

Commercial Letters of Credit in England and in Greece

by

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TABLE OF CONTENTS	Page
Table of Cases	V
Table of Statutes	XVI
Bibliography	XIX

FIRST PART

1) Scope and Importance - Definition	1
2) History	4
3) Uniform Customs	8
4) A) Revocable and Irrevocable credits; Unconfirmed and Confirmed credits	11
B) Legal Basis	17
a) English Theories	21
b) Greek Theories	27

SECOND PART

Types of Letters of Credit	34
1) General and special credits	35
2) Clean (or open) and documentary credits	35
3) Revolving credits	37
4) Transferable credits	37
5) Back-to-back credits	39
6) Credits classified according to the method of payment	39
a) Sight credits	40
b) Deferred payment credits	40
c) Negotiation credits and acceptance credits	41
d) Standby credits	41
e) Anticipatory credits	42

T H I R D P A R T	Page
The Legal Relationships	44
1) The Relationship between the Buyer and the Seller	44
A) The Contract	44
B) The Letter of Credit	47
a) The time for opening the credit	47
b) Irrevocable credit	50
c) Confirmed credit	51
C) The Buyer's Liability for the Debt	52
D) Termination of the Credit	58
E) The Seller's Agent	61
2) The Relationships arising under a Letter of Credit	65
A) The Relationship between the Buyer and the Issuing Bank	65
a) The Issuing Bank's Obligations	66
b) The Buyer's Obligations	75
B) The Relationship between the Issuing Bank and the Intermediary Bank	77
C) The Relationship between the Seller and the Issuing and the Intermediary Banks	83
a) Advising and Confirming Bank	84
b) The Bank's Obligations	85
c) The Seller's Obligations	94
d) The Drafts	97

FOURTH PART	Page
I) Shipping Documents Tendered Under a Letter of Credit	103
1) General	103
2) Main Documents	108
A) Bills of Lading	108
Legislation	
The Probatory Force of the Bills of Lading	110
a) Types of Bills of Lading	112
a.1. Bills of Lading to a Specified Person, To Order and To Bearer	112
a.2. Combined and Traditional Transport Bills of Lading	115
a.3. Clean and Claused Bills of Lading	120
a.4. Received for Shipment and Shipped Bills of Lading	133
b) The text	136
c) The Shipment	143
d) Date and Place of Presentation	149
B) Insurance Policy	151
C) Commercial Invoice	160
3) Other Documents	163
4) Forged or False Documents	167
5) Rejection of Documents	175
6) Payment under Reserve and Payment under Indemnity	179
II) Damages for the Dishonour of a Commercial Credit	186

F I F T H P A R T	Page
1) Transfer of the Letter of Credit	195
A) The Terms of the Transfer	197
B) Legal Basis	202
C) Whole or Partial Transfer	204
2) Assignment	205
 S I X T H P A R T	
The Banker's Security	210
1) The Lien	210
2) The Pledge	216
3) Other Forms of Security	224
a) Hypothecation of Goods	224
b) Letter of Trust	225

TABLE OF CASES

ENGLISH

Agra and Masterman's Bank, Re, exp. Asiatic Banking Corporation (1867) L.R. 2 Ch. App. 391	5, 25, 35, 97
Alan W.J. & Co. Ltd. v. E.L. Nasr. Export and Import Co. Ltd. (1972) 2 All E.R. 127	56
American National Bank v. Banco Nacional de Nicaragua (1936) 166 So. 8	37
Annie Johnson, The, (1918) P.154	15
Aschkenasy v. Midland Bank Ltd. (1934) 51 T.L.R. 34	212
Baltimex Ltd. v. Metallo Chemical Refining Co. Ltd. (1955) 2 Lloyd's Rep. 438	49, 52
Banco Nacional de Credito v. Bank of America (1954) 118 F. Supp. 308	37
Bank Melli Iran v. Barclays Bank (Dominion, Colonial and Overseas) (1951) 2 Lloyd's Rep. 367	79, 87, 161, 166, 179
Banner v. Johnston (1871) 5 H.L.Cas. 157	5
Banque de l' Indochine et de Suez S.A. v. J.H. Rayner (Mincing Lane) Ltd. (1982) 2 Lloyd's Rep. 476; (1983) 1 Lloyd's L.R. 228	105, 107, 130, 180, 183
Barber Charles and Others v. William Meyerstein (1870) L.R. 4 H.L. 317	218
Basse and Selve v. Bank of Australasia (1904) 20 T.L.R. 431	167
Belgian Grain & Produce Company Ltd. v. Cox & Co. France (1919) 1 Ll.L.Rep. 256	153, 188
Berk F.W. & Co. Ltd. Style (1955) 2 Lloyd's Rep. 382	156
Biddel Bros. v. E. Clemens Horst & Co. (1911) 1 K.B. 934; (1912) A.C. 18	94
Bolivinter Oil S.A. v. Chase Manhattan Bank and Others (1984) 1 All E.R. 351	71, 86
Borthwick v. Bank of New Zealand (1900) 6 Com.Cas.1	67, 155
Brandao v. Barnett and Others (1846) 12 Cl. & Fin. 787	211
Brice v. Bannister (1878) 3 Q.B.D. 569	208
Bristol Bank v. Midland Railway Co. (1891) 2 Q.B. 653	218

British Columbia and Vancouver's Island Spar, Lumber and Saw Mill Co. Ltd. v. Nettleship (1868) L.R. 3 C.P. 499	190
British Imex Industries Ltd. v. Midland Bank Ltd. (1958) 1 Q.B.542; (1957) 2 Lloyd's Rep. 591	122, 123, 126, 132
British Westinghouse Electric & Manufacturing Company v. Underground Electric Railways of London (1912) A.C. 673	192
Brown, Jenkinson & Co. Ltd. v. Percy Dalton (London) Ltd. (1957) 2 Lloyd's Rep. 1	184
Brown, Shipley & Co. v. Kough (1885) 29 Ch. D. 848	214
Bunge Corporation v. Vegetable Vitamin Foods (Pts) Ltd. (1984) 134 New L.J. 125	44
Burdick v. Sewell (1883) 10 Q.B.D. 363; (1884) 10 A.C. 79	211, 212, 218
Calico Printers' Association v. Barclays Bank Ltd. (1930) 36 Com. Cas. 71	73, 78
Canadian and Dominion Sugar Co. Ltd. v. Canadian National (West Indies) Steamships Ltd. (1947) A.C. 46	131
Cape Asbestos Co. Ltd. v. Lloyd's Bank Ltd. (1921) W.N. 274	12, 178
Cf. Reg. v. Townshend (1984) 15 Cox C.C. 466	225
Charge Card Services, Re, (1986) 3 All E.R. 289	56
Commercial Banking Co. of Sydney Ltd. v. Jalsard (1973) A.C. 279	104
David Allester Ltd., Re, (1922) 2 Ch. 211	227
Davis O'Brien Lumber Co. v. Bank of Montreal (1951) 3 D.L.R. 536	92
Dever, ex p. Re Suse (1884) 13 Q.B.D. 766	214
Dewhurst, ex p. (1873) L.R. 8 Ch. App. 965	215
Dexters Ltd. v. Schenker & Co. (1923) 14 Ll.L.Rep. 586	18
Diamond Alkali Export Corporation v. Bourgeois (1921) 3 K.B. 443	133
Discount Records Ltd. v. Barclays Ltd. and Another (1975) 1 All E.R. 1071	72, 92

Donald H. Scott & Co. v. Barclays Bank Ltd. (1923) 2 K.B. 1	86, 133, 152
Dunlop v. Selfridge (1915) A.C. 847	18
Eastern Bank Ltd., The, v. Sha Miscriamal Bhagajee (1961) II M.L.J. 88	124
E.D. & F. Man Ltd. v. Nigerian Sweets and Confectionery Co. Ltd. (1977) 2 Lloyd's Rep. 50	55
Edward Owen Engineering Ltd. v. Barclays Bank International Ltd. (1978) 1 Lloyd's Rep. 166	41, 71
Elder Dempster Lines Ltd. v. Ionic Shipping Agency Inc. (1968) 1 Lloyd's Rep. 529	19, 100
Eliau & Another v. Matsas & Others (1966) 2 Lloyd's Rep. 495	70
Ellerman and Bucknall Steamship Co. Ltd. v. Sha Bhagajee (1961) 2 M.L.R. 97	123
English, Scottish and Australian Banks Ltd. v. Bank of South Africa (1922) 13 Ll.L.Rep. 21	94
Equitable Trust Company of New York v. Dawson Partners Ltd. (1926) 25 Lloyd's L.R. 90; (1927) 27 Ll.L.Rep. 49	3, 67, 73, 165
Etablissements Chainbaux S.A.R.L. v. Harbormaster Ltd. (1955) 1 Lloyd's Rep. 303	49
Etablissements Esefka International Anstalt v. Central Bank of Nigeria (1979) 1 Lloyd's Rep. 445	93, 205
European Asian Bank A.G. v. Punjab and Sind Bank (1983) 1 Lloyd's Rep. 611, C.A.	205
Finska Cellulosaforeningen v. Westfield Paper Co. Ltd. (1940) 46 Com.Cas. 87	126
Floating Dock Ltd. v. Hong Kong and Shanghai Banking Corporation (1986) 1 Lloyd's Rep. 65	177
Forbes v. Pelling (1921) 9 Ll.L.Rep. 202	135
Forestal Mimosa v. Oriental Credit (1986) 1 W.L.R. 631	10
Frith v. Forbes (1862) 4 De G.F. & J. 409	213
Galatia, The, (1979) 2 Lloyd's Rep. 450 (see Golodetz)	10
Garcia v. Page & Co. (1936) 55 Ll.L.R. 391	49

Gaunt v. British & Foreign Marine Insurance Co. (1921) 8 Ll.L.Rep. 15	156
Gee Garnham Ltd. v. Whittall (1955) 2 Lloyd's Rep. 562	156
George Ireland and Others v. Joseph Gibbons Livingston (1872) L.R. 5 H.L. 395	161
Giddens v. Anglo-African Produce Co. Ltd. (1923) 14 Ll.L.Rep. 230	12, 50
Golodetz & Co. Inc. v. Czarnikow-Rionda Co. Inc. "The Galatia" (1979) 2 Lloyd's Rep. 450	121, 131
Griffin v. Weatherby and Henshaw (1868) L.R. 3 Q.B. 735	25
Greenhough v. Munroe (1931) 53 F. 2d 362	53
Groom v. Barber (1915) 1 K.B. 316	156
Guaranty Trust Company of New York v. Hannay and Co. (1918) 2 K.B. 623	93, 168, 214
Hadley v. Baxendale (1854) 9 Exch. 341	59, 186
Hall H. v. Pim (1928) Com.Cas. 324	190
Hamilton Young & Co., Re, (1905) 2 K.B. 772	225
Hammond & Co. v. Bussey (1887) 20 Q.B.D. 79	190
Hamzeh Malas & Sons v. British Imex Industries Ltd. (1958) 2 Q.B. 127; (1957) 2 Lloyd's Rep. 549	19, 46, 70
Hansson v. Hamel & Horley Ltd. (1922) 2 A.C. 36	104, 144
Harbottle (Mercantile) Ltd. v. National Westminster Bank Ltd. and Others (1978) Q.B. 146	71
Harmood W. Banner and J. Joung v. Carruthers C. Johnston (1871) L.R. 5 H.L. 157	214
Hick v. Raymond & Reid (1893) A.C. 22	50
Hickox v. Adams (1876) 34 L.T. 404	154
Hindley & Co. v. Tothill, Watson & Co. (1894) 13 N.Z.L.R. 13	25, 54
Holland Colombo Trading Society Ltd. v. Alawdeen and Others, (1954) 2 Lloyd's Rep. 45	144
Howe Richardson Scale Co. Ltd. v. Polimex-Cekop (1978) 1 Lloyd's Rep. 161	71, 89
Hydraulic Engineering Co. Ltd. v. McHaffee Goslett & Co. (1878) 4 Q.B.D. 670	190

Ian Stach Ltd. v. Baker Bosley Ltd. (1958) 2 Q.B. 130;	38,39,48,
(1958) 1 Lloyd's Rep. 127	60
Intraworld Industries Inc. v. Girard Trust Bank,	10
461 Pa. 343, 2d 316 17 W.C.C. Rep. 191	
Intraco Ltd. v. Notis Shipping Corporation (1981)	41
2 Lloyd's Rep. 256	
Knotz v. Fairclough Dodd & Jones Ltd.	47
(1952) 1 Lloyd's Rep. 226	
Kronman & Co. v. Steinberger (1922) 10 Ll.L.Rep. 39	51,52
Kronprinsessan Margareta (1921) 1 A.C. 486	2
Kwei Tek Chao v. British Traders and Shippers Ltd.	93,220
(1954) 2 Q.B. 459	
Kydon Compania Naviera S.A. v. National Westminster	98,107,161
Bank and Others "The Lena" (1981) 1 Lloyd's Rep. 68	177
Ladenburg & Co. v. Goodwin Ferreira & Co. Ltd.	228
(1912) 3 K.B. 275	
Landauer & Co. v. Craven (1912) 2 K.B. 94	153
Larios v. Antonio Bonany y Gurety (1873)	188
L.R. 5 P.C. 346	
Lindsay v. Cook (1953) 1 Lloyd's Rep. 328	47
Lloyds Bank Ltd. v. Bank of America National Trust	219
and Savings Association (1938) 2 K.B. 147	
London & Foreign Trading Corporation v. British	137
& North European Bank (1921) 9 Ll.L.Rep. 116	
London, Chatham & Dover Rly. v. South Eastern Rly.	187
Co. (1893) A.C. 429	
Lord Atkinson in Dublin City Distillery Ltd.	216
v. Doherty (1914) A.C. 823	
Ludwig Tillman, Re, (1918) 34 T.L.R. 322	75
Lutscher v. Comptoir d' Escompte (1876) 1 Q.B.D. 709	225
Madras Official Assignee v. Mercantile Bank	217,218
of India Ltd. (1935) A.C. 53	
Malmberg V. Evans (1924) 29 Com.Cas 235	52,153
Manbre Saccharine Co. v. Corn Products Co.	154
(1919) 1 K.B. 198	

Mann, Taylor & Co. Ltd. v. Royal Bank of Canada (1935) 40 Com.Cas. 267	36
Maran Road Saw Mill v. Austin Taylor & Co. Ltd. (1975) 1 Lloyd's Rep 156 (see also Ng Chee Chong)	55
McEwan William and Sons v. James and Archibald Smith (1849) 2 H.L. Cas. 309	217
Mason v. Hunt (1778) 7 T.R. 350	4
Mercantile Bank of India v. Chartered Bank of India, Australia and China and Another (1937) 43 Com.Cas. 80	229
Midland Bank Ltd. v. Eastcheap Dried Fruit Co. Ltd. (1962) 1 Lloyd's Rep. 359	226
Midland Bank Ltd. v. Seymour (1955) 2 Lloyd's Rep. 147	19,138
Mirabita v. Imperial Ottoman Bank (1878) 3 Ex.D. 164	170
Mitchell Ltd.v. Ivan Pederson (1929) 34 Ll.Rep. 310	37
Moralice (London) Ltd. v. E.D. & F. Man & Co. (1954) 2 Lloyd's Rep. 526	181
Morgan v. Lariviere (1875) L.R. 7 H.L. 423	17,24
Morritt, Re, (1886) 18 Q.B.D. 222	211
National Bank of Egypt v. Hannevig's Bank Ltd. (1919) 1 Lloyd's L.R. 69; (1919) 3 L.D.B. 213	79,124
National Bank of South Africa v. Banca Italiana di Sconto (1922) 10 Lloyd's L.R.531	114,135
Newman Industries Ltd. v. Indo-British Industries Ltd. (1956) 2 Lloyd's Rep. 219	88
New Zealand Banking Corporation, Re (1867) L.R. 4 Eq. 226	216
Ng Chee Chong, Ng Weng Ching, Ng Cheng and Ng Yew (trading as Maran Road Saw Mill) (1975) 1 Lloyd's L.R. 156 (see also Maran Road Saw Mill)	63
Nordskog v. National Bank (1922) 10 Ll.L.R. 652	37,85
North Western Bank v. Poynter (1895) A.C. 56	218,226
Oelbeyman v. National City Bank of New York (1935) 79 F (2d) 534	42

Oetker (Rudolf A.) v. I.F.A. International Frachtagentur A.G. (1985) 1 Lloyd's Rep.557	141
Orr and Barber v. Union Bank of Scotland (1854) 1 Maq. H.L. Cas. 513	78
Owners of Motor Tanker Athelviscount and the National Petroleum Co. Re (1934) 39 Com.Cas. 227	123
Pacific Overseas Corporation Ltd. v. Watkin Browne & Co. (N.Z.) Ltd. (1954) N.Z.L.R. 459	61,87
Panoutsos v. Raymond Hadley Corporation of New York (1917) 2 K.B. 473	15,51
Pavia & Co. S.P.A. v. Thurmann-Nielsen (1952) 2 Q.B. 84	48
Payzu Ltd. v. Saunders (1919) 2 K.B. 581	192
Pickard v. Sears (1837) 6 A. and E. 469	24
Pillans v. Van Mierop (1765) 3 Burr. 1663	4
Plasticmoda S.P.A. v. Davidsons (Manchester) Ltd. (1952) 1 Lloyd's Rep. 527	52
Prehn v. The Royal Bank of Liverpool (1870) L.R. 5 Ex. 92	186
President of India v. Metcalfe Shipping Co. Ltd. (The Dunelmia) (1969) 2 Lloyd's Rep. 476	127
Rayner & Co. Ltd. v. Hambros Bank Ltd. (1943) 1 K.B. 37	68,87,137
Reinhold & Co. and Hansloh (1896) 12 T.L.R. 422	165
Restitution S.S. Co. v. Pirie (1889) 6 T.L.R. 50	120
Reynolds v. Doyle (1840) 1 M. & G. 753	75
Robey & Co.'s Perseverance Ironworks v. Ollier (1872) L.R. 7 Ch. App. 695	212
Rosenberg v. International Banking Corporation (1923) 14 Ll.L.R. 344	211
Rosenthal v. Esmail (1965) 1 W.L.R. 1117	147
Saffron v. Societe Miniere Cafrika (1958) 100 C.L.R. 231	54
Sale Continuation Ltd. v. Austin Taylor & Co. Ltd. (1967) 2 All E.R. 1092	76

Sassoon v. International Banking Corporation (1927) A.C. 711	15, 96
Schloss v. Stevens (1906) 2 K.B. 665	156
Scott v. Barclays Bank (1923) 2 K.B. 1	18
Shamsher Jute Mills Ltd. v. Sethia (London) Ltd. (1987) 1 Lloyd's Rep. 388	56, 58
Sinason-Teicher Inter-American Grain Corp. v. Oilcakes and Oilseeds Trading Co. Ltd. (1954) 3 All E.R. 468	48
Singer and Friedlander v. Creditanstalt-Bankverein (1981) Com. L.R. 69	207
Skandinaviska Aktiebolaget v. Barclays Bank (1925) 22 Ll.L.Rep.523	104, 114, 177
Societe Metallurgique d' Aubrives & Villerupt v. British Bank for Foreign Trade (1922) 11 Ll.L.Rep 168	162, 170
Soproma S.P.A. v. Marine and Animal By-Products Corporation (1966) 1 Lloyd's Rep. 367	85, 139, 145
South African Reserve Bank v. Samuel & Co. (1931) 40 Ll.L.Rep. 291	42, 152
State Trading Corporation of India v. Companie Francaise d' Importation et de Distribution (1983) 2 Lloyd's Rep. 679	49
Stein v. Hambros Bank of Northern Commerce (1922) 10 Ll.L.Rep. 529	88, 141, 191
Sztejn v. J.Henry Schroder Banking Corporation (1941) 31 N.Y. Supp. 2d 631	171
Tamvoco v. Lucas (1861) 30 L.J.Q.B.234	153
Tolhurst v. Associated Portland Cement Manufactures Ltd. (1902) 2 K.B. 660; (1903) A.C. 414	208
Trans S.P.R.L. v. Danubian Trading Co. Ltd. (1952) 1 Lloyd's Rep. 348; (1952) 2 Q.B. 297	47
Tukan Timber Ltd. v. Barclays Bank (1987) 1 Lloyd's Rep. 171	71, 92

United Trading Corpn. S.A. v. Allied Arab Bank Ltd. (1985) 2 Lloyd's Rep. 554	71
United City Merchants (Investments) Ltd. and Glass Fibres and Equipment Ltd. v. Royal Bank of Canada, Vitrofueros S.A. and Banco Continental S.A. (1982) 2 All E.R. 720; (1983) 1 A.C. 168	90, 93, 141, 170
Urquhart, Lindsay & Co. v. Eastern Bank Ltd. (1922) 1 K.B. 318; 27 Com. Cas. 124	13, 18, 22, 87, 190
Victoria Laundry (Windsor) Ltd. v. Newman Industries Ltd. (1949) 2 K.B. 528	59, 186
Vincentelli v. Rowlett (1911) 16 Com.Cas. 310	156
Vivacqua Irmaos v. Hickerson (1939) 190 So. 657	53
Wah Tat Bank Ltd. and Overseas-Chinese Banking Corporation Ltd. v. Chan Cheng Kum and Others (1967) 2 Lloyd's Rep. 437	135
Walker v. Rostron (1842) 9 M. & W. 411	25
Waring, Inglis, Clarke, ex p. (1815) 19 Ves. 345	215
Westminster Bank v. Banca Nazionale di Credito and Others (1928) 31 Lloyd's L.R. 306	79, 124, 179, 182
Wilson, Holgate & Co. Ltd. v. Belgian Grain and Produce Company (1920) 2 K.B. 1	152
Woods v. Thiedmann (1862) 1 H. & C. 478	69
Yuill & Co. v. Scott Robson (1908) 1 K.B. 270	156

G R E E K

Decisions of Arios Pagos (The Highest Court in Greece)

A.P. 62/1922 Them 1922-23. 369	65
A.P. 217/1924 Them. 1925-26. 113	32
A.P. 54/1931 Them. 1931. 289	65
A.P. 81/1957 EEmpD 1957. 139	28, 200
A.P. 805/1958 NomV 1959. 433	3, 45

A.P. 116/1965 EEmpD 1965. 462	45
A.P. 83/1976 NomV 24. 609	194

Efetio (Court of Appeal)

Ef.A. 92/1919 Them 1919-20, 418	7
Ef.A. 346/1919 Them 1920-1921. 537-538	159
Ef.A. 540/1926 Them 1927. 230	45
Ef.A. 477/1928 Them 1928. 630	30, 66, 74
Ef.A. 629/31 Them. MB 744	222
Ef.A. 1123/1931 Them 1923. 285	57
Ef.A. 564/1932 Them 1933. 326	69, 173
Ef.A. 882/1933 Them 1934. 123	222
Ef.A. 2320/1938 Them. N 476	110
Ef.Kr. 188/1952 EEmpD 1953. 155	115
Ef.A. 29/1956 EEmpD 1956. 222	86
Ef.A. 1329/1956 EEmpD 1956. 219	84, 200
Ef.A. 1398/1956 EEN 25. 647	110, 222
Ef.A. 1039/1966 NomV 1967. 154	110
Ef.A. 7887/1974 NomV 23. 193	45
Ef.P. 186/1978 EEmpD 1979. 233	28, 45, 160, 223
Ef.A. 11141/1979 NomV 1980. 1518	14
Ef.Thes. 2541/1983 Arm 1985. 514	10
Ef.A. 9188/1984 EEmpD 1986. 470	9, 28, 82, 84
Ef.A. 2396/1989 EEN 1989. 934; EEmpD 1989. 210	9, 28, 82
Ef.P. 237/1990 EEmpD 1990. 690	174
Ef.A. 7086/1990 EEmpD 1990. 618	119
Ef.P. 1156/1991 EEmpD 1991. 499	112

Polimeles Protodikio (High Court, sitting as a Court
of First Instance or as a Court of Appeal)

Pol.Prot.P. 2152/1978 EEmpD 1979. 297	129
Pol.Prot.Ver. 453/1980 EEmpD 1981. 229	28
Pol.Prot.A. 2593/1981 EEmpD 1983. 232	28, 203, 204
Pol.Prot.Thes. 1564/1982 ArNom 1983. 696	3
Pol.Prot.P. 1235/1983 EEmpD 1984. 324	109
Poll.Prot.P. 2880/1984 EEmpD 1985. 513	109

Pol.Prot.P. 904/1985 EEmpD 1985. 698	128,129
Pol.Prot.A. 8668/1990 Arm 1991. 465	14,83

Monomeles Protodikio (Court of First Instance)

Prot.P. 1078/1921 Them 1922-23. 239	7
Prot.P. 2551/1934 Them 1935. 399	223
Prot.A. 4783/1943 EEN A'. 91	110
Prot.P. 449/1949 EEN 1950. 444	102
Prot. P. 3247/1951 EEmpD 1952. 188	115
Prot.P. 3471/1951 EEmpD 1952. 40	65
Prot.P. 2756/1952 EEmpD 1952. 390	115
Prot.A. 12432/1952 NomElld 368-369	159
Prot.P. 505/1953 EEmpD 1953. 225	115
Prot.P. 1075/1954 EEmpD 1954. 278	114
Prot.P. 5/1957 EEmpD 1957. 32	223
Prot.P. 4713/1957 EEmpD 1958. 183	128
Prot.P. 3038/1959 EEmpD 1959. 405	10,163
Prot.Samos 205/1965 EEmpD 1966. 430	158
Prot.Chan. 685/1965 EEmpD 1966. 133	140
Prot.P. 5743/1967 EEmpD 1968. 111	148
Prot.P. 5745/1967 EEmpD 1968.254	148
Prot.Thes. 1726/1968 EEmpD 1968.207	28
Prot.A. 13730/1973 EEmpD 1974. 192	110
Prot.A. 2666/1975 EEmpD 1975. 407	110
Prot. P. 613/1978 EEmpD 1978. 450	129
Prot.P. 1233/1979 EEmpD 1980. 298	128
Prot.P. 138/1989 EEmpD 1990. 695	222
Prot.P. 815/1991 EEmpD 1992. 636	129

TABLE OF STATUTES

ENGLISH

Bretton Woods Agreement Act, 1945	91
Bills of Lading Act, 1855	108
Sale of Goods Act, 1893	221
Sale of Goods Act, 1979	108
Carriage of Goods by Sea Act, 1971	108
Law of Property Act, 1925	206
Factors Act, 1889	219
Bills of Sale Act, 1878	227, 229
Companies Act, 1985	228

G R E E K

Statute of the 17.7/13.8.1923	3, 7, 12, 20, 66, 69, 73, 74, 81, 83, 101, 102, 108, 114, 115, 160, 173, 221, 222
Civil Code	27, 29, 30, 31, 32, 33, 76, 81, 83, 108, 120, 185, 193, 194, 201, 203, 206, 221, 224, 229, 230
Commercial Code	32, 119, 156, 157, 159
Code of Private Maritime Law (Statute 3816/28-2-1958)	108, 110, 111, 114, 127, 129, 132, 134, 135, 136, 148, 157, 158, 174

Statute 5325/9/16-3-1932 about the Bill of Exchange	33,115
Statute of the 2 (14) May 1835 about the Competence of the Commercial Courts	20
Statute 5076/30-6/7-7-31 about Limited Companies and Banks	20
Code of the Civil Procedure	120

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FIRST PART

1) Scope and Importance- Definition

Commercial letters of credit are mainly used to finance foreign trade and solve the problems which arise when a prospective buyer in one country wishes to buy goods from a prospective seller in another country. In this case both the buyer and the seller have to fulfil obligations which cannot take effect at the same time, not only because of the distance between the seller's and the buyer's country but also because of the different mercantile and legal conditions existing in these two countries. So it is obvious that the exporter runs a great risk if he has to be paid after he has despatched the goods or after the goods have been received by the buyer. There is always the possibility of his having to face an insolvent or dishonest buyer, especially if the price of the goods falls after the contract between the parties has been signed, or if one of the risks of international transactions takes place, such as the devaluation of currency, exchange control in the country of import or some political event. The buyer, on the other hand, may equally be uncertain about the seller's reliability and will not want to pay before he has received the goods and before he is certain that they have been shipped according to the instructions he has given to the seller-importer.

Therefore, the two parties, the buyer and the seller, agree to

include the term in the underlying contract for the sale of goods, or other contract, that payment will be by letter of credit¹⁾. So, if the contract calls for payment under a credit the buyer has to apply to his bank (the issuing bank) to open a credit in favour of the exporter (the beneficiary) and set out the conditions under which the bank may pay the beneficiary or honour his bills of exchange. The bank, which usually first investigates its customer's creditworthiness, issues the letter of credit and sends it directly to him, or, if the underlying contract includes the provision that payment should be made by a bank, usually a bank carrying on business in the country of export, the issuing bank sends the credit to the correspondent or intermediary bank. This bank is either an advising bank, which means that it incurs no liability under the letter of credit or a confirming bank which means that it adds its undertaking to pay the amount of the letter of credit itself. Thus, both parties are satisfied with the terms of their transaction because the seller makes certain that he will be paid for his goods provided he complies with certain stated conditions and the buyer will have to pay only when the goods, that have been shipped, are found to be of the quality and quantity agreed.

