDN Research (n 134) 65

[135] John F. Dolan, 'Documentary Credit Fundamentals Comparative Aspects' 3 Banking and Financial Law Review 121, 130

3. Chapter 3: Causes of the Inconsistency and Solutions for Preventing Fraud

3.1. Causes of the inconsistency

3.1.1. No rule in the UCP 600

The problem of the inconstancies between the judgements of courts in common law countries first arises from the fact that there has been no formal rule regulating the fraud issue so far. Leaving a gap in the UCP 600 for any exception is said to be deliberate,[136] but there is doubt remaining as to whether it is the most efficient way to deal with the problem. Hence, the most important issue in the field of letters of credit law remains as a serious unsolved problem that differs across the borders, causing different outcomes in cases regarding fraud issue in practice. This is because different requirements which national courts consider as necessary can vary, contrary to the internationality of documentary credits.[137]

The requirements for granting an injunction that judges look for are different across borders as they may not be experts and their nations may not have great experience in documentary credits.[138] The result may be improper decisions that do not fit with the international community of letters of credit. Furthermore, in civil law countries, the situation is even worse since there is no rule in the UCP 600 regulating fraud. As they do not have any exception in their statutes like the fraud exception to the autonomy of the credit, when a fraud dispute arises between parties, the courts have to apply their own national law to solve the case. This may be fraud under civil law or criminal law, or both.[139] However, there will be no consistent outcome.

The ICC has been inactive in this respect and has always stayed back from actively regulating this area as the experts of the ICC think that this issue relates the national courts or statutes.[140] Consequently, the silence of the UCP on the matter of fraud can be said to be intentional as the UCP leaves the issue to the domestic decision-makers. This attitude may come from the reasoning that fraud is a criminal issue, and criminal law has always been accepted as strictly domestic (unless the crime is against the humanity and of course there are exceptions).[141] Some, while criticised by others, have appreciated this passive attitude of the ICC. For instance, Dolan asserts that the UCP was meant for all nations to join and it increases the marketability so the UCP should not take

[136] Connerty (n 59) 15
[137] Buckley and Gao (n 9) 700-701
[138] ibid 702
[139] Zhang (n 10) 62
[140] Buckley and Gao (n 9) 700
[141] In China, fraud issue has been regulated under criminal law, as China is a civil law country. Zhang (n 10) 52-54

sides with one nation's practice.[142] On the other hand, Buckley claims that its successful worldwide acceptance forces the UCP to be 'fair and equitable to all parties'.[143] Similarly, it is believed that the UCP should provide the predictability and certainty to commercial parties so found to be unsatisfactory in this regard.[144]

Consequently, in order to fill the gap in the letters of credit law, common law courts originated a legal cure called the Fraud Exception Rule. The exception has become accepted world wide and in fact, even the ICC admitted the existence of the fraud exception when asked a question, stating that '[t]here is an exception in many jurisdictions, namely the abuse of rights or fraud… It is up to the courts to fairly protect the interests of all bona fide parties concerned.'[145] However, admitting the existence of the Rule does not solve the problem, as its implementation still constitutes a serious inconsistency.

3.1.2. Different Applications

The common law courts originated the Fraud Exception Rule to overcome the unfair and severe results of the Autonomy Principle for all parties. However, even having a rule is not enough to apply it in a precise manner, since the existing Rule has been interpreted in various ways. The main problem here is that the Rule does not have any certain scope as it all depends on national courts and how they understand and apply the Fraud Exception Rule. The different requirements of different courts cause the problem of inconsistency between judgements so outcomes are not similar, sometimes even in the same country. The inconsistency problem becomes apparent with the words of Ackner in the United Trading Case that:

'It is interesting to observe that in America where concern to avoid irreparable damage to international commerce is hardly likely to be lacking, … [an injunction] appears to be more easily obtainable [in fraud cases]…'[146]

For example, concerning the Rule in general, it is not clear whether the Rule can apply to the third party's fraud, or if paying banks are entitled to reimbursement if they pay upon the presentation to sellers despite their knowledge of fraud but being unable to prove it, or what counts as fraud.