From the above mentioned it follows that a commercial letter of credit may better be described than defined. English Courts

1) cf. Lord Sumner's observations in *Kronprinsessan Margareta* (1921) 1 A.C. 486, 510

have described the operation of a banker's commercial credit¹⁾ but they have not attempted to define it.

Greek Courts very often refer to the definition given by article 25 par. 1 of the statute of 17.7/13.8.1923²⁾ according to which the contract of the commercial letter of credit is a contract whereby a limited company (the issuing bank) agrees with another person (the debtor) to open a credit in favour of a third party (the beneficiary) and undertakes, against bill of lading given by the third party, to pay him the amount of the letter of credit, which (amount) the bank will get from the debtor who will receive the bill of lading.

On the other hand, according to the international definition of the Uniform Customs and Practice for Commercial Documentary Credits³⁾ article 2, a commercial credit is the arrangement whereby a bank (issuing bank), usually in the country of import, acting at the request and on the instructions of a customer (buyer of goods, applicant for the credit) is to make payment to a third party (seller, beneficiary) or is to accept and pay bills of exchange drawn by the beneficiary or authorises another bank to effect such

1a) Equitable Trust Company of New York v. Dawson Partners Ltd (1926) 25 Lloyds L.R. 90, 93; Guaranty Trust Company of New York v. Hannay (1918) 2 K.B. 623

2) A.P. 805/1958 NomV 1959, 433 ; Pol.Prot.Thes.1564/1982 ArNom 1983, 696

3) Uniform Customs, see page 8

payment, or to accept and pay such bills of exchange or to negotiate. The issuing bank's undertaking is usually conditional on presentation of stipulated documents showing that the goods described in the credit have been despatched by the beneficiary.

2) History

In their earliest form letters of credit were used by rulers such as Popes, Kings and Princes or other rich people, who sent their servants abroad to buy or sell commodities on their behalf. These servants were furnished with a letter directed to another ruler or merchant requiring him to forward a certain quantity of goods and promising the reimbursement of their value. During the eighteenth century, when the business of banking began to thrive with a build up of foreign agents, banks furnished their customers with a letter of credit, which authorised them to draw bills of exchange on the issuing bank up to a certain amount and the bank undertook to accept these bills when presented by any person who had the right to do so according to the letter of credit. The purchaser either sent the unaccepted bill of exchange and the letter of credit to the exporter who brought it to the issuing bank for acceptance or obtained the bank's acceptance first and then sent the accepted bill of exchange to the exporter⁴⁾.

4) Pillans v. Van Mierop (1765) 3 Burr 1663 and Mason v. Hunt (1778) 7 T.R.350

For a certain period of time, in the middle years of the nineteenth century, beside the commercial letter of credit another form of it, the personal letter of credit, was used. This personal letter of credit was issued by a bank which authorised its bearer to draw bills of exchange on the issuing bank up to a certain amount and contained the bank's obligation to pay the amount of those bills to any bank, provided it was one of those listed in the letter of indication which accompanied the letter of credit, if such a bank discounted the traveller's bills. The traveller could also be authorised to draw on any of the listed banks up to a certain amount and in this case the issuing bank undertook to pay the amount of such drafts to the bank which discounted them. Nowadays this form of credit is out of use as it has been superseded by traveller's cheques. As mentioned above, the commercial letter of credit, in its earlier form, was issued by a bank or other person to the purchaser of the goods and contained the issuer's undertaking to accept bills of exchange when presented by the person in whose favour the bills were drawn⁵⁾.

In the last quarter of the nineteenth century the form of the letter of credit changed remarkably. The bank which issued the letter of credit was to make payment to a third person, who was the buyer's creditor (the beneficiary) and not to its

5) a) Re Agra and Masterman's Bank (1867) 2 Ch.App.391

b) Banner v. Johnston (1871) 5 H.L.Cas. 157

customer (buyer). Thus, the creditor stopped being a non participant in the issue of the letter of credit and the debtor appeared to be a trustworthy person who had deposited his funds in the certain bank or obtained its agreement to accept bills drawn by his creditors. At this time the contracting parties used the negotiation credit, a form of letter of credit by which the bank undertook to purchase bills of exchange drawn by the creditor on the debtor. This form has been superseded in the U.K. by another kind of letter of credit, the acceptance credit, by which an authority is given to the creditor to draw bills on the issuing bank, which it undertakes to accept and pay.

After the First World War actions involving letters of credit have increased enormously. The lack of stability of exchange rates and of the convertibility of currencies, which arose in 1918, when most central and eastern European countries abandoned the gold standard, was solved by the use of the confirmed letter of credit, as exporters insisted that credits issued by foreign banks should be confirmed or guaranteed by banks in their own country. This, as well as other developments of the letter of credit, has merely elaborated the form described above and attached further obligations to it without changing its basic character.

In Greece commercial letters of credit have a shorter history compared to that of England. The reason is that the whole country was occupied by the Turks from 1453 to 1821. After 1821 various parts of Greece became independent

and at the same time trade began to thrive. The first Greek Bank, the National Bank of Greece, was established in 1841 and soon after that transactions similar to banker's commercial credits, though not under any name, began to appear. At this time the form of the letters of credit in Greece was similar to that of England. A merchant who wished to buy goods from abroad had to ask a bank, usually a bank in his own country, to open a credit for him. This credit authorised the seller to send the shipping documents to the bank and be paid at once or to have his bill of exchange accepted by it. The bank, which did not usually know the destination of the credit and which only sometimes informed the vendor about the opening of the credit was under no obligation to the vendor.

As this form of credit did not solve the existing problems and the seller ran the risk of having to face a bank which, obeying its customer's orders, might refuse to pay him, another form of commercial credit was used. From the beginning of the twentieth century, banks in Greece issued letters of credit by which they were obliged to make payment to the buyer's creditor and not to the buyer⁶⁾.

In 1923 the law governing commercial letters of credit was enacted. Articles 25-34 of the statute of 17.7/13.8.1923⁷⁾ which refer to them deal with various matters concerning them. These articles are still in force today but they have been proved to be insufficient for modern trade.

6) Ef.A.92/1919 Th 1919-20, 418; Prot.P.1078/1921 Th 1922-23.
239

7) This statute contains some specific provisions about limited companies and is part of the Greek Commercial Code.

3) Uniform Customs

For many years, commercial letters of credit have been used by most of the developed countries of the world, following almost the same main rules and practices. Nevertheless, some discrepancies between their respective rules and practices have diminished the effectiveness of credits and have an adverse financial impact on the parties to letters of credit. In 1933 in Vienna the International Chamber of Commerce (ICC)⁸⁾ in its 7th congress therefore formulated a statement of Uniform Customs and Practice for Commercial Documentary Credits, which embodied the internationally accepted rules and practices at that date. The 13th Congress of the ICC in Lisbon in 1951 revised the statement of Uniform Customs and Practices of 1933 and the Bankers Associations of over 100 countries, many of which had already subscribed to the 1933 statement, subscribed to the revised statement

8) The International Chamber of Commerce was established in 1920 and has its headquarters in Paris. Its functions are to represent the world business community at national and international levels, to promote world trade and investment based on free and fair competition, to harmonise trade practices and formulate terminology and guidelines for importers and exporters and to provide a growing range of practical services to business. 123 countries are members of the ICC, which has National Committees or Councils in some 60 countries (Uniform Customs, ICC Publication No 500).

afterwards. Among the original subscribers was the Greek Bankers Association ⁹⁾. The United Kingdom and Commonwealth Banks accepted the Uniform Customs when the second revision of 1962 was completed.

The rules have since been revised, in 1974, 1983 and 1993. The 1993 revised version came into effect on 1st January 1994 and is the version currently in force; it is contained in ICC Brochure No 500 entitled 'Uniform Customs and Practice for Documentary Credits (1993 Revision)'.

Nowadays these rules are observed by banks in almost every country in the world, and, in the standard forms of application which they use for the opening of credits and in letters of credit issued by them, the applications and the letters of credit issued by the banks in consequence are usually stated to be subject to the Uniform Customs and Practice 1993 Revision ('The UCP').

As far as the legal basis of the Uniform Customs is concerned, various opinions have been expressed, such as that the Uniform Customs are customary law, commercial usages, rules "sui generis" or a body of general rules of behaviour governing transactions involving the issue of letters of credit under commercial transactions¹⁰⁾, and this is now the prevailing theory in many European countries. It is obvious that they

9) The Greek Bankers Association was established in 1928

10) Ef.A. 2396/1989 EEN 1989. 934;

Ef.A. 9188/1984 EEmpD 1986. 470

are not law¹¹⁾ because they were not enacted by an authority with legislative power. They are binding on all parties who have adopted them, that is, if there is an express reference in the applications and in the contracts which are signed by the banks and the applicants. Similarly, according to the first article of the 1993 revised version, "the Uniform Customs and Practice for Documentary Credits shall apply to all Documentary Credits (including, to the extent to which they may be applicable, Standby Letter(s) of Credit) where they are incorporated into the text of the credit. They are then binding on all parties thereto as a matter of contract, unless otherwise expressly stipulated in the Credit."

In *Forestal Mimosa v. Oriental Credit* ¹²⁾ there was a marginal insertion which read: " Except so far as otherwise expressly stated, this documentary credit is subject to Uniform Customs and Practice for Documentary Credits....." This note was held by the Court of Appeal to be sufficient to embody the Uniform Customs into the contract between the parties.

11) *The Galatia* (1979) 2 Lloyd's Rep 450, 455

Intraworld Industries Inc. v. Girard Trust Bank 461 Pa.

343. 2d 376 17 W.C.C. Rep 191

Ef. Thes. 2541/1983 Arm 1985 . 514

Prot.P. 3038/1959 EEmpD 1959. 405

12) (1986) 1 W.L.R. 631

On the other hand ,it has been universally accepted that the Uniform Customs express, at least in part, international commercial customs. In that case, if they do not conflict with the rules of the national law of the country, they are applied as part of a contract involving the issue of a letter of credit even if the parties are unaware of the contents of the Uniform Customs.

4) A) Revocable and Irrevocable Credits; Unconfirmed and Confirmed Credits

Revocable Credits

The distinction between revocable and irrevocable credits was made by the Uniform Customs in the first edition (1933) and in all later revisions.

In their last revision 1993 the UCP make provision of these two types as follows:

Article 6

A. A credit may be either

I. revocable

or

II. irrevocable

B. The Credit therefore, should clearly indicate whether it is revocable or irrevocable

C. In the absence of such indication the Credit shall be deemed to be irrevocable

Article 6 introduces a very important element as regards

commercial letters of credit by stating that if the credit does not indicate whether it is revocable or irrevocable, it is deemed to be irrevocable, while the corresponding article of UCP Nr. 400 (Revision 1974) provided that" in the absence of such indication the credit shall be deemed to be revocable". So the new article has brought an end to the disputes and the contradictory opinions as to whether or not the bank has an obligation to give notice of its intention to cancel the credit when it is not stated to be revocable or irrevocable.

In contradiction with what has been provided by the UCP until very recently and with what has been internationally accepted, Greek Law has regulated the matter in a way which has not been susceptible to litigation. According to art. 28 par. 1 of the Greek Statute of 17.7/13.8.1923 a letter of credit is always irrevocable unless it is clearly stated that it is revocable.

Article 8A of the Uniform Customs states:

' A revocable credit may be amended or cancelled by the issuing bank at any time and without prior notice to the beneficiary.'

As stated in art.8 a revocable credit is one which can be revoked at any time before the issuing bank has accepted the drafts drawn under it, that is, the bank may cancel it whenever it wishes to do so, and is under no legal obligation to give notice to the beneficiary or to anyone else. This was upheld in the Cape Asbestos Co. Ltd. v. Lloyd's Bank Ltd.¹³⁾ with the

13) (1921) W.N.274; see also Giddens v. Anglo-African Produce Co. (1923) 14 Ll.L.Rep. 230

addition that if the bank did give notice of cancellation to the beneficiary, it was as a matter of courtesy and not obligation.

So the exporter may have manufactured or supplied the goods and even shipped them without knowing that the issuing bank has already cancelled the credit. The fact that the practice of banks is to give notice of their intention to terminate the credit does not protect the beneficiary against the buyer's instructing the bank to revoke the credit and its doing so¹⁴⁾.

A.G. Davis considers that "the term revocable credit is self-contradictory. The word "credit" implies confidence, and such is the nature of a revocable credit that for the beneficiary to place his confidence in it unreservedly is to court trouble"¹⁵⁾. It is obvious that such a credit gives no protection to a vendor and is a very unsatisfactory method of finance. Therefore it has been largely superseded by the irrevocable credit.

Irrevocable Credits

Article 9 of the U C P provides:

14) In the case, *Urquhart Lindsay & Co v. Eastern Bank Ltd.* (1922) 1 K.B.318, Rowlatt J. expressed the opinion obiter that a bank may cancel a revocable credit only by notifying its intention to the beneficiary before he has shipped goods under it.

15) See Davis A.G. *The Law Relating to Bankers' Commercial Letters of Credit*, 1963 p. 33

" An irrevocable credit constitutes a definite undertaking of the issuing bank, provided that the stipulated documents are presented to the Nominated Bank or to the Issuing Bank and that the terms and conditions of the Credit are complied with....."

The meaning of this article is that an irrevocable credit cannot be cancelled or amended by the issuing bank without the consent of the beneficiary, even if the bank's customer (the buyer) requires the bank to do so¹⁶⁾. The bank which is bound by the undertaking of the credit has either to pay against the presentation of the documents required by the letter of credit or to honour all bills drawn in compliance with the terms of the credit. The credit cannot be cancelled before the expiration date stated in the letter of credit. So a beneficiary (seller) who has received an irrevocable letter of credit can with safety proceed with the performance of his obligations under the underlying contract of sale knowing that he will be paid if he complies with the terms of the letter of credit. Besides, the buyer has the advantage that the whole transaction will be concluded by the issuing bank, and he can be sure that in the case of a contract of sale the goods will be shipped and the bill of lading will be presented in accordance with the underlying contract.

Unconfirmed and Confirmed Credits

When a letter of credit is issued by a bank in the buyer's

16) The cases Ef.A. 11141/1979 NomV 1980.1518 and Pol.Prot.A. 8668/1990 Arm 1991.465 refer to irrevocable letters of credit

country the seller (exporter) usually insists that a second bank (intermediary bank) in his own country intervenes in the transaction. In this case, the second bank may be asked by the issuing bank, (which acts on its customer's instructions) either to advise the beneficiary of the credit, or to advise the beneficiary and confirm the credit.

If the intermediary bank is employed merely to advise the beneficiary of the credit, the issued credit is called an 'irrevocable unconfirmed credit', and there is no commitment on the second bank's part to honour the credit. If the intermediary bank agrees to advise the beneficiary of and confirm the credit, then it has also to undertake the obligation to pay the amount of the credit or to accept or negotiate bills drawn under it, and the credit is called an 'irrevocable confirmed credit'¹⁷⁾.

Both in England¹⁸⁾ and in Greece¹⁹⁾ the terms 'irrevocable' and 'confirmed' were at one time taken as synonymous, but the confusion of the two different terms has long been cleared up. The effect of a confirmed credit is provided in art. 9B stating

17) The term 'confirmed credit' is explained in *Panoutsos v. Raymond Hadley Corporation of New York* (1917) 2 K.B. 473, and in *The Annie Johnson* (1918) P.154

18) *M A Sassoon & Sons Ltd v. International Banking Corp'n* (1927) AC 711 at 727, PC

19) *Ilias Anastasiadis, The Greek Commercial Law, 1st Vol., 4th edit. 1937*

that:

' A confirmation of an Irrevocable Credit by another bank (the Confirming Bank) upon the authorisation or request of the Issuing Bank constitutes a definite undertaking of the Confirming Bank, in addition to that of the Issuing Bank, provided that the stipulated documents are presented to the Confirming Bank or to any other Nominated Bank and that the terms and conditions of the credit are complied with.....'

As mentioned above, only an irrevocable credit can be confirmed, because an Intermediary Bank would never bind itself if the issuing bank could revoke the credit any time and terminate the Confirming Bank's right to an indemnity.

B) Legal Basis

Under a letter of credit there arise at least two relationships: a) The relationship between the buyer and the issuing bank and b) The relationship between the issuing bank and the seller (the beneficiary). Moreover, when the underlying contract between the buyer and the seller provides for payment by an intermediary bank, there arise two more relationships c) the relationship between the issuing bank and the intermediary bank and d) the relationship between the intermediary bank and the seller.

According to English Law the legal nature of the relationship between the buyer and the banker is undoubtedly based on the principles of contract law. However, when the relationship between the seller and the banker is considered, there arises legal uncertainty about its nature. By issuing the letter of credit the bank makes a unilateral promise to the beneficiary²⁰⁾ to pay or accept bills of exchange drawn by him under the credit while the beneficiary has not to do or to abstain from anything, that is, he does not give consideration in return. So, the basic rule of English Law that a contract must contain mutual promises or obligations in order to be enforceable, is not fulfilled. In this relationship the beneficiary's promise

20) In *Morgan and Gooch v. Lariviere* (1875) L.R. 7 H.L. 423 the House of Lords held that the beneficiary, whose bills of exchange had not been honoured by the bank, had no claim in contract against it.

to the buyer to deliver the goods is no consideration because he is under no obligation to the bank and the bank could not sue him if he fails to deliver the goods or if the goods are not of the quality or quantity agreed. Common Law requires consideration to be given by the promisee either to the promisor or to another person, in order to make the promisor's promise enforceable ²¹⁾, but in order for the contract to be enforceable the promise or act which constitutes consideration must be a 'fresh' one. So, the seller's promise to the buyer to deliver the goods cannot be considered as consideration when later the bank issues the letter of credit, because the sales contract is already made and consideration is past.

English Courts have not clearly decided whether there is consideration in the relationship between the banker and the seller though in all cases it appears so. In *Urquhart Lindsay & Co. Ltd. v. Eastern Bank Ltd.* ²²⁾ it was held that a contract arises between the issuing bank and the beneficiary when the beneficiary ships the goods. In *Dexters Ltd. v. Schenker & Co* ²³⁾ Greer, J. decided that there was full and ample consideration and that the observations of Rowlatt, J. in *Urquhart Lindsay v. Eastern Bank Ltd.* ²²⁾ were in this case applied. In *Scott v. Barclays Bank* ²⁴⁾ Scrutton L.J. held that:

21) *Dunlop v. Selfridge & Co.* (1915) A.C. 847

22) (1922) 1 K.B. 318

23) (1923) 14 Ll.L.Rep. 586, 588

24) (1923) 2 K.B. 1

" The appellants gave a confirmed credit to the respondents; that is to say they entered into contractual relations with them from which they could not withdraw except with the consent of the other party....'

In later cases the courts went even further. So in *Midland Bank v. Seymour*²⁵⁾ and *Elder Dempster Lines Ltd.v. Ionic Shipping Agency Inc.*²⁶⁾ it was held that an irrevocable credit is a binding contract between the beneficiary and the issuing bank, if the beneficiary has informed the issuing bank that he accepts its offer to honour his drafts. In *Hamzeh Malas & Sons v. British Imex Industries Ltd.*²⁷⁾ the Court of Appeal held that the opening of a confirmed letter of credit constitutes a bargain between the banker and the vendor of goods, which imposes upon the banker an absolute obligation to pay.

Legal theory in Greece has also accepted that under a letter of credit there arise the abovementioned²⁸⁾ relationships and that each relationship is a separate contract. The letter of credit is one more contract, a fact which has never been doubted in legal theory and Case Law because, according to Greek Law, in order for a contract to be concluded consideration is not necessary.

However the legal basis of the letter of credit has been a matter of great disagreement among legal writers.

25) (1955) 2 Lloyd's Rep. 147

26) (1968) 1 Lloyd's Rep. 529

27) (1958) 2 Q.B. 127; (1957) 2 Lloyd's rep. 549

28) see page 17

Furthermore the commercial character of letters of credit has been a matter for discussion in Greek Theory. According to art. 25 par.4 of the statute of the 17.7/13.8.1923 'the contract of the letter of credit ²⁹⁾ is an 'objectively'³⁰⁾ commercial act for both parties .As far as the bank is concerned the transaction is not only an 'objectively'commercial act but also a 'subjectively' commercial act³¹⁾, because banks are ex lege limited companies³²⁾and as limited companies they are ex lege merchants³³⁾. As far as the other parties are concerned, there exists uncertainty because the law speaks about the commercial character of the contract for both parties, while a letter of credit is according to the prevailing opinion a

29) The exact translation in Greek is 'security credit', a term which has been rejected by most legal writers because it does not express the exact meaning and the exact operation of the institution .

30) 'Objectively' commercial actions are the actions covered in art. 2 of the statute of the 2 (14) May 1835 about the Competence of the Commercial Courts

31) According to the Greek Legal Theory an act is said to be 'subjectively commercial' when it is done by a merchant and is connected with his business.

32) Art.11 par. 1 of the statute 5076/30-6/7-7-31 about Limited Companies and Banks

33) Art.1 of the statute 2190/1920 about Limited Companies

relationship between three parties, i.e. between the buyer, the issuing bank and the beneficiary(seller). So, many legal writers say that the letter of credit is a commercial act for all these parties, that is, not only for the bank but also for the buyer and for the seller.

a) English Theories

English legal writers have suggested various theories in order to interpret the legal basis of the letter of credit and to establish a binding relationship between the issuing bank and the beneficiary.

The Offer and Acceptance Theory

The Offer and Acceptance Theory is one of the main theories which have been put forward to account for the relationship between the issuing bank and the beneficiary. Its basis is that the issue of the letter of credit by the banker to the seller is an offer which the seller may accept. When the acceptance takes place is a matter of controversy.

Gutteridge and Megrah suggest that acceptance is constituted by the act of the beneficiary in tendering the documents and a draft to the issuing bank. However, they continue, if the credit is irrevocable there must be an intervening space of time (i.e. until the documents are tendered) during which the banker can withdraw the offer and cancel the credit, thus

defeating the very object for which it was issued³⁴⁾.

On the other hand, according to other writers, acceptance may take place earlier. Davis³⁵⁾ says that the acceptance takes place at some time anterior to the tender of the documents, at the latest when goods are shipped. Also in *Urquhart Lindsay & Co. Ltd. v. Eastern Bank Ltd.*³⁶⁾, Rowlatt J. says: 'There can be no doubt that upon the plaintiffs' acting upon the undertaking contained in this letter of credit consideration moved from the plaintiffs, which bound the defendants to the irrevocable character of the arrangement between the defendants and the plaintiffs'. Davis³⁷⁾, who tries to interpret this judgement, believes that Rowlatt, J. suggested that the contract was concluded by the plaintiffs "acting upon the undertaking" and that their acting was a sufficient acceptance of the defendants' offer. Under "acting upon the undertaking" Davis believes that the judge means the commencement of manufacture.

The Guarantee Theory

The Guarantee Theory, which has been put forward in the United States, suggests that bankers' commercial credits are in fact contracts by which the issuing bank guarantees the payment of the price of the goods payable under the contract between the

34) Gutteridge p.31

35) p. 73

36) (1922) 1 K.B. 318

37) p. 74

seller and the buyer.

However this theory cannot stand up to criticism because

1) The Guarantee Theory supposes that the buyer defaults in payment, that is, the bank's liability is not primary but secondary, while in a commercial letter of credit the bank has to pay the due sum independently of whether the buyer is in default or not.

2) If it is accepted that commercial letters of credit are ruled by the law relating to guarantees, amendments of the original sales contract would not be possible even if both the seller and the buyer agreed to this.

3) According to section 4 of the Statute of Frauds a guarantee has to be evidenced by a note or memorandum in writing, identifying the principal debtor and the debt he owes, a provision which does not apply to the letters of credit.

4) The issuing bank would be able to revoke the letter of credit at any time before its acceptance by the seller.

The Estoppel or Trustee Theory

According to the Estoppel or Trustee Theory, when a bank issues an irrevocable letter of credit, it represents that it has received from the buyer an amount equal to the price and that it will use it to meet the seller's drafts. In consequence, the bank is estopped from denying that it holds the money on behalf of the seller.

This theory is based on the following principle, which has been stated in *Pickard v. Sears*³⁸⁾:

' Where one by his words or conduct wilfully causes another to believe the existence of a certain state of things and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time'.

However in *Morgan v. Lariviere* ³⁹⁾ the House of Lords has rejected this theory by holding that:

'.....a statement by bankers to a tradesman who supplies goods to a customer of the bankers that they, the bankers, on behalf of their customer, will act as paymasters to the tradesman up to a certain sum of money.....In a transaction of that kind there is nothing of equitable assignment, there is nothing on trust; and it appears to me that any banker who had given an undertaking of that kind would be very much surprised to find that it was held that a certain portion of the funds of his customer in his hands had been impressed with a trust, had been equitably assigned, and had, in fact, ceased to be the moneys of the customer.....'

The estoppel or trustee theory has little support in practice because the buyer rarely places his bank in funds on the establishment of a credit as this would be contrary to the basis of letters of credit. But even if the buyer does not deposit these moneys, in order for them to be impressed with a trust, the bank must communicate to the creditor the fact that it holds such moneys and the letter of credit must be issued by

38) (1837) 6 A. and E. 469

39) (1875) L.R. 7 H.L. Cas. 423

the bank and accepted by the seller⁴⁰⁾.

The Assignment and Novation Theories

The Assignment Theory suggests that in a letter of credit the contract which is entered into between the buyer and the bank is simultaneously assigned by the buyer to the seller with notice to the banker. This theory has support in some earlier cases. In *Hindley & Co. v. Tothill, Watson & Co* ⁴¹⁾ it was held that:

'The proposals contained in these letters are obviously made with the express intention of placing the company and the plaintiffs in direct relations and giving each reciprocal rights, and getting rid of the defendants as intervening parties.'

Besides in *Re Agra and Masterman's Bank Ex Parte Asiatic Banking Corporation*⁴²⁾ Cairns L.J. said:

'But assuming the contract to have been at law a contract with Dickson, Tatham & Co and with no other, it is clear that the contract was in equity assignable, and that Dickson, Tatham & Co must be taken to have assigned (if assignment were needed) to the Asiatic Banking Corporation, and to have been by the writers of the letter intended to assign to them, the engagement in the letter providing for the acceptance of the bills'.

40) *Walker v. Rostron* (1842), 9 M & W 411; *Griffin v. Weatherby and Henshaw* (1868) L.R. 3 Q.B. 735

41) (1894) 13 N.Z.L.R. 13

42) (1867) L.R. 2 Ch.App.391

Here it must be mentioned that these cases refer to letters of credit delivered to the buyer, and that in a modern letter of credit, which is always sent directly to the seller, the assignment theory would not easily find support.

According to the novation theory, when the credit is issued, there is novation, that is, the buyer with the consent of the seller drops out of the transaction and the contract becomes one between the bank and the beneficiary. This theory has been rejected because it provides the release of the buyer from the obligation to pay the seller, if the bank does not do so, and the loss of his right to insist on performance of the underlying contract by the seller, facts which do not seem to be in conformity with the parties' intentions.

Both the assignment and the novation theory have been advanced by the American author McCurdy⁴³⁾.

Buyer as the Seller's Agent

According to Professor Gutteridge, who suggested this theory,

'If a contract of sale is entered into in these circumstances, there does not seem to be any reason why it should not be held that the buyer has the implied authority of the seller to arrange for payment of the price to be made in the manner stipulated for. Therefore the buyer may be deemed to act as the seller's agent for this purpose, and there comes into existence a contract ancillary to the contract of sale by which the bank promises to pay the seller when the seller places him in possession of the documents specified in the credit'.

43) "Commercial Letters of Credit" (1921-22) Harvard Law Review 583

Davis ⁴⁴⁾ suggests that 'this theory does not obviate, but rather encourages, resort (on the part of the buyer) to chicanery. If the buyer is the seller's agent, then the seller is liable for all torts committed by his agent, the buyer, in the ordinary course of his employment.....'

b) Greek Theories

Greek legal writers, in their effort to define the legal basis of the letter of credit, have tried to bring it within one of the terms included in the Greek Civil Code or even in the Greek Commercial Code.

The Delegation Theory

The prevailing view in Greek legal theory is that the letter of credit is a delegation. The meaning of the term delegation is provided and analysed in articles 876 to 887 of the Greek Civil Code (G.C.C.). Art. 876 G.C.C. states that "In a delegation an instrument is handed to the beneficiary (assignee) whereby the latter is authorised to collect in his own name from a specified debtor a payment in money or other fungible things and the specified debtor is authorised to effect payment to the assignee for the account of the assignor". According to the

44) "The Law Relating to Bankers' Commercial Letters of Credit" third edition, p. 72

supporters of this theory all the elements of delegation exist in the letter of credit, because the buyer delegates the issuing bank (assigned debtor) to pay the price owed to the seller (beneficiary, assignee) after the latter has tendered certain specified documents. Besides, the bank's obligation to pay (the same as the obligation of the specified debtor) is independent both of the relationship between the buyer and the bank and of the relationship between the buyer and the seller. Greek Courts, by a majority, have also accepted that the contract of the letter of credit resembles delegation.

The Supreme Court (Arios Pagos) in its 81/1957 decision⁴⁵⁾ held that '.....a contract of a letter of credit was concluded.....in this contract the relationships between the issuing bank and the buyer or the person to whom the credit has been transferred are ruled , as there is no specific legislative regulation, by the provisions governing delegation, which are analogously applied, because of the great resemblance between these two legal relationships....'

However this theory has been rejected by some legal writers who maintain that in the letter of credit the buyer (assignor) neither disposes anything from his property nor authorizes the seller to collect payment. Moreover, even if the buyer does pay the amount of the credit to the bank in advance, the seller cannot get the money if he does not present the shipping documents to the bank, whereas, in delegation the

45) A.P. 81/1957 EEmpD 1957. 139; see also Ef.A. 9188/1984 EEmpD 1986. 934 ;Ef.P.186/1978 EEmpD 1979. 233; Pol.Prot.A. 2593/1981 EEmpD 1983. 232; Pol. Prot.Ver. 453/1980 EEmpD 1981.229 and Prot.Thes. 1726/1968 EEmpD 1968. 207

beneficiary's right to collect payment cannot depend on a resolutive condition.⁴⁶⁾

The Theory of Stipulation for the Benefit of a Third Party

Another theory which has been advanced to explain the nature of the letter of credit is the theory of the stipulation for the benefit of a third party⁴⁷⁾. Its basis are the articles 410 to 415 of the Greek Civil Code, which govern this type of contract. According to art.410 G.C.C.: 'If a person has accepted a promise of performance in favour of a third party such a person may demand that the promisor pay to the third party'. Moreover art. 411 G.C.C. states that: 'The third party may demand the performance directly from the promisor if it appears that such was the intention of the contracting parties or if such conclusion results from the nature and the purpose of the contract'.

So the theory of stipulation for the benefit of a third party explains with exactness, first, the direct relationship which exists between the seller and the issuing bank, and secondly the fact that the credit is considered to be irrevocable after it has been issued and the bank has notified the seller of the opening of the credit. Besides, it upholds the seller's right to demand payment by the buyer.

This theory has been criticized on the ground that in

⁴⁶⁾ Pan. Perdikas: 'Commercial Law' 1969, p.202

⁴⁷⁾ Katsabis G.: 'The performance of the letter of credit',
EEmpD 1953, p. 6

stipulation for the benefit of a third party the validity of the contract influences the third party's rights, while in the letter of credit the banker is liable to the seller independently of his contract with the buyer⁴⁸⁾.

The Mandate Theory

This theory is based on the view that the letter of credit is a contract of mandate⁴⁹⁾, a term regulated by the articles 713 to 729 of the Greek Civil Code.

Art. 713 G.C.C.' Notion. By a contract of mandate the mandatory (agent) undertakes to conduct without remuneration the affairs entrusted to him by the mandator (principal) '.

It is clear that the letter of credit resembles the mandate because a) the mandatory (bank) is obliged to follow the instructions of its mandator (buyer) (art. 717 G.C.C.), b) the mandatory (bank) is responsible for any fault (art. 714 G.C.C.) and c) the mandatory (bank) is bound to render an account to the mandator (buyer) (art. 718 G.C.C.).

Nevertheless, this theory has not been broadly accepted⁵⁰⁾ because there are some important differences between the contract arising under a letter of credit and the contract

48) Masouridis Nik.: The irrevocable letter of credit, Dikeosini 1927, p. 114; and Simitis G.: The bank's letter of credit made secure by goods, 1933, p. 76

49) Ef.A. 477/1928 Them 1928.630

50) Simitis p.76

of mandate , such as that a) the bank is directly liable to the beneficiary-seller while in the mandate the mandatory is not obliged to do anything for the benefit of a third party and b)the letter of credit is usually irrevocable, while according to art.724 G.C.C. 'A mandator shall be entitled to revoke the mandate at any time. An agreement to the contrary shall be void except if the mandate also concerns the interest of the mandatory or of a third party'.

The Guarantee Theory

The supporters of the Guarantee Theory maintain that in a letter of credit the bank is the guarantor in regard to the buyer and that this relationship is a contract of guarantee ruled by the articles 847 to 870 of the Greek Civil Code.

The notion of the term guarantee, as provided in art. 847 G.C.C., is that:'By a contract of guarantee the guarantor assumes in regard to a creditor the responsibility for the payment of a debt'. Besides, art. 850 G.C.C. states that:'A guarantee presupposes a valid principal debt.....'

As shown in the abovementioned articles the guarantee theory has correctly been rejected by most legal writers and by the Courts in Greece, because in a letter of credit the bank is accountable to the seller(beneficiary) independently of the validity of the underlying contract of sale. Besides, in the contract of guarantee ' A guarantor may raise as against the creditor pleas in defence that are not personal to the principal debtor, even if the latter has desisted from such

pleas subsequently to the issue of the guarantee' (art.853 G.C.C.). In the letter of credit such pleas raised by the bank are inadmissible , because the bank's obligation is independent of the relationship between the buyer and the seller⁵¹).

The Order Theory

It has been suggested that the commercial letter of credit is in fact an order by which the mandatory (bank) acts in its own name for the account of a third party (the buyer). Thus, the bank becomes liable to this obligation and becomes also a principal debtor.

This view has been put forward by Vallindas⁵²) and is based on articles 90 to 101 of the Greek Commercial Code (G.Com.C.), which refer to commission agents. Indeed, the letter of credit seems to resemble the order, as provided in the G.Com.C., because according to art. 90 of the G.Com.C. 'A commission agent is a person who acts in his own name or in the name of a company for the account of the person who has given the order'. Nevertheless, this theory has not found favour because the bank is not a commission agent in connection with a purchase or a sale , as the contract of buying and selling, to which the

51) Tragakis G.: Greek Banking Legislation and Practice, p.887, Masouridis: p.114, Krimpas: The Guarantee in Banking Transactions , p.164, Perdikas: p.201

52) Ef.Ell.Nom.1934, p.668; see also A.P. 217/1924, Themis 1925-26 p.113

bank is not a party, has already been concluded between the buyer and the seller⁵³⁾.

Other Theories

Other theories, which have been suggested but cannot stand scrutiny, are the Assignment Theory (based on articles 455 to 470 G.C.C.), The Contract of Work Theory (based on articles 681 to 702 G.C.C.), The Loan Theory (based on the articles 806 to 809), The Taking over of Liability for Debt Theory (based on articles 471 to 479 G.C.C.) and the Law of the Bills of Exchange Theory (based on Statute 5325 of the 9/16-3-1932 about The Bill of Exchange).

On the other hand some legal writers maintain that the contract of the letter of credit is a singular contract⁵⁴⁾ and that it is an error to try to assimilate it with any other legal relationship.

53) Diovousiotis G. : About the commercial letter of credit, Themis KZ. 476

54) Simitis: p. 78, Krimpas: p. 164

SECOND PART

Types of Letters of Credit

Commercial letters of credit have been used in various countries for many decades, and in some countries, such as the United Kingdom, for two or three centuries. The fact that the Uniform Customs and Practice for Documentary Credits lays down certain terms for letters of credit that have been universally accepted has not, of course, led to a uniform nomenclature.

Each country, applying its national law and adapting the letter of credit to the developing practice of its own trade, has developed, to some extent, its own terminology based on its own system of contract law. Furthermore, terms are used which do not necessarily mean the same thing to all banks, even within the same country. The parties concerned should therefore read the credit as a whole, in connection with the whole text, in order to find the exact meaning of each term.

The most important division of letters of credit, also recognized by the Uniform Customs, is into revocable and irrevocable credits. Credits may be classified as import, export or transit credits according to whether they are intended to finance imports into a country, exports from a country or the movement of goods through a country. They may also be classified as letters of credit of 30 or 60 or 90 days maturity, according to the time at which the beneficiary will be paid by the issuing bank. There may also be a distinction between letters of credit according to the currency in which

the beneficiary will be paid. Many distinctions of this kind may be made. In the following account we shall examine those types of credit which are used most or which are of interest because of their peculiarity.

1) General and special credits

A general or open letter of credit embodies an offer of the issuing bank to any bank or other person and requests that advances be made to its (the issuing bank's) customer by anyone who will accept or negotiate bills of exchange drawn by the customer. Re *Agra and Masterman's Bank ex p. Asiatic Banking Corporation*⁵⁵⁾ was a decision about a credit of this type. A special letter of credit is addressed to some specified person and only that person can acquire rights under it , and practically all letters of credit nowadays are of this kind.

2) Clean (or open) and documentary credits

In a clean or open letter of credit the issuing bank undertakes to accept or negotiate drafts drawn by the beneficiary , unconditionally , without a requirement that any shipping or other documents should be presented. This type of credit is rarely used, because, as the beneficiary does not have to fulfil any conditions, a bank issuing such a letter of credit

55) (1867) L.R. 2 Ch. App 391

would be without the security given by the possession of shipping documents. A bank usually agrees to issue a clean (or open) letter of credit when the customer has lodged sufficient security to indemnify the bank against liability under bills which it accepts under that particular credit. On the other hand, the buyer may agree to open such letters of credit when he has had dealings with the seller for a long time and is certain about his reliability.

In a documentary letter of credit the issuing bank undertakes to honour bills drawn under the credit by the beneficiary only if they are accompanied by certain specified documents, usually bills of lading or other transportation documents. In this way the bank has the security that any payments which it makes will be reimbursed by its customer. The meaning of the term "documentary credit" has been an interesting subject for discussion and argument among experts. In *Mann, Taylor & Co. Ltd. v. Royal Bank of Canada* ⁵⁶), a dispute between banker and customer, according to the plaintiffs' witnesses", a documentary credit has always to do with the movement of goods under a contract of purchase and sale, and means a facility granted by a bank for its foreign correspondent to negotiate drafts, drawn by a seller or exporter, on the purchaser, and accompanied by a full set of shipping documents" . However the court accepted the definition given by the defendants' witnesses which was that " in New York the documentary credit is the loan of money or

56) (1935) 40 Com. Cas. 267

the bank's credit to the borrower on the security of a document of title to goods. Any document of title will do, unless particular documents are prescribed in the arrangement for the granting of the credit."

3) Revolving credits

A revolving credit is one for an amount which remains constant for a fixed period of time and may be drawn upon by successive bills for not more than a specified total amount. This happens because, either automatically or after reimbursement of the issuing bank, the previous credit is available again up to its total amount. In *Nordskog v. National Bank*⁵⁷⁾ the revolving credit was defined as "a credit for a certain sum at any time outstanding, which is automatically renewed by putting on at the bottom what you have taken off at the top." In *Mitchell, Ltd. v. Ivan Pederson*⁵⁸⁾ there was no definition of the term though the dispute was related to a revolving credit.

4) Transferable credits

The beneficiary, who may be a manufacturer or just a middleman, in whose favour a credit has been opened by the issuing bank, may transfer the benefit of it to a third person,

57) (1922) 10 Ll.L.R. 652; see also *American National Bank v. Banco Nacional de Nicaragua* (1936) 166 So.8

58) (1929) 34 Ll.Rep. 310; see also *Banco Nacional de Credito v. Bank of America* (1954) 118 F. Supp. 308

who is very often the manufacturer or supplier of goods or of parts of the goods to be supplied, provided the letter of credit is stated to be transferable.⁵⁹⁾

According to Professor Pennington⁶⁰⁾ the term transferable is inept because " In reality the substitution of the designated person as the drawer of the bills under the credit is a novation, that is, the making of a new contract by which the original credit in favour of the beneficiary is discharged, and a new credit on the same terms is opened in its place in favour of the designated person...."

Art. 48 of the Uniform Customs makes provision for the transfer of letters of credit under which the beneficiary in the case of a freely negotiable credit may request the bank specifically authorised in the credit as a transferring bank to make a credit available in whole or part to one or more other beneficiary (ies) than the named or principal beneficiary.

The procedure is similar to that in a back-to-back credit, the main difference being that in a back-to-back credit the second credit is issued only on the security of the first one, while in a transferable credit the benefit of the original credit is simply transferred to a third person (e.g. an exporter).

59) Ian Stach Ltd. v. Baker Bosley Ltd (1958) 2 Q.B. 130 and The Lena (1981) 1 Lloyd's Rep. 68

60) See Pennington , Commercial Banking Law (Macdonald and Evans 1st ed) p.322

5) Back - to - back credits

A back-to-back credit⁶¹⁾ is a credit which arises where the bank, on the strength and security of a credit opened in favour of a beneficiary by another bank, agrees to open a credit for the benefit of another person, who is usually the supplier of goods or services to the beneficiary. This type of credit may be issued successively by several banks at the request of the beneficiary of the immediately preceding credit and this can be done as many times as is wished .So it can be used to finance a string of contracts for the sale of the same goods through several intermediaries.

It is necessary for the bank issuing the second or a later credit to ensure that the documents called for under it will satisfy the requirements of the first or preceding credit, except for the price, amount and time limits for presenting shipping documents etc. This makes it possible for this issuing bank to resort to the beneficiary of the first or the preceding credit, if its own customer fails to reimburse it for the amount payable under the credit which is issued.

6) Credits classified according to the method of payment

The Uniform Customs make provision for the following types of credit, classified according to the method of payment by the issuing bank .

Art.10 of the Uniform Customs states "All credits must clearly

61) See Ian Stach Ltd v. Baker Ltd (1958) 2 Q.b. 130

indicate whether they are available by sight payment, by deferred payment, by acceptance or by negotiation" and art.1 refers to the standby credit which is used as security for a loan.

a) Sight credits

In a sight credit the beneficiary is entitled to obtain payment immediately, either on presenting a sight draft accompanied by the requisite documents (e.g. bill of lading, insurance policy etc.) or, presenting these documents only.

b) Deferred payment credits

In a deferred payment credit the paying bank is called upon to pay the amount of the credit at a specified time after the beneficiary has presented the requisite documents to the issuing or confirming bank. The exact date of payment has to be mentioned in the letter of credit (e.g. available/payable 90, 120, 180 days after the issue of the bill of lading).

This type of credit appeared originally in the 1950s in connection with commercial transactions involving parties resident or carrying on business in the Middle and Far East either as a result of exchange control or as an effort at adaptation to peculiarities in the commerce of underdeveloped countries. Nowadays the deferred payment credit is broadly used by most countries of the world.⁶²⁾

62) See M.Th.Marinos: The deferred payment letter of credit, in the periodical of the Greek Bankers Association No A-B, 1988

c) Negotiation credits and acceptance credits

A negotiation credit is one which authorises the beneficiary to draw a bill of exchange on the issuing bank or on the buyer and to negotiate his draft with the intermediary bank, or alternatively to draw a bill on the buyer with the issuing bank undertaking to purchase (i.e. negotiate) the bill at its face value. If the conditions set out in the letter of credit are fulfilled the bank pays the face value, or, if it is a bank other than the issuing bank, the discounted value of the bills presented, and on payment the issuing bank debits the buyer's account.

Nowadays banks usually undertake to accept the bills of exchange, and send them back to the seller. In this case the credit is called an acceptance credit.

d) Standby credits

While the normal documentary credit is a method of facilitating payment, the standby letter of credit provides insurance and a guarantee to the beneficiary.⁶³⁾ It takes the form either of a traditional open letter of credit or of a performance bond or demand guarantee which is issued by a bank to the beneficiary and is contingent upon the failure of its customer (the borrower or other debtor of the beneficiary) to

63) See Edward Owen Engineering Ltd. v. Barclays Bank International (1978) 1 Lloyd's Rep.166 and Intraco Ltd v. Notis Shipping Corporation (1981) 2 Lloyd's Rep 256

perform under the terms of the underlying contract which he has entered into with the beneficiary.

The Uniform Customs and Practice for Documentary Credits apply according to art.1, 1993 to Standby Letters of Credit.

e) Anticipatory credits

An anticipatory credit⁶⁴⁾ authorises advances to be made to the seller against his drafts alone, before shipping documents are presented and even before shipment. These advances are made on the strength of a letter of credit issued by a bank to enable customers to buy the goods or raw materials or in order to pay packing or dock charges or freight. Some more specific forms of anticipatory credits are "red clauses" and "green clauses" or "packing credits".

Red clause credits, so called because they used to be printed in red in the letter of credit, authorise the confirming or negotiating bank to pay the beneficiary part of the amount of the credit in advance so that he can meet the cost of purchasing goods or raw materials. They are principally used in the Australian, New Zealand and South African wool trades, where the beneficiaries (wool shippers) require pre-shipment finance.

Green clause credits, so called because they used to be

64) See South African Reserve Bank v. Samuel & Co (1931) 40 Ll.l.Rep.291 and Oelbeyman v. National City Bank of New York (1935) 79 F (2d) 534

printed in green, were issued to cover advance drawings in respect of storage and shipping expenses. Nowadays there is no colour distinction, and these credits are usually called packing credits. By this provision in a letter of credit payment is usually made when the goods are in the possession of a third person, chosen by the buyer to perform the shipment of the goods.

THIRD PART

The Legal Relationships

1) The Relationships between the Buyer and the Seller

A. The Contract

The underlying contract between the buyer and the seller is usually a contract for sale of goods, but it may also be a contract of agency, a contract for the performance of certain services, or any other contract. Under this contract the buyer or principal or recipient of the services undertakes to make payment to the seller or agent or provider of services by means of a commercial letter of credit and the former (the debtor) is obliged to procure the opening of the credit and comply with the provided terms. Furthermore the debtor must make sure that the credit has been notified to the creditor (the beneficiary). Otherwise he is liable for breach of the underlying contract, even though the failure to procure the opening of the credit or to notify it to the seller may be attributable to persons over whom he has no control. In *Bunge Corp. v. Vegetable Vitamin Foods (Pte) Ltd.*⁶⁵⁾ the plaintiffs claimed that the defendants had not opened the confirmed letter of credit on the stipulated date, and therefore the contract of sale should be cancelled. The defendants contended that according to the contract it was enough for them to procure the issue of the credit, and that it was not necessary for the credit to be notified to the seller. Nevertheless, they added that the credit had been issued and

65) (1984) 134 New L.J. 125

notified within the time provided in the contract of sale. The Court gave judgement for the defendants on the ground that the credit had been duly opened, but rejected their first argument. Accordingly, Neill, J. said that there are three contracts involved in a letter of credit; the first between buyer or debtor and the issuing bank, the second between the issuing bank and the beneficiary, and the third between any confirming bank which undertakes that the issuing bank's obligations are fulfilled and the beneficiary. Only the first two of these contracts are needed for the opening of the letter of credit, but the third contract is also needed if a second bank is to incur obligations to the beneficiary.

Greek Courts and the majority of Greek legal authors state that the contract of sale embodies an implied condition, that is, the obligation to open the credit is considered as fulfilled only if the credit has been notified to the seller and the seller has accepted it⁶⁶⁾.

Notice must be given to the beneficiary by the issuing bank, and not by the buyer or any intermediary bank⁶⁷⁾. However some other legal writers maintain that only the court which examines the facts can decide whether there is a valid contract for a bank commercial credit or not ⁶⁸⁾.

After the letter of credit has been issued, it exists

66) A.P. 805/58 NomV 1959. 433 ; A.P. 116/65 EEmpD 1965. 462; Ef.P. 186/78 EEmpD 1979. 233; Ef.A. 7887/74 NomV 23.193; Ef.A. 540/26 Th (1927) . 230; Loukopoulos:Encyc.The Commercial Letter of Credit , par.IV

67) Simitis p.

68) Perdikas p. 203 par.193 footnote 15

independently of the underlying contract of sale or supply. In *Hamzeh Malas v. British Imex Industries Ltd.*⁶⁹⁾, it was held that the opening of a letter of credit imposes upon the issuing banker an absolute obligation to pay the amount of the credit, provided that the shipping documents presented by the beneficiary of the credit comply with the terms of the credit. That is to say, the securing bank cannot refuse payment or acceptance of the seller's draft merely because of a dispute arising between the seller and the buyer as to whether the goods satisfy the seller's obligations under the underlying contract of sale or not⁷⁰⁾. Besides art. 3A of the Uniform Customs and Practice on Bankers' Commercial Credits states :

'Credits, by their nature, are separate transactions from the sales or other contract(s) on which they may be based and banks are in no way concerned with or bound by such contract(s), even if any reference whatsoever to such contract(s) is included in the Credit. Consequently, the undertaking of a bank to pay, accept and pay draft(s) or negotiate and/or fulfil any other obligation under the Credit, is not subject to claims or defences by the Applicant resulting from his relationships with the issuing Bank or the Beneficiary.'

69) (1958) 2 Q.B. 127

70) Krimpas p.160

B) The Letter of Credit

a) The time for opening the credit

If the sales contract provides that a letter of credit has to be opened and notified to the creditor within a certain time and the buyer fails to do so, the seller can treat himself as discharged from any performance of the underlying contract. Besides, he can sue the buyer for damages for not providing the credit⁷¹⁾. However, if the contract provides that the seller has to perform certain acts before the buyer is obliged to open the credit, the buyer is not liable to the seller if the latter does not comply with that term of the contract. So, in *Knotz v. Fairclough Dodd & Jones Ltd*⁷²⁾, where the contract of sale provided for the tender of a provisional invoice by the seller in order that the amount of the credit might be determined, the court held that the buyer's obligation to provide the credit did not arise until the provisional invoice was tendered.

Sometimes the underlying contract may not specify the time within which the buyer must open the credit. In such a case the courts held that the parties' implied intention is that the credit should be issued and notified to the seller within a reasonable time before the earliest date on which the

71) *Trans S.P.R.L. v. Danubian Trading Co Ltd.*, (1952) 1 Lloyd's Rep. 348; see also *Lindsay v. Cook* (1935) 1 Lloyd's Rep. 328

72) (1952) 1 Lloyd's Rep. 226

seller is entitled to ship the goods in performance of the underlying contract of sale. This is justified both in a f.o.b. and in a c.i.f. contract, because in a c.i.f. contract the seller, who is obliged to make all shipping arrangements, needs "the reasonable time", to fulfil his obligations, and in a f.o.b. contract, where the buyer has to make the shipping arrangements, the seller needs time to transport the goods to the dock and store them there. This has been accepted by the courts in the following cases:

In *Pavia & Co. v. Thurmann-Nielsen*⁷³⁾ the contract provided that the goods could be shipped in February and/or March and/or April at the sellers' option. The buyer did not procure the opening of the credit until the 22nd of April though the sellers had repeatedly pressed them to do so. In this case the Court of Appeal merely held that the credit had to be opened and notified before the earliest shipping date. But in *Sinason-Teicher Inter-American Grain Corp. v. Oilcakes and Oilseeds Trading Co. Ltd.*⁷⁴⁾, which involved a c.i.f. contract, and in *Ian Stach Ltd. v. Baker Bosley Ltd*⁷⁵⁾, which involved a f.o.b. contract, the Court went further, saying that the credit must be opened by the buyer and notified to the seller within a reasonable time before the earliest shipping date.

If the contract of sale expresses vaguely the time within which the debtor has to open the credit, e.g. 'immediately',

73) (1952) 2 Q.B. 84

74) (1954) 3 All E.R. 368

75) (1958) 1 Lloyd's Rep. 127, 137

'in a day or two', 'in a few weeks', the courts have to construe the meaning of each term. So, in *Garcia v. Page & Co.*⁷⁶⁾, where the sales contract provided that the buyer had to open a confirmed credit 'immediately', the Court held that 'immediately' meant within such a time as was needed by a person of reasonable diligence to make the necessary arrangements.

In *Baltimex Ltd. v. Metallo Chemical Refining Co. Ltd.*⁷⁷⁾ the underlying contract stated that the credit had to be opened "in a day or two". In this case the seller knew that there was a possibility of delay, because the credit would be opened by Russian sub-buyers, who would buy the goods from the English buyers. This fact was taken into account by the Court, which held that the credit should be opened within the time it normally took a Russian state agency to procure the opening of a credit available in the United Kingdom.

However, in *Etablissements Chainbaux S.A.R.L. v. Harbormaster Ltd.*⁷⁸⁾, where the contract provided that the delivery of goods was to commence eight months after the making of the sales contract and the credit had to be opened "within a few weeks", the court held that the buyers had failed to procure the opening of the credit in time and were liable for breach of the underlying contract. According to the

76) (1936) 55 Ll.L.R. 391; see also *State Trading Corporation of India v. Compagnie Francaise d'Importation et de Distribution* (1983) 2 Lloyd's Rep. 679

77) (1955) 2 Lloyd's Rep. 438

78) (1955) 1 Lloyd's Rep. 303

decision the 'reasonable time' within which the credit had to be opened was one month after the underlying contract was entered into.

In this case the judge, Devlin, J., referred to Lord Watson in *Hick v. Raymond & Reid*⁷⁹⁾, who said, the buyer's obligation to open the credit within a 'reasonable time':

'.....has invariably been held to mean that the party upon whom it is incumbent duly fulfils his obligation, notwithstanding protracted delay, so long as such delay is attributable to causes beyond his control, and he has neither acted negligently nor unreasonably'.

b) Irrevocable credit

If the underlying contract provides that payment is to be made by a particular form of credit, the seller is discharged from liability if such a credit is not opened by the buyer. In *Giddens v. Anglo-African Produce Co. Ltd.*⁸⁰⁾ the underlying contract required that a credit should be 'established'. The issued credit contained the following clause: 'Negotiation of drafts under these credits are subject to the bank's convenience. All drafts negotiated hereunder are negotiated with recourse against yourselves'. The Court held that 'established' was not a description of a type of credit, but meant the same as 'issued' or 'opened', and that it was not sufficient for the buyer to procure the opening of a revocable credit.

79) (1983) A.C. 22

80) (1923) 14 Ll.L.Rep. 230

However ,if the buyer provides a wrong kind of credit or makes some other mistake ,he has the right to correct it within the period fixed for the opening of the credit.

In *Kronman & Co. v. Steinberger* ⁸¹⁾ the buyer had agreed in the underlying contract to pay £ 42 per ton for the goods. The bank, which issued the credit , undertook to pay £ 4 per ton. The Court held that this was an 'obvious mistake' and that the buyer must be given an opportunity to correct his mistake, provided the seller has not altered his position to correct his faith in the credit originally provided.

c) Confirmed credit

In *Panoutsos v. Raymond Hadley Corporation of New York* ⁸²⁾ the underlying contract, made in London and dated September 27, provided for the sale and shipment of 4.000 tons of flour to be shipped to Greece not later than November 7. Each shipment should be deemed by a separate contract, and payment should be made 'by confirmed banker's credit'. The credit which was issued soon afterwards by an American Bank was not a confirmed credit, because on October 16, the American Bank wrote to the sellers in New York stating that they had been requested to open the above mentioned credit and adding: ' In advising you

81) (1922) 10 Ll.L.Rep. 39

82) (1917) 2 K.B. 473

that this credit has been opened, we are acting merely as agents for our foreign correspondents and cannot assume any responsibility for its continuance'.

The sellers, with notice of that fact, made some shipments and received payment by means of the opened credit. Besides, they obtained from the buyer an extension of time to November 30 for shipment of the balance of the flour. On November 25 the sellers cancelled the contract as to the shipment of the balance of the flour, without any previous notice, on the ground that the credit was not in accordance with the contract.

The Court of Appeal held that the sellers were not entitled to cancel the contract without giving the buyer reasonable notice of their intention to do so and thus giving the buyer an opportunity to comply with this term of the underlying contract. From these facts the Court concluded that the seller, acting on the credit provided, had waived his right to strict compliance under the term requiring the issue of a confirmed letter of credit⁸³⁾.

C) The Buyer's Liability for the Debt

For a long time there existed uncertainty in English Law as to whether the buyer's liability for the debt continues

83) Similar cases as to the seller's inferred waiver: Plasticmoda S.P.A. v. Davidsons (Manchester) Ltd. (1952) 1 Lloyd's Rep. 527 ; Malmberg v. Evans (1924) 29 Com.Cas. 235 ; Baltimex v. Metallo Chemical Refining Co. (1955) 2 Lloyd's Rep. 438 and Kronman & Co. v. Steinerberger 1922) Lloyd's L.R. 39

after he procures the opening of the credit, that is , whether the issue of the credit constitutes absolute or merely conditional payment of the price. If the letter of credit is considered to be an absolute payment, then the buyer, after having procured the opening and notification of the letter of credit, is under no further liability to the seller for the price. In that case if the issuing bank becomes insolvent, the seller has to be content to accept merely a dividend in the bank's liquidation. This problem does not arise when the buyer has already accepted the seller's draft, because in such a case the seller has a right of action against the buyer on his acceptance.

Now, after many decades of dispute and uncertainty, it has been established that the issue of a letter of credit effects a conditional payment only, that is, the buyer is not discharged from his liability to pay the debt under the underlying contract, if the bank refuses payment.