Common law has already answered some of these questions but there still remain problems of interpreting the Rule. For example, in English law, to apply

[142] John F Dolan, 'Commentary on Legislative Developments in Letter of Credit Law: An Interim Report' (1993) 8 Banking and Finance Law Review 53, 63

[143] Ross P Buckley, 'The 1993 Revision of the Uniform Customs and Practice for Documentary Credits' (1995) 28 Geo Wash J Int'l L and Eco. 256, 266-68

[144] Buckley and Gao (n 9) 701

[145] 'Opinions of the ICC Banking Commission 1995-1996' ICC Publications No. 565 at 22 (citations omitted)

[146] United Trading Corp SA v Allied Arab Bank [1985] 2 Lloyd's Rep 554, 561

the Rule there requires intentional fraud while the American courts require material fraud. Accordingly, the standard of proof for intentional fraud is higher than that of material fraud, so Demir-Araz claims that English law seems to treat buyer tougher.[147] However, the main questions are first, what standard of fraud is requested to invoke the Fraud Rule, to persuade a court to apply the Rule in a case of a seller's fraud and second, to what extent the Rule applies to fraud in the underlying contract. The answers to these questions differ across common law countries greatly. Moreover, the situation is worse in civil law countries as they do not have fraud exception in their system, so they may treat the fraud issue as a criminal case.[148] Having produced probably more severe results, the fraudsters may get criminal punishment, which is more serious than a civil law tort. That also creates more inconsistencies between common and civil law countries across the world regarding the fraud issue.

As a result, there emerges a conflict that while buyer and seller trade internationally, it will be local courts that resolve their case in practice whenever a dispute arises between them. But if an exception creates this conflict, then somehow there should be a standard or a common application to draw the line and this conflict should be eliminated between the Fraud Exception Rule and the Autonomy Principle.

3.2.Solutions For Preventing Fraud

3.2.1.General

In common law cases, the Rule has been applied in different ways without a consistent path although every common law country has found a logical way to apply it as they see fit. Thus, in the literature, there have been many solutions offered so far to avoid the conflict between the Rule and the principle under letters of credit. Owing to the significance of documentary credits in international trade, courts repeatedly assert that they do not encounter to the functioning of letters of credit. However, the current system already seems only to favour sellers because '[t]he fraud exception exists under common law almost like a theoretical concept rather than a practical one.'[149] The interests of buyer and seller should be balanced and trust should be built among these parties. Hence, without violating the principle, a solution should be found to overcome this fraud issue.

3.2.2. Reviewing the UCP

In practice, there is already a commonly accepted rule originated by common law courts. So the UCP should admit the Fraud Exception Rule and it should be reviewed accordingly. Thereby it could be assured that at least in a case

[147] Demir-Araz (n 6) 134
[148] As China does, Zhang (n 10) 52-54
[149] Demir-Araz (n 6) 134

related to such an important exception, every individual that incorporates the UCP would be judged predictably and equally. Hence, the UCP should have a provision on fraud.

The most appropriate body to make this provision seems to be the ICC. As authors are already mostly in consensus on this point, it should be regulated by the ICC.[150] National courts may not have as much experience as the ICC has had so far.[151] Because they are experts in their field and selection to the ICC is made so carefully (as it is necessary to have a commercial background or to be a trader), it is sound to expect them to make a provision on fraud in the UCP or even a guideline.[152] It cannot be acceptable for the ICC to remain silent on such an important issue.

For such a provision, the ICC may choose to take into account the UCC and The United Nations Convention on Independent Guarantees and Standby Letters of Credit (the UNCITRAL Convention). This is because there are some issues the UCC regulates while the UCP leaves them up to the national courts like warranties.[153] And the Convention represents a valuable example in terms of being a guideline for further improvement of the Fraud Rule.[154] Consequently, the regulation in the UCP should compromise between the UCC Article 5 Section 109 and the Convention Article 19, 20.[155]

In this regulation, there is to be a standard of fraud to trigger the Fraud Rule. However, if the standard is determined too low, then buyer may abuse the Rule or vice versa, if it is set too high, then a fraudster seller may do so. As a result, the most efficient solution must be to set the standard at material fraud, between egregious and constructive fraud, with proof of obvious and clear misconduct to invoke the Rule.[156] For this purpose, these misconducts may be listed like the UCC does, or better still; this listing could simply provide samples for comparison. Thus, whatever regulation is made by the ICC, the implementation of the Rule should be harmonised.