The Courts in other countries of the world have also dealt with the question of the buyer's liability. In the United States two cases which were decided during the same decade are completely contradictory. In *Greenhough v. Munroe* ⁸⁴⁾ the Court held that the issue of an irrevocable credit does not discharge the buyer's liability for the price, whilst in *Vivacqua Irmaos v. Hickerson* ⁸⁵⁾ the Court held that the issue of an irrevocable credit does discharge the buyer from

84) (1931) 53 F. 2d 362

85) (1939) 190 So. 657

any liability to pay. The High Court of Australia in the dispute *Saffron v. Société Minière Cafrika*⁸⁶⁾ held that the issue of a revocable letter of credit does not discharge the buyer from his liability to pay while the issue of an irrevocable and confirmed credit '.....might perhaps not unreasonably be regarded as a stipulation for the liability of the confirming bank in place of that of the buyer'. However, the Australian High Court declined to decide whether the issue of an irrevocable credit released the buyer from liability.

The view that the buyer's liability continues after he has procured the opening of the credit had already found support in the earlier New Zealand case *Hindley & Co. v. Tothill & Co.*⁸⁷⁾, where the Court of Appeal rejected the argument of counsel for the defendants that the opening and notification of the letter of credit constituted absolute payment, saying that :

'We do not accede to the contention that the acceptance of the bills by the Bank of New Zealand for the defendants ' half of the sacks was equivalent to payment and that the defendants would not have been liable for the price if the bank had not met the bills'.

In *Newman Industries Ltd. v. Indo-British Industries Ltd.*⁸⁸⁾ the buyer , who, according to the underlying contract, had to obtain a bank guarantee that he would pay the purchase price of the goods, subsequently agreed with the seller to substitute an irrevocable letter of credit for the bank

86) (1958) 100 C.L.R. 231

87) (1894) 13 N.Z.L.R. 13

88) (1956) 2 Lloyd's Rep. 219

guarantee. On this matter Sellers, J. said that:

'The action is against the buyer , not against the bank, and the question of importance is whether the seller must look only to the bank who issued the letter of credit; that is whether the method of payment agreed releases the buyer from direct liability for payment under the contract of sale. Where it has been agreed that payment is to be made by a bill of exchange, the payment would normally be a conditional payment, and it would require very clear terms to make it an absolute payment. Here payment was to be by a draft drawn on the bank issuing the credit, and it was, therefore , to be made by a negotiable instrument. Originally the payment of the price was to be guaranteed by a bank, and the letter of credit was only taken subsequently in substitution at the request of the defendants and with the agreement of the plaintiffs. I do not think there is any evidence to establish, or any inference to be drawn, that the draft under the letter of credit was to be taken in absolute payment. I see no reason why the plaintiffs....should not look to the defendants, as buyers, for payment'.

The buyer's personal liability was also dealt with in the E.D. & F. Man Ltd. v. Nigerian Sweets and Confectionery Co. Ltd.⁸⁹⁾ where the respondents, by three separate written contracts, agreed to buy 1100 metric tonnes of white crystal sugar from the sellers, payment to be made in cash against documents first presented in London. Later the contracts were orally varied, so that payment would be made by 90-day drafts drawn on the buyers' bank, under an irrevocable letter of

89) (1977) 2 Lloyds Rep. 50 ; see also Maran Road Saw Mill v. Austin Taylor & Co. Ltd. (1975) 1 Lloyds Rep. 156

credit. In this case the Court held that:

The respondent's liability to the sellers was a primary liability. This liability was suspended during the period available to the issuing bank to honour the drafts and was activated when the issuing bank failed'.

The Court cited the similar case *W.J. Alan & Co.Ltd. v. E.L. Nasr. Export and Import Co. Ltd.*⁹⁰⁾, in which Lord Denning said that a letter of credit operates as provisional or conditional payment of the debt, and that the seller can sue the buyer for the underlying debt only if the bank dishonours its obligations under the credit. However, Lord Denning continues, when the bank accepts the seller's bill of exchange, the debtor's liability is absolutely discharged even if on subsequent presentation of the bill of exchange the bank refuses payment. While Lord Denning's first ruling has already been accepted by English Courts⁹¹⁾ and is likely to be followed in the future, the second ruling, namely that acceptance of the seller's draft by the bank discharges the buyer, has so far not found support.

In Greece the early view⁹²⁾ that, if the sale contract does not provide otherwise, the issue of an irrevocable

90) (1972) 2 All E.R. 127

91) See *Re Charge Card Services Ltd.* (1986) 3 All E.R. 289 and *Shamsher Jute Mills Ltd.V. Sethia (London) Ltd.* (1987) 1 Lloyd's Rep.388

92) Masouridis: p.115, who says that the buyer has to take the risk of having to face an insolvent bank

letter of credit discharges the buyer absolutely from the liability to pay, has long been superseded. Now both Legal Theory and Case Law accept that the issue of an irrevocable letter of credit does not discharge the buyer's liability for the price⁹³⁾. The Court of Appeal in Athens in its 1123/1931⁹⁴⁾ decision states that:

'.....the contract, that is, the letter of credit, is sui generis, which means that it is similar to the delegation of Roman Law but it does not produce a new obligation, namely, it does not cause the extension of the former obligation by creating a new one, and it does not discharge the assignorunless the third party (the creditor) receives payment by the assigned debtor.....'

Consequently, the seller has two debtors who are liable to him separately for the whole amount of the price of the goods. If the bank refuses to pay the seller or accept his draft, the seller has the right to proceed against the buyer on the sale contract, unless it expressly states that the issue of the letter of credit shall be absolute and final payment.

In conclusion, the answers to the question of the buyer's liability can be summarised in the propositions made by

93) Simitis: p. 81 ; Anastasiadis: p. 914, who says that one cannot accept that the buyer is, according to the underlying contract, the "beneficiary of the goods" but is discharged from his obligation to pay though this obligation arises from the same contract; Mazis: Bank's and Limited Companies' Security, 1993p.355

94) Ef.A. 1123/1931 Th 1932. 285

Bingham, J. in *Shamsher Jute Mills Ltd. v. Sethia* (London) Ltd.⁹⁵);

-If the buyer establishes a credit which conforms or is to be treated as conforming with the sale contract, he has performed his part of the bargain so far.

-If the credit is honoured according to its terms, the buyer is discharged even though the credit terms differ from the contract terms.

-If the credit is not honoured according to its terms because the bank fails to pay, the buyer is not discharged because the condition has not been fulfilled.

-If the seller fails to obtain payment because he does not and cannot present the documents which the terms of the credit, supplementing the terms of the contract, require, the buyer is discharged.

-In the ordinary case, therefore, the due establishment of the letter of credit fulfils the buyer's payment obligation, unless the bank which opens the credit fails for any reason to make payment in accordance with the credit terms against documents duly presented.

D) Termination of the Credit

The legal relationship between the buyer and the seller may be terminated if either the buyer or the seller does not comply with one or more fundamental terms of the underlying contract.

⁹⁵) (1987) 1 Lloyd's Rep. 388

As far as the procedure for the opening, confirmation or notification of the credit is concerned it is the buyer's duty to comply with all the terms of the underlying contract. If he fails to do so, the seller may claim damages and treat the sales contract as terminated.

In *Victoria Laundry (Windsor) Ltd. v. Newman Industries Ltd.*

⁹⁶⁾ Asquith, J. explained the measure of the damages by citing the case *Hadley v. Baxendale*⁹⁷⁾ as follows:

'Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered as either arising naturally, i.e. according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.'

In *Trans Trust S.P.R.L. v. Danubian Trading Co. Ltd.*⁹⁸⁾ the Court decided similarly. The plaintiffs contracted to sell the defendants 1.000 tons of steel which they had agreed to buy from the Belgian company, S.A. Azur, and thus make profit from the different prices in the two contracts. In addition, the plaintiffs agreed with the defendants that the latter would make payment in cash against shipping documents under a confirmed credit which would be opened by an American

⁹⁶⁾ (1949) 2 K.B. 528 p. 537

⁹⁷⁾ (1854) 9 Exch. 341

⁹⁸⁾ (1952) 2 Q.B. 297

company, the Leland Corporation, to whom the defendants had resold the steel. S.A. Azur, who did not hold the steel but intended to buy it from a supplier, had relied on the issue of the letter of credit by Leland Corporation as security for the issue of a letter of credit by its own bank to its suppliers. However the American company failed to open the credit and therefore the defendants treated the contract as terminated. The plaintiffs claimed damages. The Court of Appeal held that the failure to open the credit was a breach of a fundamental term of the contract and that the loss which the plaintiffs had suffered was the difference between the purchase price which they had agreed to pay S.A. Azur and the price which the defendants had agreed to pay the plaintiffs, because it was known to the defendants that the plaintiffs depended on the opening of this credit.

In the following case the Court said that the measure of damages is the loss of the profit on the transaction concerned. In *Ian Stach v. Baker Bosley Ltd.*⁹⁹⁾ the buyers had agreed to buy ship plates from the defendants, the shipment to be financed by a banker's confirmed irrevocable credit. The buyers did not procure the opening of the credit, either by the time the shipment period started or by August 8 when the sellers called for it to be opened 'immediately'. On August 14 the sellers informed the buyers that they would be held responsible for the consequences. The Court held that it had been the buyers' duty to establish the credit by August 1, 1956 at the latest; but as the sellers had treated the contract as

99) (1958) 2 Q.B. 130

repudiated on a later date, that is August 14, the amount of damages awarded was the difference between the contract price and the market price on the day of the repudiation.

Furthermore, in the New Zealand case *Pacific Overseas Corporation Ltd. v. Watkin Browne & Co. (N.Z.) Ltd.*¹⁰⁰) the Court held that the seller is not entitled to claim damages for the loss of a special opportunity which, unknown to the buyer, would maximise his profit. Besides, the seller has to take advantage of any opportunity that would enable him to sell his goods at a higher price than the current market price.

E) The Seller's Agent

When in a letter of credit one more party, who acts as the seller's agent, intervenes, the transaction becomes more complicated.

In *Sale Continuation, Ltd. v. Austin Taylor & Co., Ltd.*¹⁰¹) the defendants, who were selling agents in London, contracted on behalf of exporters in Malaysia to sell timber to importers in Belgium. Payment would be made through a Belgian Bank. The plaintiffs, merchant bankers, following the selling agents' instructions opened an irrevocable credit, which called for drafts on the issuing bank in favour of the exporters in Malaysia, and the plaintiffs undertook to pay against documents 90 days after sight: The selling agents' application contained the following:

'In consideration of your opening this credit, we engage to

100) (1954) N.Z.L.R. 459

101) (1967) All E.R. 1092

provide you with funds to meet disbursements thereunder as soon as you receive advice that payment has been made....'

Thereafter the issuing bank accepted a draft for the permitted amount drawn by the exporters, who, some days later, delivered the documents to the selling agents in order that they should present them to the Belgian Bank and receive payment. The selling agents arranged with the plaintiffs, by giving them a 'trust receipt', to hold the documents, the goods when received and the proceeds thereof when sold, as trustees for the bank. Furthermore the agents undertook to pay to the bank the proceeds of sale without deduction of any expenses. Thus, by delivering the documents to the defendants in trust, the plaintiffs made them their trustees and agents, and therefore the defendants were not acting as the sellers' (exporters') agent. Paull, J. said:

'One starts by saying that the position here is not the usual position where the customer of the bank is the buyer of the goods. In such a case the seller parts with his ownership in the documents as soon as he sends the documents to the bank. His right is to be paid the draft. The ownership of the goods passes to the buyer, but the bank has the possessory title of a pledgee as against the buyer. It has that title until the buyer puts the bank in funds in respect of the draft and discharges his liability for interest payable in respect of the draft. If the pledgor does not do so, the bank has the usual right of a pledgee to sell as if he were the owner.'

And he continued:

'Now the essence of a pledge is that it is security against either an immediate advance or against a present liability to make a future payment. The trust receipt contemplated that the defendants would part with the documents to the Belgian buyer and recover the purchase price. It was no breach of trust to do

so. In my judgment the same principle applies to the money as applies to the obligation to put the plaintiffs in funds before the maturity date of the draft. Once the draft is dishonoured (or notice of intention not to honour it is given) (the seller) is entitled to cancel the contract of pledge by returning the draft for cancellation and claiming the purchase money from their agents, the defendants.'

However, when the agents received payment for the timber, they did not pay the money to the bank, knowing that the latter had become insolvent. Some time later the bank went into liquidation and did not honour the exporters' draft. The Court held that as the receiver, who had been appointed before the bill of exchange matured, gave notice to the defendants that there was in existence a mortgage and debenture of the bank giving the holders a charge on the whole of the assets of the bank, the plaintiffs evinced an intention not to honour the exporters' draft. Therefore the defendants were not obliged under the contract to provide the plaintiffs with the funds necessary to honour the draft.

In the case *Ng Chee Chong, Ng Weng Ching, Ng Cheng and Ng Yew (a firm trading as Maran Road Saw Mill) v. Austin Taylor & Co. Ltd*¹⁰²⁾ the plaintiffs were also timber merchants in Malaysia who contracted to sell timber through the agency of the defendants to buyers in Marseilles. The defendants used the services of Sale Continuation Ltd., which opened irrevocable letters of credit in favour of the plaintiffs. The credit provided that drafts for the price drawn by the sellers on Sale Continuation would be negotiable by the Bangkok Bank.

102) (1975) 1 Lloyd's L.R. 156

The plaintiffs drew five bills of exchange, negotiated them with the Bangkok Bank and delivered the shipping documents to the latter on time. The buyers paid the price of the goods to the defendants against delivery of the shipping documents and the defendants paid the issuing bank. However, when the bills of exchange matured Sale Continuation Ltd. dishonoured them because it had become insolvent. The negotiating bank in Malaysia sought recourse against the plaintiffs, and they, in return, sued the defendants, contending that the latter were in breach of their agency agreement. The Court held that 'on the true construction of the agency agreement the defendants did not discharge their contractual obligations to pay over and account for money received by opening the letters of credit, as the payment was not in fact made under it; the agents promised to pay by letter of credit, not merely to provide a letter of credit as a source of payment which did not pay.'

2) The Relationships arising under a Letter of Credit

A) The Relationship between the Buyer and the Issuing Bank

The commercial letter of credit has its starting point in the contract between the bank and its customer (the buyer), who gives a mandate to the bank to open a credit of a certain sum for the benefit of a third party (the seller). This contract between the bank and the beneficiary embodied in the letter of credit issued by the bank is of great importance because it regulates the relationship between the bank and the buyer and at the same time it defines the relationship between the bank and the seller (beneficiary). Under the contract between the bank and the buyer (its customer) there arise mutual obligations and rights between the bank and the buyer, which are based on the terms of the contract and on the Uniform Customs and Practice, if there is an express reference to them in the contract.

In Greece, the contract between the buyer and the bank is, according to the prevailing opinion, in Legal Theory¹⁰³⁾ and in Case Law¹⁰⁴⁾ a remunerated mandate and the relationship

103) I. Brinias: The distraint of claims in the bankers' transactions, p.300; Tsirintanis par. 19II; Perdikas p.202,203; Masouridis p.115

104) A.P. 54/1931 Th.1931. 289; A.P. 62/1922 Th 1922-23. 369; Pr.P. 3471/1951 EEmpD 1952.40

between them is primarily governed by the statute of 17.7./13.8.1923.

Article 25 par. 3 of the statute of 17.7./13.8.1923 states that: 'This contract is to be in writing'. This statement does not mean that the contract is not valid if it is not in writing, but that writing can be used to prove the terms of the contract¹⁰⁵⁾.

The buyer who opens a letter of credit in Greece has also to pay 1% of the price of the credit as stamp duties and an additional 20% of the amount of the stamp duties for the benefit of the Organisation of Agricultural Insurance in Greece. The sum is paid to the bank which is obliged to remit it to the state¹⁰⁶⁾.

a) The Issuing Bank's Obligations

In a letter of credit the bank has, as provided in article 2 II of the Uniform Customs, to act in accordance with its customer's instructions. Its primary duty is to open the credit, notify the credit to the beneficiary and promise him that it will honour the credit. Furthermore, the bank has to notify to the beneficiary of any amendments which have been made to the credit by agreement with the beneficiary and it must also notify the beneficiary of any revocation of the letter of credit, if it is a revocable one.

When the beneficiary presents the documents to the bank, the bank has to accept them only if they comply with the terms

105) Ef.A. 477/1928 Th 1928.630; Simitis:p.82

106) Art.23 par.1 of the Presidential Decree of the 28/7/1931

provided in the contract embodied in the letter of credit.

Art. 14 B of the Uniform Customs states that:

'Upon receipt of the documents the Issuing Bank and/or Confirming Bank, if any, or a Nominated Bank acting on their behalf, must determine on the basis of the documents alone whether or not they appear on their face to be in compliance with the terms and conditions of the Credit. If the documents appear on their face not to be in compliance with the terms and conditions of the Credit, such banks may refuse to take up the documents.'

Lord Sumner in *Equitable Trust Co. of New York v. Dawson Partners Ltd.*¹⁰⁷⁾ said:

'It is both common ground and common sense that in such a transaction the accepting bank can only claim indemnity from its customer if the conditions on which it is authorised to accept are in the matter of accompanying documents strictly observed. There is no room for documents which are almost the same, or which will do just as well. Business could not proceed securely on any other lines.'

In *Borthwick v. Bank of New Zealand*¹⁰⁸⁾ the bank took up shipping documents for a consignment of frozen meat attached to which was a marine insurance policy which contained the clause: 'To pay a total loss by total loss of vessel only', while the usual form of policy in the frozen meat trade is a

107) (1926) 25 Ll.L.Rep.90

108) (1900) 6 Com.Cas. 1

policy covering all risks. The Court held that the bank did not follow its customer's instructions, and was therefore liable to the buyer because a competent banker would not accept such an insurance policy.

On the other hand, in *Rayner & Co Ltd. v. Hambros Bank Ltd.* ¹⁰⁹⁾ the Court held that the defendant bank was not expected to be familiar with the specialised terms used in the trade. The bank had opened a confirmed credit in favour of the plaintiffs covering a cargo of 'Coromandel groundnuts', and it refused payment when the plaintiffs presented bills of lading for 'machine-shelled groundnut kernels'. Later, in Court, it was proved that both terms, that is, 'Coromandel groundnuts' and 'machine-shelled groundnut kernels' are universally understood to be identical, but the bank was not expected to know this, and therefore acted properly in rejecting the shipping documents.

After the bank has taken up the shipping documents it has to examine them to discover whether they comply with the terms of the credit. However, according to art. 15 of the Uniform Customs

'Banks assume no liability or responsibility for the form, sufficiency, accuracy, genuineness, falsification or legal effect of any document(s).....for the description, quantity, weight, quality, condition, packing, delivery, value or existence of the goods represented by any documents(s), or for good faith or acts and/or omissions, solvency, performance or standing of the

109) (1943) 1 K.B. 37

consignors, the carriers, the forwarders, the consignees or the insurers of the goods, or any other person whomsoever'.

Article 30 par. 1 of the statute of 17.7./13.8.1923 states: 'The creditor (the bank) is not liable a) for the accidental loss of or damage to the goods, ...'

According to the 564/1932 decision of the Court of Appeal in Athens¹¹⁰⁾, the bank is liable for damages only if it has omitted to examine the presented documents carefully, and if such examination could enable it to discover the existence of a forgery. However the excess of the quantity of the goods expressed in the bill of lading only, does not mean that the bank has acted negligently, or that it has not obeyed the terms of the credit which it has issued, if the buyer does not suffer any damages¹¹¹⁾.

So, if the presented documents comply with the terms of the credit, the bank has to honour the seller's drafts and to pay the amount of bills drawn under the credit at sight, if the credit provides for sight payment, or to pay on the maturity date if the credit provides for deferred payment (art. 9 A of the Uniform Customs). This obligation is independent of the bank's similar obligation to the buyer in the contract between them.

110) Ef.A. 564/1932

111) In Woods v. Thiedmann (1862) 1 H.&C. 478, the Court held that the bank is authorised to accept documents which prima facie appear to be genuine.

There are cases where the bank may be restrained from paying the seller, or the seller may be restrained from drawing under the credit issued in his favour. This happens when the transaction is fraudulent¹¹²⁾ and an irretrievable injustice must be prevented. In *Elian & Another v. Matsas & Others*¹¹³⁾ the Court of Appeal, approving the decision of the Court of First Instance, held that this was a special case in which an injunction should be granted in order to prevent an irretrievable injustice. Accordingly, Lord Denning, M.R. said:

'Now I quite agree.....that a bank guarantee is very much like a letter of credit. The Courts will do their utmost to enforce it according to its terms. They will not, in the ordinary course of things, interfere by way of injunction to prevent its due implementation. Thus they refused in *Malas v. British Imex Industries, Ltd.*, (1957) 2 Lloyd's Rep. 549. But that is not an absolute rule. Circumstances may arise such as to warrant interference by injunction.'

However applications for an injunction usually fail. Sir John Donaldson made some significant observations as to why an injunction is likely to be refused, in *Bolivinter Oil S.A. v.*

112) *Sellers, L.J. in Hamzeh Malas and sons v. British Imex Industries, Ltd.* (1957) 2 Lloyd's Rep. 549; (1958) 2 Q.B.127

113) (1966) 2 Lloyd's Rep. 495

Manhattan Bank and Others¹¹⁴⁾. He said:

'Before leaving this appeal, we should like to add a word about the circumstances in which an ex parte injunction should be issued which prohibits a bank from paying under an irrevocable letter of credit or a performance bond or guarantee. The unique value of such a letter, bond or guarantee is that the beneficiary can be completely satisfied that, whatever disputes may thereafter arise between him and the bank's customer in relation to the performance or indeed existence of the underlying contract, the bank is personally undertaking to pay him, provided that the specified conditions are met. In requesting his bank to issue such a letter, bond or guarantee, the customer is seeking to take advantage of this unique characteristic. If, save in the most exceptional cases, he is to be allowed to derogate from the bank's personal and irrevocable undertaking, given be it again noted at his request, by obtaining an injunction restraining the bank from honouring that undertaking, he will undermine what is the bank's greatest asset, however large and rich it may be, namely its reputation for financial and contractual probity. Furthermore, if this happens at all frequently, the value of all irrevocable letters of credit and performance bonds and guarantees will be undermined.

Judges who are asked, often at short notice and ex parte, to issue an injunction restraining payment by a bank under an irrevocable letter of credit or performance bond or guarantee should ask whether there is any challenge to the validity of the letter, bond or guarantee itself. If there is not, or if the

114) (1984) 1 All E.R. 351; see also the cases: R.D. Harbottle (Mercantile) Ltd. v. National Westminster Bank Ltd. and Others (1978) Q.B. 146; Howe Richardson Scale Co. Ltd. v. Polimex-Cekop (1978) 1 Lloyd's Rep. 161, C.A.; Edward Owen (Engineering) Ltd. v. Barclays Bank Ltd. (1978) 1 Lloyd's L.R. 166; United Trading Corp'n. SA v. Allied Arab Bank Ltd. (1985) 2 Lloyd's Rep. 554; Tukan Timber Ltd. v. Barclays Bank (1987) 1 Lloyd's Rep. 171

challenge is not substantial, prima facie no injunction should be granted and the bank should be free to honour its contractual obligation, although restrictions may well be imposed on the freedom of the beneficiary to deal with the money after he has received it. The wholly exceptional case where an injunction may be granted, is where it is proved that the bank knows that any demand for payment already made or which thereafter may be made will clearly be fraudulent. But the evidence must be clear, both as to the fact of fraud and as to the bank's knowledge. It would certainly not normally be sufficient that this rests on the uncorroborated statement of the customer, for irreparable damage can be done to a bank's credit in the relatively brief time which must elapse between the granting of such an injunction and an application by the bank to have it discharged.'

In *Discount Records Ltd. v. Barclays Bank Ltd. and another*¹¹⁵⁾ the plaintiffs ordered certain quantities of goods from a French company and instructed the first defendant bank to open an irrevocable confirmed credit to cover the price. The credit was made through the second defendant bank. When the plaintiffs received the cargo they found out that only a small quantity of the goods ordered had been sent to them, while most of the cartons shipped contained goods which the plaintiffs had not ordered. The plaintiffs brought an action against the defendants, alleging that the beneficiary had been guilty of fraud, and sought an interlocutory injunction restraining them from paying the French company. Megarry, J. said:

'I would be slow to interfere with bankers' irrevocable credits, and not least in the sphere of international banking, unless a sufficiently grave cause is shown; for interventions by the court that are too ready or too frequent might gravely impair the reliance which, quite properly, is placed on such

115) (1975) 1 All E.R. 1071

credits. The Sztejn case (1941) 31 NYS 2d 631, is plainly distinguishable in relation both to established fraud and to the absence there of any possible holder in due course.'

The bank's obligations to the buyer ,namely,that the bank has to open the credit for the benefit of the beneficiary and to pay the price of the goods when the beneficiary presents the shipping documents,are inferred from the definition of the commercial letter of credit provided in article 25 par.1 of the Greek statute of 17.7./13.8.1923¹¹⁶⁾ .

Moreover, if the issuing bank employs a second bank to advise or confirm the credit to the seller, then the issuing bank is, according to English Law, liable to the buyer for its agent's actions unless such liability is excluded, as it is under the Uniform Customs.

In Equitable Trust Co. of New York v. Dawson Partners Ltd¹¹⁷⁾ the Court held that the issuing bank is liable to the buyer when the confirming bank takes up documents which do not comply with the buyer's instructions. The bank can claim to be reimbursed only by the confirming bank(if any) , and not by the buyer.

On the other hand the Uniform Customs and Practice provide on this matter:

A. Banks utilizing the services of another bank or other banks for the purpose of giving effect to the instructions of the Applicant do so for the account and at the risk of such Applicant.

116) see p. 3

117) (1926) 25 Ll.L.Rep. 90; (1927) 27 Ll.L.Rep.49; Calico Printers Association v. Barclays BankLtd. (1930) 36 Com.Cas. 71, is a similar case where the issuing bank was found liable to the buyer because the advising bank did not follow the issuing bank's instructions to insure the goods.

B. Banks assume no liability or responsibility should the instructions they transmit not be carried out, even if they have themselves taken the initiative in the choice of such other bank(s).

Similarly art. 30 par.2 of the statute of 17.7./13.8.1923 states that:

'The creditor (bank) is liable for its fraud and negligence, including the negligence concerning the choice of its agent'.

The meaning of this article is explained in the 477/1928¹¹⁸⁾

decision of the Court of Appeal in Athens which held that the issuing bank is liable only for its own faults. So, if it has acted according to its customer's instructions and has notified the credit to its agent, that is, it has done everything possible to ensure that the credit is honoured, it is not liable for its agent's faults. The same decision states that :

'....any stipulation which discharges the bank from its own faults is invalid'

Furthermore, the bank's liability for the transmission, translation or interpretation of messages is, as provided in article 16 of the Uniform Customs, excluded. Namely:

'Banks assume no liability or responsibility for the consequences arising out of delay and/or loss in transit of any message(s), letter(s) or document(s), or for delay, mutilation or other error(s) arising in the transmission of any telecommunication. Banks assume no liability or responsibility for errors in translation and/or interpretation of technical terms, and reserve the right to transmit credit terms without translating them.'

Also, article 30 par.1b of the statute of the 17.7./13.8.1923 states that :

118) Ef.A. 477/1928 Th 1928. 630

'The creditor (the bank) is not liable a)....b) for the errors of the telegraphic office in the transmission of telegrams.'

b) The buyer's obligations

The buyer has to put the issuing bank in funds in order to meet the seller's drafts. When and how he is obliged to pay depends on the agreement between him and the bank. Usually he has to put the bank in funds to enable it to meet the seller's drafts before they become due (e.g. one day before). In rare cases however, he may be asked to pay before or at the time when the credit is issued, if the bank does not want to risk its own funds.

In *Reynolds v. Doyle*¹¹⁹⁾ the Court said that the buyer is obliged to pay the bank which opened the credit the amount for which it has accepted bills of exchange on the buyer's behalf. The payment has to take place a reasonable time before the bills fall due.

Furthermore, if the bank pays or purchases the seller's drafts out of its own resources, either because it has been so stipulated or because the buyer has failed to put the bank in adequate funds, the buyer has to pay interest on the amount paid. In *Re Ludwig Tillman*¹²⁰⁾ the bank's client, the German Tillman, failed to remit the funds to meet the drafts which had been accepted by the bank on his behalf, because of the outbreak of war. The Court held that the bank may borrow from another source and charge its client with the amount of the loan and the interest which it has to pay to its lender,

119) (1840) 1 M. & G. 753

120) (1918) 34 T.L.R. 322

or it may use its own funds and charge its customer the current commercial rate of interest from the date when it paid the amount of the bill.

On the other hand, if the bank fails to honour the drafts on presentation, e.g. if it goes into liquidation or ceases its business, the buyer is entitled to treat the credit as terminated and claim what he has already paid to the bank¹²¹⁾.

According to article 722 of the Greek Civil Code, which refers to the principal's obligations ,

'A mandator shall be bound to reimburse the mandatory of everything the latter has spent to achieve an orderly performance of the mandate'.

That is, the bank is entitled to claim the amount it has expended in order to honour the credit e.g. the notification of documents, the sending of telegrams and letters, and the making of phone calls. The bank may also claim the stipulated interest which the buyer owes it from the day the bank paid the amount of the credit to the seller to the day when it recovers it from the buyer. Furthermore, the bank may charge commission for its services. The commission under Greek Law may be a 'commission of confirmation' if the credit is a confirmed one, or a 'commission of frustration' or a 'commission of performance'¹²²⁾. The bank charges the buyer with

121) Sale Continuation Ltd. v. Austin Taylor & Co. Ltd (1967)
2 All E.R.1092

122) Pampouki-Kiantou: p. The Law of Banking Transactions
(University Course Studies)p.85

commission on the amount of the credit, and if the credit is irrevocable , commission is also calculated in proportion to the time within which the credit has to be performed. The commission is usually payable every three months.

Finally, the buyer has to reimburse the bank provided that it has conformed strictly to the instructions he has given it for the opening of the credit. If it fails to do so ,the buyer may refuse to reimburse the bank or to pay commission. Moreover, if the buyer has already put the bank in funds, that is, before the bank honours the seller's bills of exchange, the buyer is entitled to the return of his money.

B) The Relationship between the Issuing Bank and the Intermediary Bank

The relationship between the issuing bank and a second bank arises when, according to the terms of the underlying contract, a second bank, called the intermediary bank, has to mediate between the issuing bank and the seller. In this case, the intermediary bank, which is chosen by the buyer or more often, by the issuing bank, either confirms the credit or just advises it to the beneficiary. If the second bank confirms the credit , it promises the seller that it will meet the seller's drafts if they conform to the terms of the letter of credit, independently of the issuing bank's obligation to pay. Thus the seller has not to rely only on the promise of the buyer's banker, whose solvency he may not trust. If the intermediary bank has simply to advise the issue of the credit, its duty is merely to notify the credit to the

seller, and it expressly denies any liability to honour the credit.

In both cases, that is, both in respect of a confirmed and an unconfirmed credit, the intermediary bank has to follow the issuing bank's instructions. Their relationship is, if not otherwise agreed, that of principal and agent, and therefore if the intermediary bank has fully complied with its mandate, it is entitled to be reimbursed by the issuing bank for any moneys it has paid under the credit, or indemnified for any loss it has suffered while acting properly on the mandate.

If however the intermediary bank exceeds its mandate by accepting or paying the beneficiary's drafts when the tendered documents do not comply with the terms of the credit, it is liable only to the issuing bank, but not to the issuing bank's customer.

In *Calico Printers Association v. Barclays Bank Ltd.* and the *Anglo-Palestine Bank Ltd.*¹²³⁾, the Court held that the second defendant, a sub-agent of the first defendant, owed no duty of care to the applicant because no privity of contract had been established between them. Also in *Orr and Barber v. Union Bank of Scotland*¹²⁴⁾, where the confirming bank paid a forged cheque supposing it to be genuine, and then declined to make any further payment under the letter of credit, the House of Lords held that the customer of the issuing bank could not sue it.

On the other hand, if the intermediary bank has not followed

123) (1930) 36 Com.Cas. 71

124) (1854) 1 Maq.H.L.Cas.513

the issuing bank's instructions, the former is not liable to the issuing bank if the latter ratifies, expressly or implicitly, the acts of the intermediary bank. Thus, in *Bank Melli Iran v. Barclays Bank (Dominion, Colonial and Overseas)*¹²⁵⁾ the Court of Appeal held that the plaintiff (confirming bank) was not entitled to enforce the defendant issuing bank's obligation to reimburse it because the latter had paid the beneficiary on receipt of documents which did not comply with the terms of the credit but that the confirming bank could in fact claim an indemnity because the issuing bank had delayed in exercising its right for an unreasonable length of time after it had knowledge that its instructions had not been followed.

In *Westminster Bank v. Banca Nazionale di Credito and Others*¹²⁶⁾ the plaintiff bank (intermediary bank) which had issued a letter of credit on the instructions of the first defendant (applicant's bank), accepted and paid the seller's drafts although the shipping documents did not satisfy the terms of the letter of credit. The reason was that it had already received a letter of indemnity by the sellers, which had been also confirmed by Lloyd's Bank. Banca Nazionale di Credito, however refused to accept the documents and sent them back to the plaintiffs although the applicant (its customer) had already taken delivery of the goods. In this case the Court held that the applicant's bank was not liable, because

125) (1951) 2 Lloyd's Rep. 367; see also *National Bank of Egypt v. Hannevig's Bank Ltd.* (1919) 1 Lloyd's L.R. 69

126) (1928) 31 Lloyds L.R. 306

its right to reject the shipping documents is distinct from the buyer's right to reject the documents or the goods, and the Court stated that there is no contractual or other relationship between the intermediary bank and the buyer and that the former is not the latter's agent.

The Uniform Customs and Practice make provision for the relationship between the issuing and the intermediary banks, both under an unconfirmed and a confirmed credit.

Article 7 UCP, which deals with the advising bank's liability, states that:

'A. A Credit may be advised to a Beneficiary through another bank (the "Advising Bank") without engagement on the part of the Advising Bank, but that bank, if it elects to advise the Credit, shall take reasonable care to check the apparent authenticity of the Credit which it advises. If the bank elects not to advise the Credit, it must so inform the Issuing Bank without delay.

B. If the Advising Bank cannot establish such apparent authenticity, it must inform, without delay, the bank from which the instructions appear to have been received that it has been unable to establish the authenticity of the Credit, and if it elects nonetheless to advise the Credit it must inform the Beneficiary that it has not been able to establish the authenticity of the Credit.'

Furthermore, article 11B of the Uniform Customs and Practice provides in respect of Teletransmitted and Pre-Advised Credits that:

'B. If a bank uses the services of an Advising Bank to have the Credit advised to the Beneficiary, it must also use the services of the same bank for advising any amendment(s).'

If, however, the instructions given by the issuing bank are incomplete or unclear, the advising bank may, according to article 12 par.1 UCP:

'.....give preliminary notification to the Beneficiary for information only and without responsibility. This preliminary notification should state clearly that the notification is provided for information only and without the responsibility of the Advising Bank. In any event, the Advising Bank must inform the issuing Bank of the action taken and request it to provide the necessary information'.

According to article 8 B UCP, the issuing bank's liability for the unconfirmed credit continues towards the advising bank, even if the credit has been cancelled, for any payment, acceptance or negotiation of the beneficiary's bills by the advising bank prior to receipt by it of notice of an amendment or cancellation of the credit.

The Greek Statute of the 17.7/13.8.1923 provides that:

'Payment to the third party may be advanced either by the crediting bank or its agent within the country or abroad.'

In Greece, if the issued letter of credit is a confirmed one, the relationship between the issuing and intermediary banks is considered to be a contract of work with elements of mandate¹²⁷⁾ and it is therefore regulated by articles 713 to 729 of the Greek Civil Code. If the issued letter of

127) Kiantou-Pampouki: p.88; Loukopoulos (eranion): p.220

credit is an unconfirmed one, the intermediary bank is confined to the duties of a messenger and is just an assistant in performance¹²⁸⁾.

The legal relationship between the two banks is not influenced by the precedent definition of the negotiating bank and the place of payment. In both cases the Law of the country where the credit is to be performed has to be applied (*lex loci executionis*)¹²⁹⁾.

However, according to a different opinion, if the beneficiary chooses the bank by which he will be paid after tendering the shipping documents, the relationship may be regulated by the Law of the country of the issuing bank, and not of the negotiating bank¹³⁰⁾.

128) Ef.A. 2396/1989 E.Emp.D.1989.210;

Ef.A. 9188/1984 Nom.Ell.Dik. 1986.470

129) Loukopoulos (Eranion) : p.221

130) Faltsi-Gesiou P.: The International Jurisdiction of the Greek Courts in Disputes referring to Commercial Letters of Credit, in Arm. 1982. p. 953

C) The Relationship between the Seller and the Issuing and the Intermediary Banks

As mentioned above, the legal basis of the relationship between the banker and the seller has been a matter for discussion by English Courts and in Theory¹³¹⁾. In Greece, according to the prevailing theory ¹³²⁾, this relationship is a unilateral contract, and only the bank has contractual duties to the seller and not the seller to the bank. This contract is considered to be an abstract promise of debt, and is ruled by articles 873 to 875 of the Greek Civil Code.

Article 28 of the statute of 17.7./13.8.1923 provides:

'.....a) If the third party, who has been given notice by the creditor bank about the credit which it has opened, declares his acceptance to the bank, the creditor bank is not entitled to revoke the credit unless it has expressly designated the credit in the notification as revocable, b).....'.

As stated in this article the bank's duties to the beneficiary begin from the time the latter expressly accepts the credit. However, both Legal Theory and the Courts in Greece have accepted that the contract between the seller and the bank is concluded when the seller receives the notification of the

131) see p. 17

132) Brinias: p. 304; Loukopoulos: p. 54; Pol. Prot. A. 8668/1990 Arm 1991.465

credit by the bank and does not object to it at once¹³³⁾.

a) Advising and Confirming Bank

The Relationship between the seller and the intermediary bank depends a) on whether the intermediary bank acts as a principal by issuing the credit itself and specifying the terms on which it does so, or whether it acts only as an agent of the issuing bank, in carrying out the latter's instructions and b) on the kind of the issued credit, that is, on whether the credit is a confirmed or an unconfirmed one.

The kind of credit, which is usually issued by the buyers's bank according to its customer's instructions, is often prescribed by the seller and the buyer in the underlying contract.

As already mentioned, when the intermediary bank advises the credit, it undertakes no obligation to the seller. In this case the bank should state clearly that its intention is merely to notify the issue of the credit, and that it acts as an advising bank without incurring any obligation under the credit.

On the other hand, when the intermediary bank confirms the credit, its liability depends on the terms in which its confirmation has been given, though it usually undertakes all the obligations of the issuing bank as described in the letter of credit¹³⁴⁾.

133) Giesiou-Faltsi: p.953; Mazis: p. 358; Tsimikalis: p. 97 and Ef.A. 9188/1984 EEmpD 1986. 470; Ef.A. 1329/1956 EEmpD 1956. 219

134) see 'Unconfirmed and Confirmed Credits p.4

Article 9B of the Uniform Customs ¹³⁵⁾ provides that the intermediary confirming bank's liability is additional to that of the issuing bank. However, Legal Theory and Courts in England and in Greece have not dealt with the problem which arises when the confirming bank issues its own credit, not stating that it is issued in accordance with the credit of another bank. In this case, it is doubtful whether there is privity between the original issuer and the beneficiary, when the former's obligation is not at least implied from the credit. Usually, however, the confirming bank merely adds its confirmation to the original credit issued by the buyer's bank and so accepts the obligation to make payment under the credit on the same terms as the buyer's bank.

b) The Bank's Obligations

The main obligation of the bank which issues or confirms an irrevocable letter of credit, to the seller, is to accept or to negotiate the seller's drafts, and pay him if the documents presented to it comply with the terms of the credit. This obligation of the bank is independent of its obligation to the buyer ¹³⁶⁾. The seller, on the other hand, is under no obligation to the bank because the tender of documents is not the performance of a duty owed by the seller to the issuing bank, but merely the condition of his right to receive the credit.

135) see p. 16

136) *Nordskog & Co. v. National Bank* (1922) 10 Lloyd's L.R. 652; *Soproma S.p.A. v. Marine and Animal By-Products Corpn.* (1966) 1 Lloyd's Rep. 367; see also p. 69

In Donald H. Scott & Co v. Barclays Bank¹³⁷⁾ Scrutton, L.J. said: 'The appellants gave a confirmed¹³⁸⁾ credit to the respondents; that is to say they entered into contractual relations with them from which they could not withdraw, except with the consent of the other party, and the respondents were entitled, on complying with the terms on which the confirmed credit was given, to receive sums of money.... from the appellants'.

The Court of Appeal in Athens in its 9188/1984 decision states:

'The beneficiary's rights from the letter of credit which has been opened depend on its kind, that is, on whether it is a revocable or an irrevocable credit. If it is an irrevocable credit, the notification of the beneficiary by the bank about the irrevocability of the credit opened in his favour has the meaning of an offer that cannot be revoked by it (the bank), which, when accepted by the beneficiary, expressly or implicitly, causes the irrevocability of the letter of credit.'¹³⁹⁾

If the presented documents do not correspond exactly to the requirements of the credit, the bank can refuse to take them up and to honour the seller's drafts. This refusal is justified because the bank may debit the buyer's account for the amount it has paid the seller only if it has followed exactly the instructions given to it by the buyer. Moreover, the bank may refuse payment if it finds out that the credit is void or discharged¹⁴⁰⁾ or if the seller has acted fraudulently¹⁴¹⁾. If the bank accepts documents which are not in order, the Court

137) (1923) 2 K.B. 1

138) 'Confirmed' had then the meaning of 'irrevocable'

139) see also Ef.A. 29/1956 EEmpD 1956.222

140) Bolivinter Oil S.A. v. Chase Manhattan Bank (1984) 1 All E.R. 351

141) see post p.90

may hold it liable to the buyer¹⁴²⁾.

Article 14D of the Uniform Customs provides that:

'If the Issuing Bank and / or Confirming Bank, if any, or a Nominated Bank acting on their behalf, decides to refuse the documents, it must give notice to that effect by telecommunication or, if that is not possible, by other expeditious means, without delay, but no later than the close of the seventh banking day following the day of receipt of the documents. Such notice shall be given to the bank from which it received the documents, or to the Beneficiary, if it received the documents directly from him'.

The 1983 Revision of the Uniform Customs provided that the bank had to give notice to that effect 'without delay', not mentioning anything about the time the bank might devote to the examination of the documents. The statement that the bank had to act within a 'reasonable time' did not solve the problem because opinions as to what 'reasonable time' means, differed remarkably. Thus, article 14D of the last 1993 Revision of the Uniform Customs has brought an end to the existing disputes. However, the bank is not entitled to refuse to pay the beneficiary merely because the buyer has instructed it to do so. In *Urguhart Lindsay & Co. Ltd. v. Eastern Bank Ltd.*¹⁴³⁾ the credit was issued by the defendant bank in pursuance of a contract between *Urguhart Lindsay & Co* and the *Benjamin Jute Mills Co. Ltd.*, by which the plaintiff undertook to

142) *Bank Melli Iran v. Barclays (D.C.O) Ltd* (1951) 2 Lloyds Rep.

367; but the bank is not expected to acquaint itself with trade names, see *Rayner & Co. v. Hambros Bank Ltd.* (1943) 1 K.B. 37

143) (1922) 1 K.B. 318 ; see also *Pacific Overseas Corp'n. v. Watkins Browne & Co.* (1954) N.Z. L.R. 45

manufacture certain machinery and deliver it to Benjamin Jute Mills. This contract also contained a term that if the cost of labour for manufacturing the goods increased, the purchase price would increase correspondingly. After the defendant bank had paid certain bills of exchange, it refused to take up shipping documents which contained invoices reflecting an increased cost of manufacture. After that, the buyers instructed the Eastern Bank to pay to the beneficiary in future only the amounts representing the original prices, and the bank, following its customer's instructions, refused to honour the seller's drafts. The Court held that the bank had to accept the invoices of the seller because they were within the limits of the credit, and that the plaintiffs were entitled to damages from the bank on its refusal to do so. On this matter, Rowlatt, J.'s decision contained the following dictum:

'.....the defendants undertook to pay the amount of invoices for machinery without qualification, the basis of this form of banking facility being that the buyer is taken for the purposes of all questions between himself and his banker, or between his banker and the seller, to be content to accept the invoices of the seller as correct. It seems to me that so far from the letter of credit being qualified by the contract of sale, the latter must accommodate itself to the letter of credit. The buyer having authorized his banker to undertake to pay the amount of the invoice as presented, it follows that any adjustment must be made by way of refund by the seller, and not by way of retention by the buyer.'

On the other hand, in *Stein v. Hambros Bank of Northern Commerce*¹⁴⁴⁾ the letter of credit provided that the goods were

144) (1922) 10 Ll.L.Rep. 529

to be shipped 'per steamer Caboto leaving Calcutta about the middle of January', but the steamer did not leave until after the middle of February. The Court held that the defendant bank could not be compelled to accept bills of lading the contents of which did not comply with the terms of the credit and the buyer's instructions.

The bank's obligation to the seller was also considered in the recent case of *Howe Richardson Scale Co. Ltd. v. Polimex-Cekop and National Westminster Bank Ltd.*¹⁴⁵⁾ where the Court of Appeal refused the plaintiff's application to restrain the second defendant from paying. Roskill, L.J. said:

'.....the obligation of a bankdoes not in the ordinary way depend on the correct resolution of a dispute as to the sufficiency of performance by the seller to the buyer or by the buyer to the seller, as the case may be, under the sale and purchase contract.'

The seller can in no case invoke the terms of the underlying contract to avail himself. Article 3B of the Uniform Customs states:

'A Beneficiary can in no case avail himself of the contractual relationships existing between the banks or between the Applicant and the Issuing Bank.'

Though the bank's obligation to the seller under an irrevocable documentary credit has been considered in many

145) (1978) Lloyd's Rep. 161

English and Greek cases, its nature and limits have not yet been clearly defined. The recent case *United City Merchants (Investments) Ltd. and Glass Fibres and Equipment Ltd. v. Royal Bank of Canada, Vitrofueros S.A. and Banco Continental S.A.*¹⁴⁶⁾, however, is one of the cases which contribute to a great extent to the definition of the relationship between the bank and the seller. In this dispute the second plaintiffs, an English company, contracted to sell fibreglass making machinery to a Peruvian company (second defendant) f.o.b. United Kingdom port. According to a term of the contract the buyer (at his suggestion) would apparently pay the seller double the price originally quoted, and the excess price would be remitted by the seller to the credit of an associate company of the buyer at a bank in the United States of America. Such a scheme was illegal under Peruvian Law because it breached Peru's exchange control regulations. The Peruvian company opened a letter of credit with the Peruvian bank, which in turn arranged with the first defendant to open a confirmed irrevocable letter of credit in favour of the seller. The seller assigned its rights under the credit to the first plaintiffs. Shipment of the goods was made on 16 December 1976, although the letter of credit required shipment not later than 15 December 1976. The shipping agent, falsely and fraudulently, but not acting as agent of the seller or of the bank, entered the date of shipment on the bill of lading as 15 December 1976. The bank discovered the

146) (1982) 2 All E.R. 720

fraud and rejected the documents.

The Court of the First Instance held that, as the plaintiffs were unaware of the shipping agent's fraud, the defendants were not entitled to reject the shipping documents. However it refused to give judgement for the plaintiffs on the ground that the underlying contract and the letter of credit were not enforceable by reason of article VIII, section 2(b), of the Bretton Woods Agreements Order in Council 1946^{146a)} providing for the international enforcement of exchange control restrictions.

The plaintiffs took it to the Court of Appeal, which dismissed their appeal on the ground that the bank was entitled to refuse payment under a letter of credit against the presentation of fraudulent shipping documents, even though the person presenting the documents was unaware of the fraud. In addition the Court of Appeal held that the letter of credit was not enforceable under the Breton Woods Agreement to the extent that it infringed Peruvian exchange control regulations. That is, the Court of Appeal would have given judgement for the plaintiffs for the part of the amount of the letter of credit which did not constitute a monetary transaction in disguise if the shipping agent had not acted fraudulently. The plaintiffs appealed to the House of Lords.

Lord Diplock stated about the relationship between the bank and the seller:

'If, on their face, the documents presented to the confirming bank by the seller conform with the requirements of the credit as notified to him by the confirming bank, that bank is under a

146a) Bretton Woods Agreement, 1945

contractual obligation to the seller to honour the credit, notwithstanding that the bank has knowledge that the seller at the time of presentation of the conforming documents is alleged by the buyer to have, and in fact has already, committed a breach of his contract with the buyer for the sale of the goods to which the documents appear on their face to relate, that would have entitled the buyer to treat the contract of sale as rescinded and to reject the goods and refuse to pay the seller the purchase price.'

However Lord Diplock accepted that only the fraud of the seller¹⁴⁷⁾ may normally relieve the bank from paying against documents if the documents are false or forged and the bank has knowledge of the fact. He said:

'..... as to the contractual obligations of the confirming bank to the seller, there is one established exception: that is, where the seller, for the purpose of drawing on the credit, fraudulently presents to the confirming bank documents that contain , expressly or by implication, material representations of fact that to his knowledge are untrue.'

The House of Lords held that since the shipping documents had been fraudulently completed by the shipping agent, but not by the seller as his principal, the defendant bank remained under a duty to pay to the seller and its assignee the amount due under the letter of credit. As to the matter of the enforcement

147) As to the seller's fraud see also: Davis O' Brien Lumber Co. v. Bank of Montreal (1951) 3 D.L.R. 536; Sztejn v. J. Henry Schroder Banking Corp'n. (1941) 31 N.Y. Supp. 2d 631; Discount Records Ltd. v. Barclays Bank Ltd. (1975) 1 All E.R. 1071; Tukan Timber Ltd. v. Barclays Bank p.l.c. (1987) 1 Lloyds Rep. 171

of the letter of credit the House of Lords agreed with the Court of Appeal that the sales contract did not constitute a monetary transaction contrary to the law of Peru, and was therefore enforceable to the extent that it did not infringe

Peruvian exchange control regulations. The appeal was accordingly allowed.

On the other hand, if the beneficiary is neither responsible for nor aware of the forgery the bank may not refuse to accept tender of documents¹⁴⁸⁾.

Legal theory in Greece has accepted that the bank is entitled to reject the documents a) if the seller is obviously acting in bad faith in exercising his rights contrary to morality and good faith (because the plea of fraud may never be excluded) or b) if the relationship between the buyer and the seller is illegal, illicit or non-existent or c) if the relationships between the buyer and the bank or between the buyer and the seller are null and void.¹⁴⁹⁾

148) Kwei Tek Chao v. British Traders and Shippers Ltd. (1954) 2 Q.B. 459; United City Merchants Ltd. v. Royal Bank of Canada (1983) 1 A.C. 168; Etablissements Esefka International Anstalt v. Central Bank of Nigeria (1979) 1 Lloyd's Rep. 445; Guaranty Trust Co. of New York v. Hannay & Co. (1918) 2 K.B. 623
149) Krimpas: p. 161; Mazis: p. 358

c) The Seller's Obligations

The seller's primary obligation is to tender to the banker all documents mentioned in the letter of credit. Besides this, he has to make sure that these documents¹⁵⁰⁾ comply strictly with the terms of the credit. If he does so, he is entitled to payment on the date stipulated in the credit, even if the credit does not expressly provide for payment against documents. In *Biddel Bros. v. E. Clemens Horst Co.*¹⁵¹⁾ the buyer refused payment when the sellers tendered the appropriate shipping documents and insisted on examining the goods first, on the ground that the contract did not provide for payment against documents. The Court of Appeal upheld the buyers' contention, but the House of Lords held that under a c.i.f contract payment is due upon tender of documents, unless the contract expressly provides otherwise.

If the seller does not fulfil his obligations, the bank may refuse to take the documents up, and he will have no cause of action against it.

In *English, Scottish and Australian Banks Ltd. v. Bank for South Africa*¹⁵²⁾, Bailhache, J., said:

'It is elementary to say that a person who ships in reliance of a letter of credit must do so in exact compliance with its terms. It is also elementary to say that a bank is not bound or,

150) Questions relating to the documents tendered are dealt with separately see post : p. 103

151) (1911) 1 K.B. 934 and (1912) A.C. 18

152) (1922) 13 Ll.L.Rep. 21

indeed, entitled to honour drafts presented to it under a letter of credit, unless those drafts with the accompanying documents are in strict accord with the credit as opened.'

An irrevocable credit, as already stated, can neither be amended nor cancelled without the seller's agreement. If, however, the issuing bank advises an amendment or amendments of the letter of credit to the beneficiary, the latter should, according to article 9D III of the Uniform Customs and Practice:

'.....give notification of acceptance or rejection of amendment(s). If the Beneficiary fails to give such notification, the tender of documents to the Nominated Bank or Issuing Bank that conform to the Credit and to not yet accepted amendment(s), will be deemed to be notification of acceptance by the Beneficiary of such amendment(s) and as of that moment the Credit will be amended.'

Furthermore, if the beneficiary has drawn a bill of exchange on the buyer's bank, the bank is obliged to honour it in maturity if the holder has met the legal requirements of presentation and delivery and has not been paid. If the beneficiary negotiates the bill to a third person, he will normally be liable as an indorser to that third person; he may, of course, negate his liability by signing his draft 'without recourse', but this does not help him if the tendered documents are not in conformity with the letter of credit, because in this case the term 'without recourse' is of no effect as regards the bank.

On the matter, the Commission on Banking Technique and

Practice¹⁵³⁾, which was asked to say if the seller is liable to the bank in cases where the bill is drawn 'without recourse', it decided at its meeting of 9 November 1979¹⁵⁴⁾ that:

'...although a bank might have no recourse under a bill of exchange drawn 'without recourse' or under a bill to which the Geneva Convention Rules applied, such bank could have rights of recourse under the documentary credit which formed the underlying contractual basis for the transaction.'

On the other hand, if the draft is a 'time draft' the drawer-beneficiary who has signed 'without recourse' is not liable to a third party who has become transferee of the draft after it has been divorced from the tendered documents.

However, the letter of credit usually does not permit drawing 'without recourse', and therefore the bank is not willing to take up such a draft.

In *Sassoon v. International Banking Corporation*¹⁵⁵⁾ the defendant bank discounted 'time bills' drawn by the plaintiff

153) This Commission is a body within the International Chamber of Commerce, which devotes a considerable part of its efforts to the task of considering queries raised regarding the interpretation of the various provisions of Uniform Customs and Practice, and giving its authoritative decisions for the guidance of all interested parties.

154) ICC Documents 470/Int.151, 470/358

155) (1927) A.C. 711

under a credit that had been issued by the Eastern Bank Ltd. After that the defendant tendered the documents direct to the buyer but ,as it was not paid, it sued the plaintiffs as drawers of the discounted bills. Lord Sumner said:

'If the respondents discounted the drafts on the faith of the invitation(if any) contained in the letter of advice, the decision In re Agra and Masterman's Bank¹⁵⁶⁾ entitled them, if they chose to do so, to sue on the credit....as if they had been parties to it from the beginning. If they had not discounted on the faith of that invitation, the principle would not apply, and...(for the defendants) the name of M.A.Sassoon & Co. was good enough in this case, and the confirmed credit was accordingly superfluous. Apart from this, however, the principle would only confer a right of action on the International Banking Corporation against the Eastern Bank, if they chose to exercise it, but it would not impose on them a duty towards M.A. Sassoon & Co. so as to modify the ordinary right of recourse at all events or in any event. It is a matter between the respondent Corporation and the Eastern Bank, not between M.A.Sassoon & Co. and the respondent Corporation.'

d) The Drafts

Irrevocable letters of credit very often include the term that payment shall be made by drafts drawn by the seller at sight, or at the expiration of a specified term, on the issuing

156) (1867) L.R. 2 Ch.App. 391

bank or the buyer, under the condition that the drafts will be accompanied by documents which comply with the terms of the credit. When the seller presents the required documents and the drafts to his bank, usually the intermediary bank, the latter takes up the documents against payment or acceptance, and either pays the amount of the beneficiary's draft or accepts it. If the seller tenders the documents and receives payment at once, the documents are called 'documents against payment' (D/P), while, if the bank accepts the documents and pays the seller later on presentation of the bill of exchange drawn by the beneficiary, which is more common in modern transaction, the documents are called 'documents against acceptance' (D/A). Similarly, according to the time of payment, the tendered drafts may be either 'Sight Drafts' (D/P bills) or 'Time Drafts' (D/A bills).

'Sight Drafts' are drafts payable upon delivery and presentation of the bill of exchange to the drawee. So, when the credit provides for payment against 'Sight Drafts', the seller delivers the shipping documents and gets paid if they are in conformity with the credit. In this case, the presented draft is of little importance, the bank may overlook any existing irregularities in it and, if the draft is drawn on the buyer, the seller does not need to present it to him. However, Parker, J. in *Kydon Compania Naviera S.A. v. National Westminster Bank and Others (The Lena)* ¹⁵⁷⁾ said:

'Whether or not a sight draft or any other document serves a

157) 1981) 1 Lloyd's Rep. 68, 75

useful purpose is not a matter with which the bank is concerned. Its contract is to pay in accordance with the terms of the credit. If the credit states that it is available by certain documents the bank is not therefore in breach of the contract if it does not pay in the absence of such documents'.

Therefore, if the credit requires a draft (even if it has to be a sight draft), the bank should ask for it to be tendered . Otherwise, it will run the risk of not being reimbursed by the issuing bank or the buyer for its advances. On the other hand, if the tendered documents are in accordance with the terms of the credit, the bank, which has paid the seller, does not, as provided in article 9 of the Uniform Customs and Practice, have recourse on the bill if the issuing bank fails to reimburse it.