3.2.3. The UNCITRAL Convention

In 1995, the United Nations Commission on International Trade (the UNCITRAL) produced the UNCITRAL Convention. To determine whether or not the Convention represents a suitable regulation of the fraud issue, it is first necessary to look through the provisions of the Fraud Rule in this Convention. According to Article 19/1/a, b, c of the Convention:

[150] For example, see Xiang and Buckley (n 12) 335.
[151] Buckley and Gao (n 9) 701-702
[152] Clive M. Schmitthoff, Export Trade, (1983) Journal of Business Law 319, 321
[153] Lee (n 34) 146-147
[154] Kayembe (n 66) 40
[155] Xiang and Buckley (n 12) 34
[156] ibid

(1) If it is manifest and clear that:
(a) Any document is not genuine or has been falsified;
(b) No payment is due on the basis asserted in the demand and the supporting documents; or
(c) Judging by the type and purpose of the undertaking, the demand has no conceivable basis,
the guarantor/issuer, acting in good faith, has a right, as against the beneficiary, to withhold payment.

Here Article 19 states that under three circumstances, issuing banks have the right not to pay out to sellers. First, if the documents are made fraudulently, second, if the date of payment is not due yet, and third when considering the type and the purpose of an undertaking, if the demand has no conceivable basis. Moreover, Article 19/2 defines the meaning of 'conceivable basis' in four subparagraphs afterwards. So it is clear from the rule that the Fraud Exception Rule is recognised in this article and further; it clarifies the types of misconducts that can resort to the Rule.

Also, in Article 20, the Convention explains the provisional court measures and its conditions. So, if a plaintiff succeeds in proving the high probability of one of the serious misconducts with immediately available strong evidence, obvious and clear misconduct stated above in Article 19/1/a, b and c, he may be entitled to obtain a provisional order. The Convention requires strong evidence as proof of misconduct while it does not do so for the intention of seller,[157] the contrary to the traditional English approach.

However, there are some issues attached to the Convention. First, the Convention provides a listing of the types of misconduct to invoke the Rule. Although some find this encouraging, it is arguable whether this listing should be exhaustive, or maybe it should provide samples for further comparison.[158] Second, because it is a convention, for parties to documentary credit transaction to incorporate these rules, their nations should already have accepted the Convention for it to take effect. So this way does not seem beneficial to legitimate the Rule. Finally, its scope does not cover fraud issues in all documentary credits as it only regulates standby letters of credit and independent guarantees.[159] Although the UCP treats standby letters of credit in a similar way to commercial letters of credit, there is still some room for differences so it cannot be adapted directly. Yet it is still able to provide a good example for the UCP to include the Fraud Rule as such. Buckley and Gao argue at this point, that if its

[157] ibid 333
[158] Xiang and Buckley (n 12) submit that the listing may not be detailed but encouraging, 303. Also Kayembe (n 66) agrees on this idea stating that it constitutes a guidance with all drawbacks, 40.
[159] Buckley and Gao (n 9) 710

scope were broader than now, its effect would be stronger, but still they see it as a first step towards better solutions at international level rather than leaving it to national courts.[160] Hence, the development of fraud seems positive with this convention, so despite its scope, the provisions in the Convention can be taken as a measure for further reform in the UCP to improve the Fraud Rule.