'Time Drafts' are drafts payable a specified number of days or months after their date of issue or acceptance. When the credit provides payment against 'Time Drafts' the bank takes up the presented documents, if they are in order, and accepts the seller's draft. Under such a credit the buyer obtains credit from the seller and the seller receives payment later, when the accepted bill of exchange matures.

The bank, if it does not confirm the credit, may purchase the draft, either before or after acceptance, from the beneficiary or a third party to whom the draft has been indorsed. The seller, after his draft has been accepted by the bank, may

- a) sell the draft for face value less a discount to his own bank or to a third person
- b) negotiate the bill to a third person in return for a loan on the security of it

c) hold the bill until maturity

After the acceptance of the documents and the draft the bank is liable to the holder of the draft for its face value even if it turns out later that the documents are not in order. As to the regularity of the documents the issuing bank is bound, according to article 8 B of the Uniform Customs and Practice , to reimburse an intermediary bank which has accepted the documents and the seller's draft, even if it believes that the documents are not in compliance with the credit. Consequently, if the buyer takes a different view from that of his bank and of the intermediary bank, he may be in conflict with them. However, this is not the only problem of the D/A draft and of this kind of credit as a whole. If the buyer or his bank refuse to take up the documents and pay the amount of the draft , the seller's bank will be in the difficult situation of having the goods on its hands at a distant place (usually a custom -house) without being sure that it will be reimbursed. Furthermore, if the buyer becomes insolvent before payment, the issuing bank which has paid the draft will have only the seller to look to for repayment. If the seller has also become insolvent the loss will fall on the bank.

In *Elder Dempster Lines Ltd. v. Ionic Shipping Agency Inc.*; *Midland Bank*; and *Marine Midland Grace Trust Company of New York* ¹⁵⁸⁾ a credit was addressed to two parties 'jointly'. Donaldson, J. said:

¹⁵⁸⁾ (1968) 1 Lloyd's Rep. 529

'The letter of credit is not addressed simply to the plaintiffs and Ionic, but to them with the added word "jointly". In the light of this highly unusual method of address, the words "your drafts" in the body of the letter, can only mean "your joint drafts".

In earlier times in Greece there prevailed the view that no contract exists under a commercial letter of credit if the bank does not undertake to pay to the beneficiary the amount of the credit in cash, but merely accepts the seller's drafts which accompany the shipping documents. This view was based on the argument that in this case the bank has no security, that is, it has no pledge on the goods, because, as soon as it receives the bill of lading from the seller, it has to send it to the buyer.¹⁵⁹⁾ Indeed, according to article 25 of the statute of 17.7/13.8.1923¹⁶⁰⁾ the letter of credit is a contract under which the issuing bank and the buyer receive the bill of lading only against payment.

However, as already mentioned, these few articles of the statute of 17.7/13.8.1923 do not constitute a comprehensive description of the operation of the letter of credit, and are therefore insufficient for modern trade.

Besides, the fact that the bank has no pledge on the goods after it has accepted the seller's draft, is no reason for not applying the provisions of this statute on this kind of contract¹⁶¹⁾. What is of great importance is that the bank has a pledge on the goods as soon as it receives the bill of lading, and not that it does not hold this document in its

159) Simitis: p. 74; Mazis: p. 348

160) see p. 3

161) The term lien is not used under Greek Law. The bank's right to retain the goods is based on the pledge provided by Law.

hands for long. If we accepted that the articles 25 to 34 of the statute of 17.7/13.8.1923 are not applied in the case of a D/A bill then we should also accept that the bank never obtains a pledge on the goods (not even for a while). This, however, would not serve the purpose of the transactions. So, the rule of Greek Law that the bank obtains a pledge on the goods is applied both when the bank receives the documents against payment and when it accepts the seller's drafts and sends the bill of lading on to the buyer.

Later, especially after the Second World War, there was no objection to the fact that under a letter of credit the seller could be paid not only in cash but also against acceptance of his drafts¹⁶²⁾.

Nowadays Greek sellers often avoid the stipulation of payment or acceptance against drafts, because according to Greek Law¹⁶³⁾ they have to pay 50/00 stamp-duties on the amount of the draft and additionally 20% of the amount of the stamp-duties for the Organisation of Agricultural Insurance in Greece. The duties have to be paid within five days from the date of acceptance. If they are not paid or if they are paid after the expiration of the term, the draft does not become void, but its holder has no right of recourse to the drawer and the indorsers who have signed the draft before him, and he does not have the advantage of the speedy procedure which is provided for the recovery of the amount of dishonoured credit documents (i.e. negotiable instruments) by Greek Law.

162) Kiantou-Pampouki: p. 62, 72; Prot. P. 449/1949 Ef. Ell. Nom. 1950 . 444

163) Article 40 of the Greek Code for Stamp Duties

FOURTH PART

Shipping Documents Tendered Under a Letter of Credit

1) General

The buyer who opens a letter of credit always lists in it the various shipping documents which the beneficiary has to present to the issuing or confirming bank. The main documents which are required by every letter of credit issued to finance an import or export transaction are a) the bill of lading in respect of the goods b) the marine insurance policy and c) the commercial invoice.

The bank which receives the documents does not usually see the goods themselves or the way they are packed and delivered. According to article 4 of the Uniform Customs and Practice

'In Credit operations all parties concerned deal with documents, and not with goods, services and/or other performances to which the documents may relate'.

The bank's duty is just to examine the tendered documents carefully and, if they are in accordance with the terms and conditions of the credit, it sends them to the buyer.

Article 13 A par.1 of the Uniform Customs and Practice provides:

'Banks must examine all documents stipulated in the Credit with reasonable care, to ascertain whether or not they appear, on their face, to be in compliance with the terms and conditions of the Credit. Compliance of the stipulated documents on their face with the terms and conditions of the

Credit, shall be determined by international standard banking practice as reflected in these Articles. Documents which appear on their face to be inconsistent with one another will be considered as not appearing on their face to be in compliance with the terms and conditions of the Credit.'

In *Hansson v. Hamel & Horley Ltd.*¹⁶⁴⁾ Lord Sumner said:

'These documents have to be handled by banks; they have to be taken up or rejected promptly and without any opportunity for prolonged inquiry; they have to be such as can be re-tendered to sub-purchasers, and it is essential that they should so conform to the accustomed shipping documents as to be reasonably and readily fit to pass current in commerce'.

So, as was held in *Skandinaviska Aktiebolaget v. Barclays Bank*¹⁶⁵⁾, a bank cannot be compelled to accept a bill of lading which does not contain the name of the shipper and which is indorsed in an illegible manner. On this matter, Greer, J. said:

'It seems to me that documents of this sort tendered to a bank under a credit ought to be documents on which questions cannot be raised so far as the documents are concerned....the documents ought to be completely in order.....'.

However, as already mentioned, an obvious typographical error does not justify the rejection of the documents¹⁶⁶⁾.

Banks very often accept the tendered documents and pay the seller 'under reserve'. This happens because the documents

164) (1922) 2 A.C. 36; see also *Commercial Banking Co. of Sydney Ltd. v. Jalsard* (1973) A.C. 279

165) (1925) 22 Ll.L.Rep. 523

166) see p.51 the case *Kronman & Co v. Steinberger*

contain or are alleged to contain discrepancies and the bank needs time to send the documents for consideration by the applicant. If the bank is a confirming one, it remits the documents to the issuing bank and draws its attention to the discrepancies which prevent it from paying the seller unconditionally.

The Uniform Customs make provision for payment under reserve in article 14F:

'If the remitting bank draws the attention of the Issuing Bank and/or Confirming Bank, if any, to any discrepancy(ies) in the document(s) or advises such banks that it has paid, incurred a deferred payment undertaking, accepted Drafts(s) or negotiated under reserve or against an indemnity in respect of such discrepancy(ies), the Issuing Bank and/or Confirming Bank, if any, shall not be thereby relieved from any of their obligations under any provision of this Article. Such reserve or indemnity concerns only the relations between the remitting bank and the party towards whom the reserve was made, or from whom, or on whose behalf, the indemnity was obtained.'

The matter of 'payment under reserve' as well as the problem which arises when the credit does not call for a certain document although it includes a statement which has to be evidenced by the beneficiary, were examined in the following case.

In *Banque de l'Indochine et de Suez S.A. v. J.H. Rayner (Mincing Lane) Ltd.*¹⁶⁷⁾ a letter of credit was issued which included the statement that the carrying ship should be a

¹⁶⁷⁾ (1982) 2 Lloyd's Rep. 476

conference line vessel. The defendants tendered documents under the credit and requested payment, but, as the plaintiffs refused it because of discrepancies in the documents, the defendants accepted payment under reserve. When the buyers rejected the documents, the plaintiffs considered that they were entitled to repayment of the amount paid with interest, seeking to establish their term 'under reserve' as a part of the credit. The Court of the First Instance did not accept the plaintiffs' allegation but, nevertheless, it decided against the defendants because the documents were not on their face consistent with each other. As to the requirement included in the letter of credit Parker, J. said:

' As to the primary contention of the parties, since the credit expressly stipulated for shipment on what for convenience I shall call merely 'a Conference Line vessel' the plaintiffs were both entitled and obliged to ensure that the stipulation was complied with. No specific documentary proof was called for by the credit but since parties to documentary credits deal only in documents, the bank were in my judgement entitled to insist upon, and the defendants were obliged to provide, reasonable documentary proof. The requirement for a certificate was, in my view, a reasonable requirement, and accordingly the bank were entitled to regard its absence as a valid ground for refusing payment even if, as was in fact the case, the vessel was a Conference Line vessel.'

The Uniform Customs and Practice require strict compliance to the terms of the credit not only of the transport documents, but also of the insurance documents and commercial invoices. Accordingly, article 37C of the Uniform Customs and Practice

states:

'The description of the goods in the commercial invoice must correspond with the description in the Credit. In all other documents, the goods may be described in general terms not inconsistent with the description of the goods in the Credit.'

Similarly, in *Kydon Compania Naviera S.A. v. National Westminster Bank Ltd. and Others (the 'Lena')*¹⁶⁸, it was held that the commercial invoice, which was tendered by the plaintiff's assignee to the issuing bank (third defendant), had to describe the goods in terms corresponding with the description in the credit, that is to say the invoice might not include words with the same meaning as the words in the credit but it had to follow the exact wording of the credit.

Moreover, *Donaldson, M.R. in Banque de l'Indochine et de Suez SA v. J.H. Rayner (Mincing Lane) Ltd.*¹⁶⁹ accepts that, contrary to what is provided by the Uniform Customs and Practice, the description in other documents must be consistent and only consistent with the commercial invoice and the credit, which means that it is not sufficient to produce a document, e.g. a certificate of origin, which is merely 'not inconsistent' with the other documents.

The 1993 Revision of the Uniform Customs and Practice covers the documents under a commercial letter of credit in its

168) (1981) 1 Lloyd's Rep. 68

169) (1983) 1 Lloyd's L.R. 228

articles 20 to 38. These articles will be dealt with in respect of each document .

2) Main Documents

A) Bills of Lading

Legislation

In England the bill of lading was ruled by the Bills of Lading Act 1855. This Act defined the function of the bill of lading as a document of title. The character of the bill of lading as a document of title is also provided in the Sale of Goods Act 1979, which assimilates the Bill of Lading with other documents of land or air transport such as 'delivery orders' and warrants, and considers them also documents of title. The rules about the bill of lading were revised by the Carriage of Goods by Sea Act 1971.

In Greece the sea bill of lading is ruled by articles 168 to 173 of the Code of Private Maritime Law¹⁷⁰⁾ which has many similarities with the terms of the Hague Rules. The bill of lading is also provided for and regulated by articles 25,26,28,31,34 and 76 to 80 of the statute of 17.7/13.8.1923. This statute regulates the function of the bill of lading in accordance with the commercial letter of credit. In addition, article 978 of the Greek Civil Code is applied to the bill of lading in case of transfer of possession by transmission of the bill of lading.

170) Statute 3816 of 28/2/1958

On an international scale, two important treaties govern bills of lading; the Hague-Visby Rules, drawn up in 1924 and amended in Brussels in 1968, which cover all goods from the time of loading to final discharge at the port of destination, and the United Nations Convention on the transport of goods by sea (1978).

The Hague-Visby Rules have the force of law in England. According to article 10 of these rules:

'The provisions of these rules shall apply to every bill of lading to the carriage of goods between ports in different states if:

- a) the bill of lading is issued in a contracting state or
- b) the carriage is from a port in a contracting state....whatever may be the nationality of the ship, the carrier, the shipper, the consignee, or any other interested person.'

Greece has ratified neither of the abovementioned Conventions¹⁷¹⁾. So, these rules are applied in a certain transaction in Greece only if the parties have decided that their shipment will be governed by them¹⁷²⁾.

The Uniform Customs and Practice also make provision for the bill of lading in various articles. However, the term 'bill of

171) Farmakidis: The Law Relating to Greek Foreign Commerce, 1993, p. 233

172) Pol. Prot. P. 1235/1983 EEmpD 1984. 324; Pol. Prot. P. 2880/1984 EEmpD 1985. 513

lading' is expressly mentioned only in respect of marine ocean transport¹⁷³⁾. According to the Uniform Customs the use of this term is not compulsory in any kind of transport¹⁷⁴⁾ and banks will, unless otherwise stipulated in the Credit, accept a document, whatever it is called, if it includes some specified information and instructions.

In practice, if the goods are to be transported by land or air and no sea transit is involved, the document which proves the delivery of the goods for carriage is called a consignment note or air waybill. The terms in Greek transactions are similar. However, the term 'bill of lading' has prevailed over all other terms and is used in practice for all means of transport.

The Probatory Force of the Bill of Lading

The bill of lading is a receipt for goods received for carriage to a stated destination; it is a document of title which can be used as a symbol for transferring possession or property. Furthermore it is evidence of the terms of the contract of carriage¹⁷⁵⁾ and also a title which authorises the buyer of the goods to receive them.

Article 170 of the Greek Code of Private Maritime Law states

173) Articles 23 and 25 of the Uniform Customs

174) Articles 23A, 25A, 27A, 28A

175) Ef.A.1039/1966 NomV 1967.154; Prot.A. 13730/1973 EEmpD 1974.192; Prot.A. 2666/1975 EEmpD 1975. 407; Ef.A. 2320/1938 Th N 476; Prot.A. 4783/1943 EEN A'. 91 Ef.A. 1398/1956 EEN 25.647

that:

'The bill of lading which has been issued legally constitutes evidence between all concerned in the goods as well as between them and the insurers.'

That is, the bill of lading can be used to prove the kind, the quantity and the quality of the goods which have been delivered for transport, as well as to claim the value of the goods if lost. When the original of the bill of lading is in the transporter's hands it proves, if it has been reimbursed by the consignee, that the transporter has fulfilled all his duties.

A bill of lading also contains instructions to the carrier and to the consignee, the carrier's duties and the consignee's obligations and rights when he receives the goods.

As inferred from the above mentioned the bill of lading is a very important document with probatory force. On the other hand, if in a certain transaction there is no bill of lading, either because it has not been issued or because it has been lost, the validity of the contract of transport or of the sales contract is not affected, except if the parties have expressly or by implication stipulated that the contract's validity depends on the issue and delivery of the bill of lading.

Besides, according to article 108 par.1 and 2 of the Code of Private Maritime Law

'the contract of charter (charter party) is proved in writing. In contracts of transport the charter party can be substituted by the bill of lading or a document which proves the receipt of the goods for shipment'.

In the 1156/1991 decision of the Court of Appeal in Piraeus¹⁷⁶⁾, where the parties had stipulated for the sea transport of certain goods the issue of a bill of lading without a bill of freight, the Court held that the party is not entitled to prove by witness the existence or the text

'....of contracts for which the law provides that a document is necessary , either as a constitutory act or as a means of proof, as in the case of a sea transport according to the rules of the Code of Private Maritime Law.... and thus this contract can be proved by witnesses only in case of an accidental loss of the document (bill of lading)....'

In Greece the bill of lading for domestic transport was subject to stamp-duties of 3% on the price of the goods and 20% of the amount of the stamp duties for the benefit of the Organisation of Agricultural Insurance in Greece. On 1/1/1987 the stamp duties were substituted by the value-added tax, the percentage of which depends on the kind of goods.

a) Types of Bills of Lading

a.1. Bills of Lading to a Specified Person, To Order and To Bearer

A straight bill of lading is one purporting to consign goods to a specified person. This type of bill of lading is non negotiable .The International Chamber of Commerce produced

176) Ef.P. 1156/1991 EEmpD 1991. 499

the Uniform Rules for a Combined Transport Document¹⁷⁷⁾ , which in their 1975 Revision make provision for the non-negotiable bill of lading in rule 3 as follows:

'Where a combined transport document is issued in non-negotiable form:

- a) it shall indicate a named consignee;
- b) the combined transport operator shall be discharged of his obligation to deliver the goods if he makes delivery thereof to the consignee named in such non-negotiable document or to the party advised to the combined transport operator by such consignee as authorized by him to accept delivery.'

In usual practice, bills of lading are issued to order or to bearer and are therefore negotiable documents.

According to rule 4 of the Uniform Rules for a Combined Transport Document

'Where a combined transport document is issued in negotiable form,

- a) it shall be made out to order or to bearer
- b) if made out to order it shall be transferable by indorsement;
- c) if made out to bearer it shall be transferable without indorsement;

Article 21 of the Uniform Customs issued in 1962 entitled the issuing and confirming banks to insist that the beneficiary's name should appear in the bill of lading either as a shipper or as indorser. This requirement is not included in the next

177) see about this type of bill of lading on page 115

revised versions of the Uniform Customs.

Similarly, the following two English cases deal with the indorsement of bills of lading.

In *National Bank of South Africa v. Banca Italiana di Sconto*¹⁷⁸⁾ the Court held that a bill of lading is not a good tender if it is made out in favour of the beneficiary or a third person and is not indorsed by him. In *Skandinaviska Kreditaktiebolaget v. Barclays Bank Ltd.* ¹⁷⁹⁾ , a bill of lading 'to order' in which no person entitled to the goods was mentioned and on which the indorsement was illegible, was held to be irregular.

Article 76 of the statute of 17.7/13.8.1923 provides that:

'Documents to order can be used in respect of a) e) sea and land bills of lading. 'Furthermore, according to article 169 of the Greek Code of Private Maritime Law: 'The bill of lading is issued at the consignor's choice, to a specified person or to order'. As inferred from these articles, Greek Law, contrary to Legal Theory ¹⁸⁰⁾ , makes no provision of bills of lading to bearer.

The Court of First Instance in Piraeus ¹⁸¹⁾ held that the bill

178) (1922) 10 Lloyd's L.R. 531

179) (1925) 22 Lloyd's L.R. 523

180) Simitis:p.33; Mitroulis:The Law Relating to Land Transportation, 1983,p.148; Farmakidis:p.238. On the other hand Deloukas in 'Documents of title' says that a document can be issued to bearer only if provided by the Law.

181) Prot.P. 1075/1954 EEmpD 1954.278

of lading is not 'ipso jure' a document 'to order', because according to article 76 of the statute of 17.7/13.8.23 the sea and land bills of lading 'can' be issued 'to order'. So, if the clause 'to order' is not included in the bill of lading, such a document is issued to a specified person and can be transferred only according to the rules of the Civil Law. This statement was perfected by other, including some earlier, decisions¹⁸²⁾, according to which the bill of lading to a specified person can be transferred only by assignment. These decisions also cite the Law of Bills of Exchange and accept that the indorsement constitutes assignment.

a.2. Combined and Traditional Transport Bills of Lading

The difficulties which arise in respect of transportation through distant countries, where the use of various means of carriage is inevitable, have led to the invention of Combined Transport Bills of Lading. Such transports are called combined transports or multi-modal transports.

A combined transport bill of lading is issued to cover goods transported usually in containers, by at least two modes of transport. It is a 'peculiar' type of bill of lading which has been invented to correspond to the rapid development of international transport.

182) Prot.P. 2756/1952 EEmpD 1952.390; Ef.Kr. 188/1952 EEmpD 1953.155; Prot.P. 3247/1951 EEmpD 1952.188; Prot.P.505/1953 EEmpD 1953.225

The combined transport document is governed by two International Conventions : The International Convention on Transportation by Rail (CIM) also called the 'Berne Convention' and the International Convention of Transportation by Land (CMR) also called the 'Geneva Convention '.

The Berne Convention was first signed in 1890 and was revised in 1923, 1933, 1952, 1961 and 1970. It was signed by almost every country of Europe including England and Greece.

The Geneva Convention of 1956, which was amended by the Geneva Protocol in 1976, includes more detailed rules about combined transport.

According to article 2 par.1 of the Geneva Convention, when the vehicle which contains the goods travels by sea or even by rail, and the goods are not unloaded and transhipped, the rules of the convention are applied in cases of damages caused in the transport as a whole. However, if the loss, the damage or the delay occurred during rail or sea transport, the transporter's liability will be defined by the Railway or the Maritime Law, under the condition that the consigner has entered into an agreement of transport with other means of carriage, too. Otherwise, the liability of the international land transporter will be ruled by the Convention of Geneva.

Both England and Greece have ratified the Convention of Geneva.

The International Chamber of Commerce has produced Uniform Rules for a combined transport document, which are issued for guidance and are binding between the parties only if they have decided so. Rules 3 and 4 deal with the obligations of the

combined transport operator in negotiable and non-negotiable documents.

Rule 3-Negotiable document

(f) delivery of the goods may be demanded only from the Combined Transport Operator or his representative, and against surrender of the Combined Transport Document duly endorsed where necessary;

(g) the Combined Transport Operator shall be discharged of his obligation to deliver the goods if, where a Combined Transport Document has been issued in a set of more than one original, he, or his representative, has in good faith delivered the goods against surrender of one of such originals.

Article 4-Non negotiable document

(b) the Combined Transport Operator shall be discharged of his obligation to deliver the goods if he makes delivery thereof to the consignee named in such non-negotiable document or to the party advised to the Combined Transport Operator by such consignee as is authorized by him to accept delivery.

The Uniform Customs and Practice provide for Multimodal Transport Documents, stating in article 26 what a bank may accept where its credit calls for a transport document covering a combined transport.

Article 26

If a Credit calls for a transport document covering at least two different modes of transport (multimodal transport), banks will, unless otherwise stipulated in the Credit, accept a document, however named, which:

I. appears on its face to indicate the name of the carrier or multimodal transport operator and to have been signed or otherwise authenticated by:

-the carrier or multimodal transport operator or a named agent for or on behalf of the carrier or multimodal transport operator, or

-the master or a named agent for or on behalf of the master.

Any signature or authentication of the carrier, multimodal transport operator or master must be identified as carrier, multimodal transport operator or master, as the case may be.

An agent signing or authenticating for the carrier, multimodal transport operator or master must also indicate the name and the capacity of the party, i.e. carrier, multimodal transport operator or master, on whose behalf that agent is acting,

and

II. indicates that the goods have been dispatched, taken in charge or loaded on board.

Dispatch, taking in charge or loading on board may be indicated by wording to that effect on the multimodal transport document and the date of issue will be deemed to be the date of dispatch, taking in charge or loading on board and the date of shipment. However, if the document indicates, by stamp or otherwise, a date of dispatch, taking in charge or loading on board, such date will be deemed to be the date of shipment,

and

III.a. indicates the place of taking in charge stipulated in the Credit which may be different from the port, airport or place of loading, and the place of final destination in the Credit which may be different from the port, airport or place of discharge,

and/or

b.contains the indication "intended" or similar qualification in relation to the vessel and/or port of loading and/or port of discharge,

and

IV. consists of a sole original multimodal transport document or, if issued in more than one original, the full set as so issued,

and

V.appears to contain all of the terms and conditions of carriage, or some of such terms and conditions by reference to a source or document other than the multimodal transport document (short form/blank back multimodal transport document); banks will not examine the contents of such terms and conditions,

and

VI.contains no indication that it is subject to a charter party and/or no indication that the carrying vessel is propelled by sail only,

and

VII.in all other respects meets the stipulations of the Credit.

B. Even if the Credit prohibits transshipment, banks will accept a multimodal transport document which indicates that transshipment will or may take place, provided that the entire carriage is covered by one and the same multimodal document.

Greek Law does not make provision for combined transport. Therefore, according to one opinion, which is not the prevailing opinion, the abovementioned conventions of Bern and Geneva should also be applied in inland combined transport.¹⁸³⁾ However, the Court of Appeal in Athens in its 7086/1990 decision¹⁸⁴⁾ held:

'The contract of transport of goods is regulated by the rules of articles 95 to 100 of the Greek Commercial Code if it concerns an inland transport and by the rules of the Convention of Geneva (19.5.1956) if it concerns an international land transport of goods....This contract has the form of a contract of work, in which the transporter's obligation is to transport the goods and the other contracting party's

183) Mitroulis : p. 241

184) Ef.A. 7086/1990 EEmpD 1990.618

counter-performance is to pay the agreed remuneration (carriage-fee). In cases where the abovementioned specific rules do not make other provision, there are applied additionally the rules of the Civil Code concerning the contract of work (article 681) and concerning bilateral contracts (such as article 380).'

a.3. Clean and Claused Bills of Lading

Clean Bills of Lading

A bill of lading is clean if it has no superimposed clauses which indicate that either the goods or packaging are in any way defective or damaged or not as described in the text of the bill of lading. In order for a bill of lading to be accepted by the issuing or confirming bank when tendered by the beneficiary, it has to include in its standard wording the phrase 'shipped in apparent good order and condition'. This is provided by article III, rule 3(c) of the Schedule to Carriage of Goods by Sea Act, 1971, which states that a bill of lading issued in the United Kingdom must show the apparent order and condition of the goods.

However, in Law as well as in practice the term 'clean' bill of lading has not been clearly defined and the question 'when exactly is a bill of lading clean?' has been a matter of dispute.

So, in *Restitution S.S.Co. v. Pirie*¹⁸⁵⁾ Cave, J. said:

'.....where, for instance, you insert in the margin of the bill of lading that the weight or quantity or quality is

185) (1889) 6 T.L.R. 50

unknown, that is not a clean bill of lading, because that contains a qualification. Where, on the other hand, there is no such qualification in the margin, there the bill of lading is a clean one.'

That is, according to Cave, J., if there is a marginal note on the bill of lading stating that the master or the owner of the ship is unaware of the condition of the goods, the bill of lading is not a clean one.

In *Golodetz & Co. Inc v. Czarnikow-Rionda Co. Inc.*, *The Galatia*¹⁸⁶), one of the three bills of lading tendered bore a typewritten note explaining what had happened to part of the cargo after loading. It stated:

'Cargo covered by this bill of lading has been discharged Kandla view damaged by fire and /or water used to extinguish fire for which general average declared '.

The buyers refused to accept the documents, arguing that the bill of lading was 'unclean'. Both the Court of the First Instance and the Court of Appeal held that the bill of lading was a 'clean' one, and that the loss of the ship and the goods after shipment or the existence of a liability in general average is no excuse for the buyers to refuse to take up and pay for the documents. The reason for the Court holding that this was so was that the annotation on the bill of lading related, not to the condition of the goods when they were shipped, but to an event which occurred after shipment, when the goods were at the risk of the carrier.

Furthermore, the authors Pollock and Bruce in *Law of Merchant Shipping*¹⁸⁷) say:

186) (1979) 2 Lloyd's Rep. 450

187) *Law of Merchant Shipping*, 4th Ed. (1881) by Pollock and Bruce p. 341

A bill of lading commonly states that the goods are shipped in good order and condition and are to be delivered in like good order and condition, and a bill of lading in such form is commonly called a clean bill of lading. But as it frequently happens that when the goods are shipped the master has no means of judging of the quality or condition of the goods or even of the nature of the contents of the packages put on board, it is usual to qualify the statement in the body of the bill by adding in the margin or at the foot of the bill of lading 'weight ,contents, and value unknown,' or similar words. Where this is done the words so added control the bill of lading and operate to relieve the master and owners from any statements contained in the body of the instrument relating to the weight, contents, and value of the goods which are not true in fact.'As inferred from this second statement, if there is a reference in the body of the bill of lading specifying the quality of the goods and there is also a marginal note saying 'quality unknown' then the bill of lading is not a clean one.

In *British Imex Industries Ltd. v. Midland Bank Ltd.*¹⁸⁸⁾

Salmon, J., had a similar view as to the term 'clean bill of lading'. He said:

A 'clean bill of lading' has never been exhaustively defined, and I do not propose to attempt that task now. I incline to the view, however, that a clean bill of lading is one that does not contain any reservation as to apparent good order or condition of the goods or the packing.'

188) (1958) 1 Q.B. 542

However, the term 'condition' of the goods may cause doubts as to what it includes and whether the term 'quality' of the goods is also implied by it. Branson, J., in *Re Owners of Motor Tanker Athelviscount and the National Petroleum Co.*¹⁸⁹⁾ held that 'condition' of the shipped goods means external and apparent condition and not 'quality', because the transporter is usually an unskilled person who cannot be expected to have specific knowledge .

Article 32 of the Uniform Customs makes provision for the clean bill of lading and defines it as follows:

a) A clean transport document is one which bears no clause or notation which expressly declares a defective condition of the goods and/or the packaging.

b) Banks will not accept documents bearing such clauses or notations unless the Credit expressly stipulates the clauses or notations which may be accepted.

Furthermore, the uncertainty as to whether the seller has to tender a clean bill of lading, while there is no expressed requirement set by the buyer, has also given rise to disputes.

In *British Imex Industries Ltd. v. Midland Bank* ¹⁹⁰⁾ Salmon, J., said:

'....when a credit calls for bills of lading, in normal circumstances, it means clean bills of lading. I think that, in normal circumstances, the ordinary businessman who undertakes to pay against the presentation of bills of lading

189) (1934) 39 Com.Cas. 227

190) (1958) 1 Q.B. 542; see also *Ellerman and Bucknall Steamship Co. Ltd. v. Sha Bhagajee* (1961) 2 M.L.R. 97

means clean bills of lading; and he would probably consider that that was so obvious to any other businessman that it was hardly necessary to state it.'

The same view was held by the Court of the First Instance in the earlier case *National Bank of Egypt v. Hannevig's Bank Ltd.*¹⁹¹⁾ where Bailhache, J. accepted the defendants' contention that 'Bills of Lading' as used in the instructions given by them to the plaintiffs, means 'clean Bills of Lading'. However, the Court of Appeal¹⁹¹⁾ did not give an answer to this question, while two of its Judges, who doubted whether Bailhache was right, expressed the following opinion: Lord Bankes, L.J. said:

'I express no opinion about it; but I certainly think it is worthy of careful consideration whether, although that may be the generally accepted construction to be put upon such a letter of instruction as this in normal times, and with reference to a business which is being conducted in the ordinary way, a different construction may not have to be put upon the same expression in a letter of instructions to a Bank in reference to a business which, to the knowledge of both parties, is completely disorganised and has to be carried on in war time under very different conditions from those under which it is carried on in peace time.'

Lord Scrutton, L.J. said¹⁹²⁾:

'My present impression is, I do not know that it is necessary to decide it finally in view of the grounds on which we are

191) (1919) 1 Ll.L.Rep.69; see also *Westminster Bank v. Banca Nazionale di Credito* (1928) 31 Ll.L.Rep.306; see also *The Eastern Bank v. Sha Miscriamal Bhagajee* (1961) II M.L.J. 88

192) (1919) 3 L.D.B. 213

deciding this case, that a mere credit against delivery of bills of lading is not necessarily a credit against 'clean' bills of lading. It depends on the facts of the case. A c.i.f contract involves your providing a contract of insurance and a contract of carriage and what the particular contract of insurance and contract of carriage specify as the obligation is, in my view, a question of evidence of the usual conditions of trade at the time.....The question is whether 'clean' bill of lading is 'usual' bill of lading in the trade at the time.'

A bank, however, cannot be expected to know what bills of lading are used in each kind of trade. Therefore, in practice, the bank is entitled to reject a bill of lading which is not clean within the rules of the Uniform Customs unless it has been authorized by the buyer to accept it or wants to take the risk.

Claused Bills of Lading

Bills of lading may have one or more clauses or notations either in writing, typed or stamped. There are various clauses put either in the margin or in the text of the bill of lading, but not all of them have the same force and effect. Often clauses are written to discharge the transporter from a certain liability to the consignee or the consignor, but they may also have another purpose e.g. clauses referring to the competent court in case of a dispute or the subjection of the dispute to the Hague-Visby Rules (paramount clause).

When a clause is embodied in the bill of lading the bank has to decide whether it is 'usual' in the trade or not and to take into

consideration the practice in the relevant ports at the relevant time. So, in *Finska Cellulosaforeningen v. Westfield Paper Co. Ltd.*¹⁹³⁾ the Court held that in wartime a bank could not reject a bill of lading issued by a neutral shipping line and containing a clause which allowed the master to unship at any safe port a cargo declared to be contraband by either belligerent as the ship had to travel through waters patrolled by both belligerents.

If the bank concludes that the clause is a 'usual' one it has also to make sure that the buyer will not suffer any loss or damage because of its acceptance. That is, a clause, even if it is a 'usual' one, has to be in accordance with the terms stipulated between the buyer and the seller. Consequently, the bank has to accept a bill of lading which has no superimposed clause and the 'usual' clauses it eventually carries should not be in contradiction with the terms of the credit.¹⁹⁴⁾ The bank is not in breach of its contract with its principal (the importer) if it accepts a bill of lading which complies with the terms of the credit, even if one or more clauses are detrimental from the standpoint of the buyer.

193) (1940) 46 Com.Cas. 87

194) In *British Imex Industries Ltd. v. Midland Bank Ltd.* (1957) 2 Lloyd's Rep. 591 the Court did not accept the bank's argument that a bill of lading was not 'clean' because it contained a printed clause disclaiming liability in certain circumstances and was not accompanied by proof that the parties agreed with the conditions of the clause.

If the bill of lading carries a superimposed clause which conflicts with a printed clause, the superimposed clause prevails over the printed one because it declares the parties real will¹⁹⁵⁾. If, however, the clauses contained in the bill of lading are not in compliance with the terms of the charter party, there is legal uncertainty both in English and in Greek Case Law and Legal Theory. The Court of Appeal in *President of India v. Metcalfe Shipping Co. Ltd., (The 'Dunelmia')*¹⁹⁶⁾ held that the charter party prevails over the bill of lading when the charterer is not the consignee of the bill of lading which was negotiated to the charterer after the issue of the charter party. However, according to Legal Theory¹⁹⁷⁾ when a bill of lading is issued to a third party and is later transferred to the importer the clauses of the bill of lading prevail over the different terms of the charter party.

In Greece, article 170 par. 2 of the Code of Private Maritime Law states that:

'In the relationship between the shipmaster (or shipowner) and the charterer the stipulations prevail which are contained in the contract of charter and proved by the charter party.'

This article, however, makes no provision for the relationship between the shipmaster and the consignee or the shipmaster and

195) Charlaftis: Meaning and force of the clauses in bills of lading EEmpD 1958. 247

196) (1969) 2 Lloyd's Rep. 476

197) Scrutton: On Charter Parties and Bills of Lading (1964);
Carver: Carriage of Goods by Sea (1963)

the holder of the bill of lading. According to the prevailing view in Legal Theory¹⁹⁸⁾ and Case Law¹⁹⁹⁾, in the relationship between the shipmaster or the shipowner and the consignee or the bearer of the bill of lading, the bill of lading prevails over the charter party, provided that the charterer is not the same person as the consignee or the bearer of the bill of lading.

A clause which is often included in a bill of lading is the clause: 'measurement, weight, quality, brand, contents, condition, quantity and value as declared by shipper but unknown to the carrier.' If a bill of lading bears such a clause, either printed or superimposed, the carrier is not discharged from his liability to the shipper or the consignee, but the holder of the bill of lading has the burden of proof that the goods were shipped in the condition described in the bill of lading²⁰⁰⁾.

According to article 3 of the Hague-Visby Rules of 1924 the carrier may refuse to confirm in the bill of lading the weight, the quantity and the other characteristics of the shipped goods only if there are serious reasons for him to suspect that the condition of the goods is not as described in the bill of lading or if the carrier had not the means to determine the condition of the goods.

198) Tsagaris EEmpD 1950. 228 ; Charlaftis EEmpD 1958. 247

199) Prot.P. 4713/1957 EEmpD 1958. 183

200) Pol.Prot.P. 904/1985 EEmpD 1985. 698; Prot. P. 1233/1979 EEmpD 1980. 298

Similarly, article 125 par. 3 of the Greek Code of Private Maritime Law provides that:

'The carrier is not obliged to include in the bill of lading the characteristics of or declarations about the measurement or the weight of the shipped goods, if he has reasonable cause to consider these characteristics do not exactly comply with the shipped goods or if he is not able, according to reasonable judgement, to determine this with exactness.'²⁰¹⁾

'Furthermore, article 31 of the Uniform Customs states:
Unless otherwise stipulated in the letter of Credit, banks will accept a transport document which.....
and/or
bears a clause on the face thereof such as 'shipper's load and count' or 'said by shipper to contain' or words of similar effect.'

As far as the packing of the goods is concerned it has been accepted that a bank is entitled to refuse to accept a bill of lading which bears a clause saying that the shipped goods have no packing at all.

However, it is not always that clear when a bank has to accept a claused bill of lading as a 'clean' one and when it is entitled to reject it. Thus, the superimposed clause 'not portmarked: vessel not responsible for incorrect delivery. Any extra expense incurred in consequence to be borne by consignees' was held by the Court of First Instance to be a clean bill of lading. This was the judgement of Parker, J. in

201) see also: Prot.P.815/1991 EEmpD 1992. 636;
Pol.Prot.P.2152/1978 EEmpD 1979. 297; Prot.P. 613/1978 EEmpD
1978.450 and Pol.Prot.P. 904/1985 EEmpD 1985. 698

the case *Banque de l' Indochine et de Suez S.A. v. J.H. Rayner (Mincing Lane Ltd.)*²⁰²⁾ where the plaintiffs' objection was not that the clause prevented the bill from being a clean one. They based their objection on the terms of the letter of credit which stated

(1) That the documents should cover shipment of the goods at U.S. \$ 505 per metric ton net cost and freight line out Djibouti.

(2) Under the heading 'Special Conditions'

All charges outside Djibouti, if any are to be paid by applicant-payment of costs additional to the freight charges.... is strictly excluded and is not covered by this letter of credit. Their reference on shipping documents should be considered as null and void if negotiated or paid under the terms and conditions of this letter of credit.

This special condition followed another one which stated: 'Insurance payable in excess of credit against documentary evidence.'

So, Parker, J. said:

The special condition quoted under (2) above in my view is doing no more than stating that charges outside Djibouti are by contrast with insurance not payable in excess of the credit.

It expressly recognizes that there may be such charges and that the documents may refer to them. It also recognizes that despite such reference the documents may be negotiated or paid. Its purpose is merely to ensure that no such charges are

paid under the credit, even if documentary evidence is provided. Furthermore, the clause itself is not inconsistent with the terms of the credit. There was no requirement that the goods should be portmarked and the clause was not in any way unusual. The second objection was in my judgement invalid.'

On the contrary, the Court of Appeal held that the shipment was 'cost and freight liner Djibouti' and that the term would constitute a specific prohibition in the terms of Article 16 d (1974 Revision).

Furthermore, in some cases, banks are entitled to reject bills of lading though they are considered to be clean in the sense of Article 32 of the Uniform Customs. So, if the clauses 'subject to mate's receipt'²⁰³⁾ or 'signed under guarantee to produce ship's receipt' are written or stamped on a bill of lading, they may give rise to the bank's rejecting the tendered documents though they do not render a bill unclean.

The bill of lading which does not clearly state the name of the ship in which the goods have been shipped, while the credit expressly makes provision for it or just admits shipment on board, without clearly stating that the goods have been shipped, is also a clean bill of lading according to article 32 of the Uniform Customs, but the bank has the right to reject it. Similarly, the tender of documents which cannot be easily read and understood is a bad tender²⁰⁴⁾.

203) see Canadian and Dominion Sugar Co. v. Canadian National (West Indies) Steamships Ltd. (1947) A.C. 46

204) Golodetz & Co. Inc. v. Czarnikow-Rionda Co. Inc. ("The Galatia") (1979) 2 Lloyd's Rep. 450

Moreover, the bank may refuse to accept a bill of lading which contains a clause discharging the master or the owner from liability for incorrect delivery or from any expense incurred because of the fact that the packed goods do not bear clean or sufficient identification marks as to the name and address of the consignee ²⁰⁵⁾, though this bill of lading is a clean bill. As far as the shipping company's liability for incorrect delivery is concerned, article 142 of the Greek Code of Private Maritime Law states:

'Any stipulation discharging the master or the owner of the ship from their responsibilities and liabilities in this chapter, or in any way limiting them is null and void.'

Thus the bank which takes up a bill of lading bearing such a clause does not run any risk if the buyer refuses to reimburse it, because the Court will apply the Law and nullify the clause.

205) British Imex Industries Ltd. v. Midland Bank Ltd. (1957)
2 Lloyd's Rep. 591

a . 4. Received for Shipment and Shipped Bills of Lading

A received for shipment bill of lading states that the goods which are described in it have been taken in charge and are waiting to be loaded.

Before the 1983 Revision of the Uniform Customs the bill of lading had to be a 'shipped bill of lading' (article 20 of the 1974 Revision). This was also the view of Case Law in England.²⁰⁶⁾

Article 27 of the 1983 Revision provided:

a) Unless a credit specifically calls for an on board transport document , or unless inconsistent with other stipulation(s) in the credit, or with Article 26, banks will accept a transport document which indicates that the goods have been taken in charge or received for shipment.

(b) Loading on board or shipment on a vessel may be evidenced either by a transport document bearing wording indicating loading on board a named vessel or shipment on a named vessel, or, in the case of a transport document stating 'received for shipment', by means of a notation of loading on board on the transport document signed or initialled and dated by the carrier or his agent, and the date of this notation shall be regarded as the date of loading on board the named vessel or shipment on the named vessel.'

According to this article, which introduced a change in the form of the bills of lading , the bill of lading did not have to

206) Diamond Alkali Export Corporation v. Bourgeois (1921) 3 K.B. 443; Donald H. Scott & Co. Ltd. v. Barclays Bank Ltd. (1923) 2 K.B. 1

prove that the goods had been loaded on board or shipped on a named vessel. This article has been omitted in the 1993 Revision which does not expressly provide for this type of bill of lading. Article 23A of the 1993 Revision states:

'If a Credit calls for a bill of lading covering a port-to-port shipment, banks will, unless otherwise stipulated in the Credit, accept a document, however named, which:

I..... and

II. indicates that the goods have been loaded on board, or shipped on a named vessel.'

Articles 24AII, about the Non-Negotiable Sea Waybill, and 25AIV, about the Charter Party Bill of Lading, are similar to 23A. These articles state when a bank may accept a bill of lading or not and if, in the case of a received for shipment bill of lading, it may accept or reject it.

However, it is inferred from articles 26AII about the Multimodal Transport Document, 27AII about the Air Transport Document and 28AII about Road, Rail or Inland Waterway Transport Documents that at least in these means of transport the received for shipment bill of lading is not excluded by the Uniform Customs.

Article 125 par. 4 of the Greek Code of Maritime Law makes provision for the received for shipment bill of lading by stating:

'If a temporary receipt for the goods is given to the shipper, the shipping company or the master is obliged to deliver the bill of lading only against return of this receipt.'

According to the interpretation of this article, the temporary receipt is the received for shipment bill of lading. However, though Greek Law makes reference to the received for shipment bill of lading, this type is not recognized as having the same effect as the shipped bill of lading²⁰⁷⁾, because article 168 of the abovementioned Code provides:

'The bill of lading is issued by the master of the ship after the loading. A copy of the bill of lading, signed by the shipper is handed to the shipping company.'

Furthermore, banks will refuse to take up a mate's receipt²⁰⁸⁾ or a delivery order²⁰⁹⁾ when a bill of lading is stipulated for, or even when the credit does not expressly mention the name of the transport document. On the other hand, if the letter of credit calls for the tender of delivery orders, tender of bills of lading in their place is not sufficient. This was held in 'The National Bank of South Africa v. Banca Italiana di Sconto and Arnhold Bros. & Co. (Oleifici Nazionale of Genoa, Third Parties)²¹⁰⁾ where the Court of Appeal decided that the issuing bank was entitled to refuse to honour the drafts of the beneficiaries, who had to tender a delivery order or a document equivalent to it in the business sense and not bills of lading.

207) Mazis: p.125; Prot.P. 5/1957 EEmpD 1957. 32

208) Wah Tat Bank Ltd. and Overseas-Chinese Banking Corporation Ltd. v. Chan Cheng Kum and Others (1967) 2 Lloyd's Rep.437

209) Forbes v. Pelling (1921) 9 Ll.L.Rep. 202

210) (1922) 10 Ll.L.Rep. 531

β) The Text

The Bill of lading is a printed document which is issued by the master of the ship or his agent or the shipowner or his agent and contains certain information.

Article 125 par. 2 of the Greek Code of Private Maritime Law provides:

'The bill of lading contains :a) specification of the shipping company, the shipper, the consignee, the ship and the master of the ship b) specification of the place of loading and the place of destination c) the stipulations about the freight d) the marks put for the distinction of the loaded goods as they (the marks) have been made by the shipper and if the marks have been put on the loaded goods or on their packing in such a way, that they are expected to remain distinct till the end of the voyage of the ship e) the number of packets or pieces or their weight, as these characteristics have been declared in writing by the shipper f) the condition of the goods as they appear at face during the loading g) the date of issue .

The description of the goods, their exact name and their packing are of great importance. They must be included in the bill of lading, because, in this way, the transporter knows which goods and in what condition he has to deliver to the consignee. Besides, the carrier has to know if the goods are dangerous to human life or health or if they are fragile and can be easily damaged²¹¹⁾. Again, the exact description of the danger and the protective measures which have been taken have also to be mentioned in the bill of lading, because this

211) Mitroulis: p. 145

will protect not only the carrier but also the consignor from any adverse consequences.

Furthermore, the description of the goods in the bill of lading has to be consistent with the other documents and with the description of them in the letter of the credit.

In *Rayner & Co. Ltd. v. Hambros Bank Ltd.*²¹²⁾, a case which has been already dealt with²¹³⁾, the goods in the letter of credit and the invoice were described to be Coromandel groundnuts, while the bill of lading tendered evidenced a shipment of machine-shelled groundnut kernels. The Court of Appeal held the Hambros Bank was justified to reject the tendered documents although it was proved that both terms are identical, but this was known only by participants in the trade and so not necessarily to the bank which issued the letter of credit.

In *London & Foreign Trading Corporation v. British & North European Bank*²¹⁴⁾ the plaintiffs contracted to open a letter of credit in London with the Hongkong & Shanghai Bank to cover a sales contract for 500 tons of meal. The plaintiffs sued the defendant bank because it paid the seller against covering a quantity considerably short of 500 tons. That is, while the invoice said 5895 bags at 190 lb. per bag, equal to 500 tons, the bill of lading had described the goods in the margin as 5895 bags and no weight at all. In fact, the actual quantity shipped was 448 tons, although there was the proper number of

212) (1943) 1 K.B. 37

213) p. 68

214) (1921) 9 Ll.L.Reports 116

bags. Rowlatt, J., said: 'But to my mind it is quite obvious that when you read these you must read the requirements of the bill of lading.... as the requirements of the bill of lading relevant to the invoice. It cannot mean that it is to be a blank form of bill of lading. (It) must be relevant to the invoice. Therefore I think nothing turns on the omission to state when the requisites of the bill of lading are being set out the quantity there, because I think that argument would carry one so far as to land one in an absurdity.

Therefore it seems to me that what the bank were authorised to do was to pay against a bill of lading which answered to the invoice, so that the buyer got the responsibility of the ship for the amount of goods which his seller was charging him for.'

Devlin, J., in *Midland Bank Ltd. v. Seymour*²¹⁵⁾ was also of the opinion that the shipping documents have to be consistent with each other. He said:

'.....it is sufficient that the description should be contained in the set of documents as a whole and that the documents should each one be valid in itself and each be consistent with the other; and, accordingly, it would not matter for this purpose whether the description in the bill of lading is or is not negatived by the clause in the bill of lading, since the description is sufficiently contained in the invoice, which is one of the documents.'

The Uniform Customs make reference to the description of goods only in article 37C, which states:

'The description of the goods in the commercial invoice must correspond with the description in the Credit. In all other documents, the goods may be described in general terms not inconsistent with the description of the goods in the Credit.'

215) (1955) 2 Lloyd's Rep. 147

The bill of lading has also to mention the whole amount of freight written in full or in numbers and stating whether it has been paid or is still due.

If, however, the seller has to tender the shipping documents under a c.i.f contract, then banks do not usually accept documents which show that freight has not been prepaid, unless the attached invoice shows that freight has been deducted or the seller tenders a freight receipt. In *Soproma S.p.A. v. Marine & Animal By-Products Corporation* ²¹⁶), although the credit called for bills of lading marked 'FREIGHT PREPAID', the bills of lading were in fact marked 'FREIGHT COLLECT'. As to this, the Court of Appeal had found that:

'It is common practice in the trade for Bills of Lading to be marked 'Freight Collect' under a C & F contract, and this is regarded as good tender provided sellers either deduct freight from the invoice or tender a freight receipt'.

McNair, J. in his decision said that if this finding meant more than that buyers do not usually raise the objection that a bill of lading in this form is not a valid tender, the finding was one which could not be sustainable in law 'since on the hypothesis stated, documents would be mutually inconsistent'.

Article 33 of the Uniform Customs provides:

'A. Unless otherwise stipulated in the Credit, or inconsistent with any of the documents presented under the Credit, banks will accept transport documents stating that freight or transportation charges (hereafter referred to as 'freight')

216) (1966) 1 Lloyd's Rep. 367, 387

have still to be paid.

B.If a Credit stipulates that the transport document has to indicate that freight has been paid or prepaid, banks will accept a transport document on which words clearly indicating payment or prepayment of freight appear by stamp or otherwise, or on which payment or prepayment of freight is indicated by other means.If the Credit requires courier charges to be paid or prepaid,banks will also accept a transport document issued by a courier or expedited delivery service evidencing that courier charges are for the account of a party other than the consignee.

C.The words 'freight prepayable' or 'freight to be prepaid ' or words of similar effect, if appearing on transport documents,will not be accepted as constituting evidence of the payment of freight.

D.Banks will accept transport documents bearing reference by stamp or otherwise to costs additional to the freight, such as costs of, or disbursements incurred in connection with, loading, unloading or similar operations, unless the conditions of the Credit specifically prohibit such reference.'

The signature and the address of the person who issued the bill of lading are further particulars which have to be included in the transport document.If the bill of lading has not been signed by its issuer, the terms and clauses included in it cannot be used as proof for or against him. On the other hand, the probatory force of the bill of lading is not affected by the fact that the shipper's signature is missing, provided that it does not contain clauses which are 'unusual' in common trade²¹⁷⁾).

217) Prot.Chanion 685/1965 EEmpD 1966. 133

Another essential item of information which has to be included in the bill of lading is the date of shipment. According to the Uniform Customs, loading on board or shipment on a vessel may be indicated by pre-printed wording on the bill of lading that the goods have been loaded on board or shipped on vessel, in which case the date of issue of the bill of lading will be deemed to be the date of loading on board and the date of shipment (see also articles 23II par.2, 24II par.2, 25IV par.2, 26II par.2, 27III and 28II). If the shipment mentioned in the bill of lading has not taken place within the time mentioned in the letter of credit, the bank is entitled to reject the shipping documents. So, in *Stein v. Hambros Bank*²¹⁸⁾, a case which has already been dealt with above ²¹⁹⁾ the Court of Appeal held that the bank could not be compelled to accept the shipping documents which mentioned that the goods had been shipped about a month after the date of shipment provided in the credit²²⁰⁾.

The importance of the date of shipment can be inferred from the case of *Oetker (Rudolf A.) v. I.F.A. International Frachtagentur A.G.*²²¹⁾ where Oetker chartered a vessel to I.F.A., who rechartered it to *Mebro Mineraloelhandels - gesellschaft* for the

218) (1922) 10 Ll.L.Rep. 529

219) p. 88

220) see also the case of *United City Merchants (Investments) Ltd. and Glass Fibres and Equipment Ltd. v. Royal Bank of Canada and others* p. 83

221) (1985) 1 Lloyd's Rep. 557

carriage of oil purchased from Petrolexport, a Romanian state trading company . Mebro tendered two bills of lading, one correctly dated June 27 and the other wrongly dated June 22. The bank did not notice the error and made payment under the letter of credit taking into account the dates mentioned in the bills of lading, because the parties had stipulated that the price of the goods would be fixed according to the ruling prices on the bill of lading date. Between the two dates, however, the price of the goods had fallen by 7 dollars per ton, that is, Mebro paid 231,981 dollars more than it would have paid if the bill of lading had been correctly dated. Mebro claimed this sum from Oetker for breach of an implied term in the sub-charter. The arbitrators held that a breach had taken place, but the bank's failure to notice the irregularity did not break the causal chain, and the bank could not be expected to find it out in the ordinary course of business. Oetker appealed, but the Court held that there was nothing in the point that would have justified setting aside the award.

As inferred from what has been said above, a bill of lading has at least to mention the name and the address of the consignee, the name and the address of the consignor, the description of the goods, the signature²²²⁾ of the consignor and the date of shipment.

222) According to English Law the signature of the consignor is not necessary if the consignor is indentified

If, however, some of these items of information or others required by the letter of credit are missing, but the shipment has taken place, the bill of lading is not void, but its probatory force is confined to the information which it contains²²³⁾.

c) The Shipment

Article 23B of the Uniform Customs defines the term 'transshipment' as follows:

'For the purpose of this Article, transshipment means unloading and reloading from one vessel to another vessel during the course of ocean carriage from the port of loading to the port of discharge stipulated in the Credit.'

This term is similarly defined in articles 24B, 27B and 28C of the Uniform Customs.

In earlier times goods had to reach their destination in the same vessel in which they had initially been loaded. This rule was in force because the master of the ship and the ship were of great importance for the safety of the goods during their transport and for their delivery on time.

Nowadays the safety and the regularity of the transportation of goods has resulted in changes to the terms of carriage. Bills of lading usually entitle the master of the ship to deviate or to transship. If the credit expressly prohibits transshipment, the bill of lading which evidences that transshipment has taken place will be rejected by the bank.

223) Simitis:32; Mitroulis;330

The Uniform Customs make, as to this, a similar provision in article 23C:

'Unless transshipment is prohibited by the terms of the Credit, banks will accept a bill of lading which indicates that the goods will be transshipped, provided that the entire ocean carriage is covered by one and the same bill of lading.'²²⁴⁾

Furthermore, if a bill of lading does not include a term permitting transshipment in its printed text, but just bears a superimposed clause permitting the carrier to transship the goods, the bank may reject the documents, if the buyer has not expressly accepted it.

The Uniform Customs do not make such a distinction and provide in article 23D:

'Even if the Credit prohibits transshipment, banks will accept a bill of lading which
and/or

II. incorporates clauses stating that the carrier reserves the right to transship²²⁵⁾.

Moreover a bill of lading with wide liberty to transship would, it was argued, be a bad tender under a c.i.f or c.&f. contract because it would not give to the buyer the continuous documentary cover to which he is entitled²²⁶⁾. As to this,

224) see also article 24C

225) see also articles 24D, 26B, 27C, 28D of the Uniform Customs

226) see *Hansson v. Hamel and Horley, Ltd.* (1922) 2 A.C. 36; and *Holland Colombo Trading Society Ltd. v. Alawdeen and Others*, (1954) 2 Lloyd's Rep. 45

McNair, J. in *Soproma S.p.A. v. Marine & Animal By-Products Corporation* ²²⁷⁾ added that, despite the wide liberty given in the bill of lading, he would 'not be disposed to hold that a bill of lading otherwise unobjectionable in form which did in fact cover the whole transit actually performed would be a bad tender merely because it contained a liberty not in fact exercised but which, if exercised, would not have given the buyers continuous cover for the portion of the voyage not performed by the vessel named in the bill of lading.'

It is generally accepted that in order for a transshipment to take place the goods have to be unloaded from one conveying vehicle and reloaded on to another one. If the goods are loaded on a conveying vehicle which is then transshipped, e.g. a lorry carrying the goods which is transshipped from a ship to another ship, it is not clear whether the goods are transshipped or not. However, article 23D of the Uniform Customs provides:²²⁸⁾

'Even if the Credit prohibits transshipment, banks will accept a bill of lading which:

I. indicates that transshipment will take place as long as the relevant cargo is shipped in Container(s), Trailer(s) and/or 'LASH' barge(s) as evidenced by the bill of lading, provided that the entire ocean carriage is covered by one and the same

227) (1966) 1 Lloyd's Rep. 367

228) see also article 24D

bill of lading.'

Sometimes the credit contains the stipulation that part shipments are allowed. If such provision is not made in the credit the Uniform Customs in article 40A state that:

'Partial shipments are allowed, unless the credit specifically states otherwise.'

So, banks may accept documents evidencing partial shipment if this is not expressly excluded in the letter of credit, provided the price, the weight and the measurement of the partial consignment are mentioned in the credit or may be inferred from it. That is, if the credit covers the sale of specific machines and their appendages, the bank will probably have to reject the documents of the partial shipment of the appendages, not only because it is difficult to calculate their exact price but also because these goods will be of no use to the buyer if the seller fails to send the machines at the stipulated time²²⁹).