3.2.3. The DOCDEX Rules

The ICC launched a panel system to resolve disputes arising between parties of documentary credits under the Documentary Credit Dispute Resolution Expertise (the DOCDEX) in 1997. A panel consisting of three experts from the ICC International Centre for Expertise makes a decision by applying the provisions of the UCP.[161] The decision, which is not binding on the parties unless they agree otherwise,[162] is not intended to solve the case but to show how the disputes should be handled by applying the UCP.[163] Although the DOCDEX is meant for banks' disputes, the parties to arbitration, arbitrators and national courts may apply to the DOCDEX Panel for its opinion. However, it remains unclear whether the decision of the Panel would apply in tribunals.[164]

The aim of such a regulation arose from the fact that banks began to refuse the presentations due to the Strict Compliance Principle.[165] Its scope was not intended for fraud cases but only for technical discrepancies within documents.[166] The rules do not make any reference to the Fraud Rule and cannot be a way to resolve disputes regarding fraud.[167] Moreover, it is important to have a binding tribunal decision for one party to enforce it upon the other, as the main purpose of obtaining such an order is only to restrain the other party from taking any action.[168] As a result, though the DOCDEX Rules are very useful for interpreting the UCP, they are not by nature suitable for fraud disputes.

It is humbly submitted that, apart from the revision of the UCP for adding the Fraud Exception Rule, the ICC may regulate fraud issue in three slightly different ways. For example, firstly, the ICC might produce a regulation, maybe another banking practice, authorising another panel like the DOCDEX Panel. The panel could have similar features to the DOCDEX Panel, and consist of the certain number of experts on fraud issues in letters of credit. Parties may incorporate this separate piece of regulation of the ICC from the UCP into their contract at the beginning. If they did so, it would mean that they authorised

[160] ibid 710
[161] The DOCDEX Rules 2002, art 1/1.3
[162] The DOCDEX Rules, Article 1.4
[163] Connerty (n 13) 525
[164] ibid 534
[165] Connerty (n 59) 16
[166] Zhang (n 10) 208-209
[167] Connerty (n 13) 524
[168] ibid 209

this Panel to be the only body that could make binding decisions on fraud issue among those same parties. This Panel would apply provisions of this regulation in parts regarding fraud issue in accordance with the UCP, in order to resolve the fraud disputes. Wherever necessary, the Panel may decide to make a hearing for monetary disputes above certain amount or it might make a decision on the basis of documents only. In relation with the enforcement of the decisions of this Panel, national courts should respect and enforce the decisions upon the request of one party, which would generally be the buyer in cases of fraud.

Another way the ICC may choose to regulate the fraud issue is that the UCP might refer to a panel for fraud related disputes that again could have similar features to the DOCDEX Panel. The referral could be first for an expert opinion on a case of fraud in front of a national court. In this case, the court might allow a party to apply to this panel and obtain the decision as evidence for the case. Secondly, the UCP could give an entitlement for parties to apply directly to the Panel and to obtain a binding or non-binding panel decision, depending on their will, with the effect of the enforcement later in national courts upon the request of one party. Hence, whenever one incorporated the UCP to his transactions, he would recognise the international jurisdiction of the Panel in advance.

This solution is also consistent with that of Morris, who argues that in such a time when the fraud disputes are on the rise, an international body should resolve the disputes in accordance with the international nature of letters of credit.[169] He proposes the establishment of the International Court of Commerce that would be only bound by the international banking rules and practice as well as parties expectations.[170] As he attributes this Court to all bankers and traders from the international community of letters of credit, he thinks that its fund should come from them all as a transaction fee on each credit opened.[171] He also hopes that one day, the reputation of the Court would reach such a level that national courts would apply its decisions willingly[172]. As a result, within and the assistance of the UCP, the fraud issue would be finally solved by benefiting from the expertise of the ICC.

Thirdly, so as to reinforce the jurisdiction of the previously mentioned Panel, the ICC could make a convention regarding fraud disputes under all documentary credits, even founding a new international court with special powers just like the European Court of Human Rights. This court would resolve disputes between parties to letters of credit, making a binding decision among parties

[169] Richard Morris, 'Editorial: The Need For an International Court of Commerce' (1994) 9(6) Journal of Banking Law 219
[170] ibid 220
[171] ibid
[172] ibid 220-221

whose countries are signatory to the Convention. However there are some issues that need to be addressed here. First, this solution does not overlap with Morris's, as in his proposal the Court is supposed to operate like an advisory court to national courts.[173] However here, the Court would be able to produce binding decisions. Secondly, it can be foreseen that the court would eventually become overworked due to the excessive amount of cases. For a solution to that work overload, this Court could authorise certain national courts to decide on fraud issues. Thirdly, it can be objected that this issue should not be regulated in a convention, as parties' freedom of contract may be restricted to the approval of states on the convention.[174] Convention, however, is a hard law instrument, and the most certain way to achieve harmonisation in the applications of fraud issues.[175]

In this way, there would be only one single body that could make a decision, offering its expertise to parties on fraud issues. However, a counter-argument could be made that the work of the Panel in all three scenarios would be too much so the judgements would be too late to ensure justice in time. This could be overcome by creating courts with special authorisation powers that could decide on fraud disputes in the same way as the Panel did, in different nations over the world under the common authority of the Panel. It can be argued that in that case, there would be more than one body to decide, which might also lead to inconsistency. The inconsistencies between judgements might not disappear completely, but as they would all have the same regulations in hand the inconsistencies would at least be reduced.

3.2.4. Other Solutions

Several other solutions to prevent fraud from accelerating so rapidly have been offered so far, alongside the Fraud Exception Rule regulated by a provision. For example, Ventris suggests that inspection companies hired by the buyer should make a detailed examination of the goods before the shipment and also supervising during the loading process.[176] As well as the guarantee this certificate can give for the existence of the goods to the buyer, the transaction would become more secure if the carrier sends a copy of the certificate directly to the bank.[177] So the inspection certificate should be conditioned in the contract. Moreover, quickly referring to the Lloyd's Shipping Intelligence can help place

[173] ibid
[174] Ian Fletcher, Loukas Mistelis and Marise Cremona (eds), Foundations and Perspectives of International Trade Law, London: Sweet&Maxwell 2001, 16
[175] ibid para. 1-049, 22
[176] Ventris FM, Banker's Documentary Credits: Chapter 13 Fraud (3rd edn, Lloyd's of London Press LTD 1990) 155. Also, the idea of the use of independent inspectors is supported by Demir-Araz (n 6) 133
[177] Daniel E Murray, 'Letters of Credit and Forged and Altered Documents: some Deterrent Suggestions' (1993) 98 Commercial Law Journal 504, 507-508

the location of contracted vessel.[178] In addition, if the buyer has not done any business with the seller before, he can either check the seller's credibility from local banks, or ask for the use of performance bonds that insure the payment undertaken by the issuing bank in the case of non-performance by seller.[179]

Furthermore, the use of ICC services may assist banks in many ways. For instance, Demir-Araz reminds that banks can always send the documents for examination to the Commercial Crime Bureau that has a database for all parts of the world.[180] However, comparing the limit of the examination time period determined by the UCP 600 Article 14/b, and the time for the examination of the Bureau, her suggestion appears not to be so realistic. Moreover, extending the liability of banks in the UCP and the education of banks' staff with a basic training would place more burdens on the bank.[181] Additionally, some traders founded a project across the borders for the secure transfer of trade information, called the Bolero Project.[182] This new e-commerce platform[183] will satisfy the needs of e-commerce and fill the gaps in the field.[184]

There are other solutions suggested in the literature to fight fraud, like payment under reserve, and indemnities. In this way, if a bank thinks that a buyer presents enough convincing evidence to prove the fraud of a seller, but the evidence is not enough to stop payment, then the bank may choose to pay to the seller under reserve so that if the buyer rejects the documents, the bank then is entitled to turn to the seller and demand repayment. So here, the bank reserves its right to take money back in the case of any discrepancies or fraud established in a court.[185] In indemnity, if an advising bank is not a seller's bank, it can demand an indemnity from the seller's own bank to assure that in the case of established fraud, it can demand the amount it paid to the seller, from that bank.[186]

[178] Demir-Araz (n 6) 133
[179] ibid 134
[180] ibid 132
[181] ibid 134
[182] ibid 135
[183] It is called bolero.net
[184] Lee (n 34) 139
[185] Kayembe (n 66) 61
[186] Schmitthoff (n 14) para 11-039. And Baggs (n 118) N217

Conclusion

The Autonomy Principle in documentary credits requires the separation of the credit and the underlying transaction, by assigning banks only to deal with documents. However, if the Rule applies strictly, then the system of documentary credits may create unintended results like protecting fraudsters. Or if it applies loosely, then the buyer could exploit the credit and try to stop payments to seller on the grounds of fraud all the time. So there should be a balancing rule so that commercial peace can be preserved. The main problem is that no regulation exists to hinder fraud in the international arena. As a solution, common law courts have found a cure for this problem, namely the Fraud Exception Rule.

In the light of the discussions above, it can be concluded that the fraud issue is an important problem the UCP 600 left out in letters of credit. Although the Rule provides vital protection against fraudsters, its scope is unclear as well as lacking consistent implementation in practice. The standard of fraud necessary to activate the Rule differs substantially across common law countries, so some solutions should be found to harmonise judgements relating to this issue. Despite the inactive attitude of the ICC in respect to the fraud issue, there seems to be no other international body more suited to dealing efficiently with fraud. So, of all solutions offered, the most efficient solution would be that the ICC should take the control in its hands since the expertise of the ICC should be utilised in resolving fraud disputes. In this respect, the UCP should include an exception known as the Fraud Exception Rule; originated in and applied by, common law courts. In a new version, the UCP should compromise the Fraud Rule enacted in the UNCITRAL Convention Article 19, 20 and the UCC Article 5-109. Consequently, it should make the scopes of the Rule clear in the UCP to provide predictability and certainty in its dealings with fraud issues.

The standard of fraud to invoke the Rule should be determined as between egregious fraud and constructive fraud. For securing the consistent implementation of this exception, the ICC should establish a panel internally within and the reference of the UCP like the DOCDEX Panel, similar to Morris's proposal.[187] The Panel could make binding or non-binding decisions optionally, on fraud disputes arising between parties to documentary credit. This Panel should be bound only by the UCP and other international banking rules and practices. Thereby, in this field, harmonisation of judgements of letters of credit regarding fraud issues can be achieved through the Fraud Rule in the UCP, implemented by a single international panel within the ICC.

This study merits further research in this field since it is certain that there is not always a single best solution for such complicated issues; there are some

[187] Morris (n 170) 220

issues that are not included in this research owing to its size limitations. For instance, it is still ambiguous where the Rule should be best regulated, what standard of fraud can provide the most efficient application of the Rule and what evidence should be considered adequate to trigger the Rule. Or, in this research, arbitration is only mentioned briefly as a solution but whether arbitration represents an effective solution to fraud issue in documentary credits can be examined in another research. Furthermore, more alternative solutions could be offered to overcome fraud issues. Hence, issues in the field of letters of credit can be researched more as the use of letters of credit increases.

Bibliography

Aharoni D and Johnson A, 'Fraud and Discounted Deferred Payment Documentary Credits: The Banco Santander Case' (2000) 15(1) Journal of International Banking Law 22

Allen and Overy, 'Banking and Insolvency Law' (1999) 14(7) Journal of International Banking and Finance Law 317

Baggs C, 'Case Comment: Letters of Credit-Knowledge of Fraud' (1993) 8(11) Journal of International Banking Law N216

Buckley RP and Gao X, 'The Development of the Fraud Rule in the Letter of Credit Law: The Journey So Far and the Road Ahead' (2002) 23 University of Pennsylvania Journal of International Economic Law 66

Buckley RP, 'The 1993 Revision of the Uniform Customs and Practice for Documentary Credits' (1995) 28 Geo Wash J Int'l L and Eco. 256

Chatterjee C and Lefcovitch A, 'The Principle of Autonomy of Letters of Credit is Sacrosanct in Nature' (2003) 5(1) Journal of International Banking Regulation 72

Connerty A, 'Fraud and Documentary Credits: The Approach of the English Courts' <http://www.arc-chambers.co.uk/FRAUD%20AND%20DOCUMENTARY%20CREDITS.pdf> accessed on 21 June 2011

Connerty A, 'DOCDEX: The ICC's Rules for Documentary Credit Dispute Resolution Expertise' (1998) 13(11) Journal of International Banking and Finance Law 523

Demir-Araz Y, 'International Trade, Maritime Fraud and Documentary Credits' (2002) 8(4) International Trade Law & Regulation 128

Dolan JF, 'Commentary on Legislative Developments in Letter of Credit Law: An Interim Report' (1993) 8 Banking and Finance Law Review 53

Dolan JF, 'Documentary Credit Fundamentals Comparative Aspects' 3 Banking and Financial Law Review 121

Fletcher I, Mistelis L and Cremona M (eds), Foundations and Perspectives of International Trade Law, London: Sweet & Maxwell 2001

"Fraud in the Transaction': Enjoining Letters of Credit during the Iranian Revolution' (1980) 93(5) Harvard Law Review 992

Guest AG (Ed), Benjamin's Sale of Goods, London: Sweet & Maxwell, 6th ed

Harfield H, 'Enjoining Letter of Credit Transactions' (1978) 95 Banking Law Journal 596

Johnson C, 'Case Comment Letter of Credit: Fraud Exception/Rule of Documentary Compliance' (1987) 2(2) Journal of International Banking Law N52-53

Kayembe GL, 'The Fraud Exception in Bank Guarantee' (LLM Thesis The University of Cape Town 2008)

Kuo-Ellen SL, 'A Banker's Guide to the Prevention of Fraud and Money Laundering in Documentary Credit Transaction' (2002) 5(3) Journal of Money Laundering Control 189

Lee RJ, 'Strict Compliance and the Fraud Exception: Balancing the Interests of Mercantile Traders in the Modern Law of Documentary Credits' (2008) 5 Macquarie Journal of Business Law 137

Leacock SJ, 'Fraud in the International Transaction: Enjoining Payment of Letters of Credit in International Transactions' (1984) 17 Vanderbilt Journal of Transnational Law 885

Lu L, 'Fraud Rule in Documentary Credits' (2009) 2 Plymouth Law Review 157

Mann RJ, 'The Role of Letters of Credit in Payment Transactions' (2000) 98 Michigan Law Review 400

Mautner M, 'Letter-of-Credit Fraud: Total Failure of Consideration, Substantial Performance and the Negotiable Instrument Analogy' (1986) 18 Law and Policy In International Business 579

Midland Bank, Letters of Credit Management and Control (1985)

Morris R, 'Editorial: The Need For an International Court of Commerce' (1994) 9(6) Journal of Banking Law 219

Murray DE, 'Letters of Credit and Forged and Altered Documents: some Deterrent Suggestions' (1993) 98 Commercial Law Journal 504

Official Comment to Article 5 of the Uniform Commercial Code

'Opinions of the ICC Banking Commission 1980-1981' ICC Publication No. 399

'Opinions of the ICC Banking Commission 1995-1996' ICC Publication No. 565

Proctor C and Nathanson N, 'Enron, Letters of Credit and The Autonomy Principle' (2004) 19(6) Journal of International Banking and Finance Law 204

Report of the Task Force on the Study of U.C.C. Article 5, An Examination of UCC Article 5 (Letters of Credit) (1990) 45 Business Lawyer 1521

Ryder FR, 'Challenges to the Use of Documentary Credit in International Trade Transactions' (1981) 16(4) Columbia Journal of World Business 36

Schmitthoff CM, Export Trade, (1983) Journal of Business Law 319

Schmitthoff CM, 'The Export Trade and Practice of International Trade: Chapter 11 Letters of Credit' (3rd Edn, Stevens London 1975)

Smith GWL, 'Irrevocable Letters of Credit and Third Party Fraud: The American Accord' (1983) 24 Virginia Journal of International Law 55

Xiang G and Buckley RP, 'A Comparative Analysis of the Standard of Fraud Required Under the Fraud Rule in Letter of Credit Law' (2003) 13 Duke Journal of Comparative & International Law 29

Ventris F M, Banker's Documentary Credits: Chapter 13 Fraud (3rd edn, Lloyd's of London Press LTD 1990)

Wiley RA, 'How to Use Letters of Credit in Financing the Sale of Goods' (1965) 20 Business Lawyer 495

Zhang Y, 'Approaches to Resolving the International Documentary Letters of Credit Fraud Issue' (PhD Thesis, University of Eastern Finland 2011)