Further article 40 (B and C) provides:

'B. Transport documents which appear on their face to indicate that shipment has been made on the same means of conveyance and for the same journey, provided they indicate the same destination, will not be regarded as covering partial shipments, even if the transport documents indicate different dates of shipment and/or different ports of loading, places of taking in charge, or despatch.'

When a partial shipment has taken place is not always easy to

229) Theofilopoulos: Commercial Credits against documents, 1976; p.93

say. Usually the shipment of goods under two bills of lading each covering half the amount of the goods and mentioning different destinations is considered to be partial shipment. In *Rosenthal v. Esmail* ²³⁰⁾, however, where the goods had been shipped in two equal amounts, on the same ship, under two bills of lading and two sets of shipping documents and the sellers had tendered all documents as one set, the House of Lords held that there was one shipment.

A credit may also provide that shipment will take place by instalments, mentioning the exact dates of shipments. In this case there arises the question of whether a bank may accept the documents covering e.g. the second shipment if the seller has not tendered the documents which cover the first shipment. As to this, article 41 of the Uniform Customs provides:

'If drawings and/or shipments by instalments within given periods are stipulated in the Credit and any instalment is not drawn and/or shipped within the period allowed for that instalment, the Credit ceases to be available for that and any subsequent instalments, unless otherwise stipulated in the Credit.'

Another subject connected with the shipment is the stowage of goods. It is generally accepted that, during transport, goods should be stowed below deck because on deck they may be more easily damaged. English banks usually reject bills of lading which permit deck stowage if the credit does not expressly provide for this mode of shipment. This happens even if

230) (1965) 1 W.L.R. 1117

the clause is embodied in the text of the bill of lading .

Deck stowage is also governed by the Schedule to the Carriage of Goods by Sea Act, 1971, Article 1Cc) according to which goods which by the contract of carriage are stated to be carried on deck and are in fact carried on deck, are excluded from the operation of the Act.

Similarly article 31 of the Uniform Customs provides:

'Unless otherwise stipulated in the Credit, banks will accept a transport document which:

I. does not indicate, in case of carriage by sea or by more than one means of conveyance including carriage by sea, that the goods are or will be loaded on deck. Nevertheless, banks will accept a transport document which contains a provision that the goods may be carried on deck, provided that it does not specifically state that they are or will be loaded on deck.'

On this subject, the Greek Code of Private Maritime Law, in article 114, states: 'The shipowner is not entitled to stow the goods on deck. The above rule is not applied in the coasting trade.' As this rule is not Public Law the parties may stipulate that the goods will be stowed on deck. This stipulation, however, has to be in writing, that is, it cannot be evidenced by witnesses.²³¹⁾

231) article 108 par. 1 of the Code of Private Maritime Law; Prot.P. 5743/1967 EEmpD 1968.111; and Prot.P.5745/1967 EEmpD 1968. 254

d) Date and Place of Presentation

After the goods have been received by the master of the ship or the shipowner and the bill of lading has been handed to the seller, the latter has to tender it to the intermediary or to the issuing bank, within the period set down in the credit, accompanied with the other stipulated documents.

According to article 42A of the Uniform Customs

'All Credits must stipulate an expiry date and a place for presentation of documents for payment, acceptance, or with the exception of freely negotiable Credits, a place for presentation of documents for negotiation. An expiry date stipulated for payment, acceptance or negotiation will be construed to express an expiry date for presentation of documents.'

Further article 43A provides:

'In addition to stipulating an expiry date for presentation of documents, every Credit which calls for a transport document(s) should also stipulate a specified period of time after the date of shipment during which presentation must be made in compliance with the terms and conditions of the Credit. If no such period of time is stipulated, banks will not accept documents presented to them later than 21 days after the date of shipment. In any event, documents must be presented not later than the expiry date of the Credit.'

Questions had arisen as to whether a bank might accept a bill of lading if it was presented more than 21 days after shipment and if it was stipulated in the credit that 'stale documents are acceptable'. On this matter the Commission on Banking Technique and Practice decided in its meeting of 20 October

1975²¹⁰) that since the term 'stale' no longer appears in the Uniform Customs and Practice, the parties should no longer use it in credits, the credit which includes the words 'stale document acceptable' should be considered vague and the issuing bank should ask for additional instructions.

Another question which had also arisen was the date from which the 21 days provided in article 43A are to run. According to article 47A of the 1983 Revision, the transport document should be presented to the bank not later than 21 days after the date of issue of the transport document. Thus, where a credit called for an 'on board' bill of lading and a 'received for shipment' bill was tendered, bearing an 'on board' notation dated subsequently to the date of issue of the transport document, it was not clear whether the date of the first issue or of the notation should be taken. The 1993 Revision solved the problem by stating that documents should be presented not later than 21 days after the date of shipment.

232) ICC Documents 470/263, 470/266

B) Insurance Policy

In a c.i.f contract it is the seller's duty to insure the goods against losses incidental to events affecting the kind of transport, cargo, freight or other subject matter during a given voyage or during a specified period of time. In order to prove that the goods have been insured, the seller has to tender to the bank, beside the other documents, an insurance policy, which is a document issued by the insurer, containing the terms and conditions of the insurance contract. The insurance policy is legal evidence that the goods have been insured.

Article 34A of the Uniform Customs states:

'Insurance documents must appear on their face to be issued and signed by insurance companies or underwriters or their agents.'

However, according to article 34C

'Cover notes issued by brokers will not be accepted, unless specifically authorised in the Credit.'

Instead of an insurance policy a certificate of insurance is usually used in a case where a merchant makes continuous shipments and therefore the goods he sends to the buyers are insured by an open or floating policy. Thus, the seller does not have to ask for the issue of a separate policy for each shipment. This certificate, however, has to be equivalent to a policy in order for it to be considered that the beneficiary has performed his obligation sufficiently. In Wilson, Holgate

& Co. Ltd. v. Belgian Grain and Produce Company²³³) the Court held that in an open policy covering all shipments, when the credit provides for a policy of insurance, the buyer is justified in rejecting the tendered broker's cover note.

The 1993 Revision, for the first time, makes provision for the insurance certificate and states in article 34 D that:

'Unless otherwise stipulated in the Credit, banks will accept an insurance certificate or a declaration under an open cover pre-signed by insurance companies or underwriters or their agents. If a Credit specifically calls for an insurance certificate or a declaration under an open cover, banks will accept, in lieu thereof, an insurance policy.'

English banks accepted an insurance certificate issued by Lloyd's or the Institute of London Underwriters long before it was introduced by the last Uniform Revision, provided that the credit did not expressly prohibit such tender, even if an insurance policy was called for.

The insurance certificate has, however, to inform the bank of the precise nature of the insurance. Thus in Donald H. Scott & Co. v. Barclays Bank Ltd.²³⁴) it was held that the tender of an insurance certificate which referred to the terms of the policy, but did not set them out was a bad tender, and the bank was entitled to reject it. Scrutton, L.J. said:

'In my view they have a right to see a document or documents

233) (1920) 2 K.B. 1; see also South African Reserve Bank v. Samuel (1931) 40 Ll.L.Rep. 291

234) (1923) 2 K.B.1

which contain the terms of the insurance which is offered to them as security for the loss of the goods, and if the document tendered to them does not show them what the terms of that insurance are, from a commercial point of view, reasonable in refusing to approve it or accept it as a policy.'

On the other hand, in *Malmberg v. H.J. Evans* ²³⁵⁾, where the certificate did not incorporate the rules contained in the company's policy of insurance, Scrutton, L.J., said that a document did not necessarily cease to be a policy because it incorporated another document which was not produced. A Lloyd's policy incorporating Institute clauses without setting them out in full, would not cease to be a policy because one did not see on the face of the policy what the Institute clauses were. The Court held that if the certificate shows, by express reference to the risks covered by the insurance, that they were as extensive as required (to be) by the credit, the certificate should be treated as good tender.

In addition, the certificate or insurance policy has to cover the whole contractual journey²³⁶⁾ and the full amount of the value of the goods.²³⁷⁾

In *Belgian Grain & Produce Company Ltd. v. Cox & Co (France) Ltd.*²³⁸⁾ the policy of insurance did not cover the whole voyage, because the goods had been transshipped in the course of the voyage. The Court of Appeal held that, as the policy contained the clause 'including all liberties as per contract of affreightment' the voyage actually performed was permitted

235) (1924) 29 Com.Cas. 235

236) *Landauer & Co. v. Craven* (1912) 2 K.B. 94, 106

237) *Tamvaco v. Lucas* (1861) 30 L.J.Q.B. 234

238) (1919) 1 Ll.L.Rep.256

by the bill of lading.

Article 34F II of the Uniform Customs states that:

'Unless otherwise stipulated in the Credit, the minimum amount for which the insurance document must indicate the insurance cover to have been effected is the CIF (cost, insurance and freight (...."named port of destination") or CIP (carriage and insurance paid to (... "named place of destination") value of the goods, as the case may be, plus 10%, but only when the CIF or CIP value can be determined from the documents on their face. Otherwise, banks will accept as such minimum amount 110% of the amount for which payment, acceptance or negotiation is requested under the Credit, or 110% of the gross amount of the invoice, whichever is the greater.'

To avoid probable delay in dealing with the documents and third parties whose goods are also insured by the same document, the beneficiary should present a policy which covers only the goods mentioned in the bill of lading and not more. In *Hickox v. Adams* ²³⁹⁾, where the insurance policy covered 2.000 quarters of wheat while only 1.000 quarters had been purchased, the Court held that the buyers were entitled to reject the tendered documents because otherwise they would be embarrassed.

The insurance document must be expressed in the same currency as the Credit, unless otherwise stipulated in the Credit (article 34F I). It must also be genuine and bear no alterations. If, however, the bank accepts a forged policy in good faith, it is not liable to its customer.

Article 34 E of the Uniform Customs provides:

'Unless otherwise stipulated in the Credit, or unless it

239) (1876) 34 L.T. 404; see also *Manbre Saccharine Co. v. Corn Products Co.* (1919) 1 K.B. 198

appears from the insurance document that the cover is effective at the latest from the date of loading on board or dispatch or taking in charge of the goods, banks will not accept an insurance document which bears a date of issuance later than the date of loading on board or dispatch or taking in charge as indicated in such transport document.'

An insurance policy or certificate, moreover, has to cover all risks in the letter of credit. If it does not specify what exactly the risks covered are, the goods are insured against all 'usual risks' for the particular goods in the trade.

In *Borthwick v. Bank of New Zealand*²⁴⁰) a case which has already been dealt with²⁴¹), the policy tendered contained the term 'to pay total loss of vessel only'.' After a partial loss of the goods , the Court held that a policy in this form was unusual in the frozen meat trade and the bank should accept only a policy which covered 'all risks'.

As to the risks to be covered, article 35 of the Uniform Customs provides:

'A. Credits should stipulate the type of insurance required and, if any, the additional risks which are to be covered. Imprecise terms such as 'usual risks' or 'customary risks' shall not be used; if they are used, banks will accept insurance documents as presented, without responsibility for any risks not being covered.

B. Failing specific stipulations in the Credit, banks will accept insurance documents as presented, without responsibility for any risks not being covered.

240) (1900) 6 Com.Cas. 1

241) p. 67

C. Unless otherwise stipulated in the Credit, banks will accept an insurance document which indicates that the cover is subject to a franchise or an excess (deductible).'

In *Yuill & Co. v. Scott Robson*²⁴²⁾ the sales contract provided that the cattle bought at Buenos Aires for shipment to Durban had to be insured by the seller 'against all risks'²⁴³⁾. The policy presented by the seller contained the clause that the goods were insured against 'capture, seizure and detention and the consequences thereof'. Because of disease among the cattle which broke out on the voyage the authorities at Durban did not permit their importation. The Court held that the seller failed to insure the goods against all risks and therefore the buyer was entitled to damages²⁴⁴⁾.

As to 'all risks insurance cover' article 36 of the Uniform Customs provides:

'Where a Credit stipulates "insurance against all risks", banks will accept an insurance document which contains any "all risks" notation or clause, whether or not bearing the heading "all risks", even if the insurance document indicates that certain risks are excluded, without responsibility for any risk(s) not being covered.'

Policies, however, which cover all risks of loss and/or damage do not insure the goods from inherent vice.²⁴⁵⁾

242) (1908) 1 K.B. 270

243) As to the meaning of 'all risks' see also: *Gaunt v. British & Foreign Marine Insurance Co.* (1921) 8 Ll.L.Rep. 15 and *Schloss v. Stevens* (1906) 2 K.B. 665

244) On the other hand, in *Groom v. Barber* (1915) 1 K.B. 316 it was held that the 'free of capture and seizure' clause was good tender; see also *Vincentelli v. Rowlett* (1911) 16 Com.Cas. 310

245) *Berk F.W. & Co. Ltd. v. Style* (1955) 2 Lloyd's Rep. 382 and *Gee Garnham Ltd. v. Whittall* (1955) 2 Lloyd's Rep. 562

In Greece , the insurance of land transportation is governed by articles 189 to 225 of the Commercial Code while the insurance of sea transportation is governed by articles 257 to 288 of the Code of Private Maritime Law. The insurance of sea transportation is also governed by articles 189 to 225 of the Commercial Code so far as they are not incompatible with the rules about sea transportation. Air transportation is regulated by the rules of the Warsaw Convention. Greece has ratified these rules by the statute 596/1937 and they are now domestic Law.

Article 192 of the Commercial Code states that a contract of insurance has to be in writing and that beside the date of issue it has also to contain a) the name of the person who effects the insurance and his place of residence or his permanent domicile, b) the insurer's name and his place of residence or his permanent domicile c) the object of the insurance, d) the amount insured, e) the insurance premium paid or to be paid f) the risk\$ which the insurer undertakes, and the time of the beginning of the risk and its ending.

As we see, this article does not mention the signatures of the person who effects the insurance and of the insurer. In practice, an insurance policy does not bear the signature of the person who effects the insurance. On the other hand, the insurer's signature, though not mentioned in the above article, has to be included in the contract, because, otherwise, the document of insurance would not have any probatory force (article 443 of the Code of the Civil Procedure).

The subject of the insurance, that is, the kind of goods and their quantity have to be expressly mentioned in the insurance policy. This helps the parties to distinguish the goods insured from other goods loaded on the same means of transport.

In a land transportation the insurance policy has also to mention the risks which the insurer undertakes to cover. Thus, if the risks are not mentioned in the insurance policy the goods are insured against any 'usual risk' for the specified goods. On the contrary, in a sea transportation the principle prevails of the 'universality of the risks'²⁴⁶⁾. The insurer, if not otherwise stipulated, is liable for the losses and damages which have taken place because of any incident during the transport across the sea, including theft. This is provided in article 269 of the Code of Private Maritime Law which also states:

'The insurer is liable for any damage for which the ship, because of collision, is liable to third parties, except injury and illness.'

If, however, during the transport a war breaks out and the goods are not insured against it, the contract of insurance which insures the goods only against 'common risks' is cancelled as soon as the ship reaches the first port (article 272).

According to article 258 of the Code of Private Maritime Law

'The insurance policy, beside the particulars mentioned by article 192 of the Commercial Code, has to bear the name, the kind, the tonnage and the nationality of the ship.'

If one of the particulars mentioned in the above articles 192

246) Prot. Samos 205/1965 EEmpD 1966.430, 435

and 258 is not included in the insurance policy, the policy is not void but its probatory force is confined to the particulars which it contains. In the 346/1919²⁴⁷⁾ decision of the Court of Appeal in Athens it was held that if the date of issue of the policy is missing, the document is not void.

If there is no insurance policy or other document to prove the contractual relationship with the insurer, or if the policy has been drawn up and lost, the insurer's obligations may be proved by oath or judicial admission, but not by witnesses or presumptions²⁴⁸⁾.

Goods are usually insured to cover probable danger in future, while, an insurance policy is valid from the date of its issue at the earliest. Regarding these two statements one might ask if a contract of insurance which covers a specific time in the past is valid according to Greek Law. Article 203 of the Commercial Code states:

'The insurance is void if the insurer and the insured person or the person who made the insurance was aware of the non-existence or the cessation of the risk or the existence of the damage. If only the insurer knew the non-existence or the stopping of the danger, the insured person is not obliged to pay the insurance premium. If the person who effected the insurance knew of the existence of the damage, the insurer is

247) Ef.A. 346/1919 Th.LA (1920-1921) 537-538

248) This is inferred from article 192 of the Commercial Code which provides that the insurance policy has to be in writing; see also Prot.A. 12432/1952 NomEllDik 368-369

not liable on the contract, but he is entitled to the insurance premium.'

As inferred from this article a contract of insurance which insures goods for past time is valid if the insurer does not know that there is no danger or if the person who makes the insurance does not know that the goods have already been damaged.

The insurance policy is, beside the bill of lading and the commercial invoice, one of the main documents which have to be tendered by the beneficiary of the letter of credit (article 26 par.2 of the statute of 17.7/13.8.1923). Neither the issuing bank nor the intermediary bank is entitled to insure the goods because banks do not own the goods and do not run the risk of their loss or damage²⁴⁹⁾.

C) Commercial Invoice

The beneficiary of the credit is usually required to tender an invoice, that is, a document describing the goods, their total price and the shipping terms. The bank which receives a commercial invoice has to examine it and make sure that the quantity of the goods and their price are consistent with the bill of lading, the insurance policy and the credit. Otherwise the bank is entitled to reject the invoice and the other documents presented by the beneficiary.

Blackburn, J., describes the form which an invoice must have, in

249) Ef. P. 186/1978 EEmpD 1979.233

George Ireland and Others v. Joseph Gibbons Livingston²⁵⁰) as follows:

'The invoice is made out debiting the consignee with the agreed price (or the actual cost and commission, with the premiums of insurance, and the freight, as the case may be), and giving him credit for the amount of the freight which he will have to pay to the shipowner on actual delivery,....'

In Kydon Compania Naviera S.A. v. National Westminster Bank Ltd. and Others (The Lena)²⁵¹), a case which has already been dealt with,²⁵²) the commercial invoice did not include specific terms mentioned in the credit and Parker, J., held that the bank was entitled to reject the documents though the plaintiffs had acted according to the requirements of the credit.

Article 37 of the Uniform Customs provides:

A. Unless otherwise stipulated in the Credit, commercial invoices;

I. must appear on their face to be issued by the beneficiary named in the Credit (except as provided in Article 48) and

II. must be made out in the name of the Applicant (except as provided in sub-Article 48 (H)).

and

III. need not be signed.

B. Unless otherwise stipulated in the Credit, banks may refuse commercial invoices issued for amounts in excess of the amount

250) (1872) L.R. 5 H.L. 395, 406

251) (1981) Lloyd's Rep. 68; see also Bank Melli Iran v. Barclays Bank, (1951) 2 Lloyd's Rep. 367

252) p. 98

permitted by the Credit. Nevertheless, if a bank authorised to pay, incur a deferred payment undertaking, accept Draft(s), or negotiate under a Credit accepts such invoices, its decision will be binding upon all parties, provided that such bank has not paid, given a deferred payment undertaking, accepted Draft(s) or negotiated for an amount in excess of that permitted by the Credit.

C. The description of the Goods in the commercial invoice must correspond with the description in the Credit. In all other documents, the goods may be described in general terms not inconsistent with the description of the goods in the Credit.'

The Commission on Banking Technique and Practice was asked to say whether banks were obliged to check the individual calculation made by the beneficiary of the credit and shown in the invoice, such as multiplication of quantity (weight, number of packing units, individual items) with the unit price. The Commission decided in its meeting of November 1979²⁵³) that:

'Banks were not generally obliged to check the individual calculations made by the beneficiary and shown in the commercial invoice, but that banks might possibly be held liable by the courts if they negligently failed to notice obvious errors on the face of the commercial invoice.'

The beneficiary is not obliged to tender the invoices which he has received from the supplier of the goods. In *Société Metallurgique d' Aubrives & Villerupt v. British Bank for Foreign Trade*²⁵⁴) the seller did not tender to the bank the

253) ICC documents 470/355, 470/358

254) (1922) 11 Ll.L.Rep. 168

original invoices sent to him by the manufacturers but made out his own invoices and presented them to the bank. Bailhache, L. said that this was a good tender and

'more particularly is that so when the original invoices, as here, come in a foreign language, and the business has been conducted in the English language. It is reasonable that the documents should be translated, and there is nothing in the objection that Mr....made out new invoices instead of presenting the original invoices from the works.'

Greek Case Law also requires the commercial invoice to be consistent with the letter of credit and the other stipulated documents. In the 3038/1959 decision of the Court of First Instance in Piraeus²⁵⁵), the invoice had given the price of the goods as 590 DM per 1kg instead of 475 DM, without including that this amount was, as stipulated in the credit, money paid in advance. The Court held that the bank was entitled to reject the documents.

3) Other Documents

Beside the bill of lading and the other two main documents, that is, the insurance policy and the commercial invoice, the credit may call for more documents, which cannot be specified in number and contents. Such documents are, for example, Warehouse Receipts, Manufacturer's Certificates, Delivery Orders, Consular Invoices, Certificates of Origin, of

255) Prot.P. 3038/1959 EEmpD 1959, 405

Weight, of Quality or of Analysis, Packing Lists, etc. From all documents involved in a letter of credit only the bill of lading and the insurance policy are documents of title which can be transferred by indorsement, and are therefore of legal interest. The other documents are just proof of the good performance of the terms of the credit.²⁵⁶⁾

As far as the certification of weight of the shipped or received for shipment goods is concerned, article 38 of the Uniform Customs provides:

'If a Credit calls for an attestation or certification of weight in the case of transport other than by sea, banks will accept a weight stamp or declaration of weight which appears to have been superimposed on the transport document by the carrier or his agent, unless the Credit specifically stipulates that the attestation or certification of weight must be by means of a separate document.'

The bank, before it makes payment, has to make sure that all documents stipulated in the credit have been tendered and that they are in compliance with the credit and each other. If the buyer wishes the certificate/s to be issued by a certain person or to have certain contents, he must have the issuing bank mention it in the letter of credit or inform the seller and the bank about it. This may be inferred from article 21 of the Uniform Customs which states:

'When documents other than transport documents, insurance documents and commercial invoices are called for, the Credit

256) G.I. Katsabis: 'The Performance of the Letter of Credit'
EEmpD 1953 p.7

should stipulate by whom such documents are to be issued and their wording or data content. If the Credit does not so stipulate, banks will accept such documents as presented, provided that their data content is not inconsistent with any other stipulated document presented.'

In *Equitable Trust Co. of New York v. Dawson Partners Ltd.*²⁵⁷⁾ the credit, *inter alia*, called for a 'Dutch Government certificate of quality'. As the Dutch Government did not grant such certificates, the buyers instructed their bank to require a certificate of quality signed by 'experts' instead of a 'Dutch Government certificate of quality'. Owing to ambiguity in the telegraphic code the sellers were informed that they had to tender a certificate signed by an 'expert'. When the sellers presented a certificate signed by one expert only, the bank took up the documents and paid the seller but the buyers refused reimbursement on the ground that the bank had failed to comply with its customers' instructions. The bank sued the buyers, claiming reimbursement, but the Court held that the tender of a certificate of quality signed by one expert only was a bad tender and that the bank should not have accepted such documents. A similar case is that of *Reinhold & Co. and Hansloh*²⁵⁸⁾ where the sales contract called for a 'legalized Chamber of Commerce Certificate as to shipment'. When the seller tendered the shipping documents, the buyer refused to accept them because the above certificate described the goods as shipped in bags 'marked and numbered as

257) (1927) 27 Ll.L.Rep. 49; see about the same case on page 67

258) (1896) 12 T.L.R. 422

in the margin', that is, with the letter F. It was held that the buyer was entitled to reject the documents.

In *Bank Melli v. Barclays Bank (Dominion, Colonial and Overseas)*²⁵⁹ a letter of credit representing the value of '100 new Chevrolet trucks' was issued by the defendants and provided that the seller had to tender, beside the other documents, a U.S.A. Government undertaking that the trucks were new. The defendants accepted an invoice which referred to the trucks as 'in new condition' and a certificate testifying that a firm from which the beneficiaries had acquired the trucks had purchased '100 new, good, Chevrolet....trucks'.

McNair, J., held that the tendered documents did not comply with the terms of the credit. He said:

1) that the phrase 'in new condition' in the invoice was not synonymous with the term 'new', 2) that the description of the trucks in the United States Government certificate as 'new (comma) good' might clearly denote something different from the description 'new' and that, in any event, the certificate did not purport to relate to any specific trucks; and 3) that the description 'new (hyphen) good' in the delivery order was not the same as 'new'.

259) (1951) 2 Lloyd's Rep. 367

4) Forged or False Documents

As already mentioned, if the shipping documents tendered by the beneficiary are in strict compliance with the terms of the credit the bank is obliged to accept them, while, if they differ or do not exactly conform with each other, the bank is entitled to reject them. It may, however, happen that the documents, although complying with the credit, are forged or fraudulently issued.

According to article 15 of the Uniform Customs

'Banks assume no liability or responsibility for the form, sufficiency, accuracy, genuineness, falsification or legal effect of any document(s)'²⁶⁰⁾

Consequently, if the bank pays against forged or false documents without any negligence on its part, it is entitled to be reimbursed by the buyer. In *Basse and Selve v. Bank of Australasia*²⁶¹⁾ the defendants, an English banking company, were instructed by the plaintiffs to negotiate against, inter alia, a certificate of analysis by a chemist, named Helms, showing not less than 5 per cent protoxide for the shipped 100 tons cobalt ore. At first the bank refused to take up the documents because there was nothing on the face of the certificate of analysis to connect it with the goods which

²⁶⁰⁾ see ante p. 68

²⁶¹⁾ (1904) 20 T.L.R 431; see also *Woods v. Thiedemann* (1862) 1 H. & C. 478

were described in the bill of lading as '2680 bags containing 100 tons cobalt ore'. The shipper then marked the sample packet, which he had first given to the chemist, with 'P.M. 2680 bags representing 100 tons' and returned it to Dr. Helms, who furnished him with a new certificate showing that the test of a sample of cobalt ore marked 'P.M. 2680 bags representing 100 tons' was satisfactory. Thus, the bank took up the shipping documents and paid the shipper's drafts. Very shortly after payment the defendants found out that the shipper had acted fraudulently and that the ore which had been sent to the buyers was worthless. The plaintiffs brought an action against the defendants for damages for having negligently performed their duty, but Bigham, J., said:

'But once they were in touch with the right man the defendants' only remaining duty was to see that the documents which he brought purported on their face to be the documents described in the mandate. It was no part of their duty to verify the genuineness of the documents; the duty was not cast upon them of making inquiries at the office of the ship's agent as to whether the goods had, in truth, been received on board; nor were they to examine the contents of the packages to see whether they were right; nor were they to communicate with Dr. Helms in order to ascertain whether he had properly made the analysis mentioned in the certificate.'

As regards the beneficiary who is not the consignor of the goods described in the bill of lading, it was held that he does not warrant the genuineness of the shipping documents. In *Guaranty Trust Company of New York v. Hannay & Co.*²⁶²) the

262) (1918) 2 K.B. 623

defendants ,who were cotton brokers at Liverpool, purchased cotton from Messrs. Knight, Yancey & Co., who were shippers of cotton carrying on business at Decatur, Alabama. The shippers drew a bill of exchange on the defendants' bank in Liverpool for the price of the goods and sold it with the bill of lading to the bona fide plaintiffs, who were dealers in foreign bills of exchange in New York. The plaintiffs then sent the documents to the defendants' bank in Liverpool, which accepted the draft and paid it at maturity. The defendants discovered that the bill of lading was a forgery and brought an action in America against the plaintiffs claiming the amount of the bill paid by them. The plaintiffs, on the other hand, brought an action against the defendants in England claiming a declaration that, by presenting the bill of exchange with the bill of lading attached, they did not warrant the genuineness of the bill of lading. Warrington, L.J., said:²⁶³⁾

'I can see no ground on which any such warranty should be implied as to the bill of lading. It is contended that by surrendering the bill of lading on acceptance, the plaintiffs purported to transfer the property represented by it to the acceptors, and that it must be taken that they warranted the existence of such property and that the bill of lading represented it. The answer is that the indorsee of a bill of exchange with the bill of lading attached obtains a special property only in the goods defeasible upon acceptance, and on that event the property in the goods passes, not by virtue of the surrender to the acceptor of the bill of lading, but by virtue of the contract between the drawer as vendor of the

263) p. 652

goods and the acceptor as the purchaser thereof: *Mirabita v. Imperial Ottoman Bank* (1878) 3 Ex.D. 164. The bill of lading is surrendered, not by virtue of any contractual obligation between the indorsee and the drawee, but by virtue of the obligation he assumed towards the drawer. Under such circumstances I can see no room for any implication of warranty as to the genuineness of the bill of lading.'

Moreover, the bank is not discharged of its liability to pay the beneficiary who has acted in good faith, even if it finds out that the documents are false. In *United City Merchants and Others v. Royal Bank of Canada and Others*²⁶⁴) the House of Lords held that although the shipping documents had been fraudulently completed by the shipping agent, the defendant bank had to pay to the beneficiary the amount due under the letter of credit, because the seller was not aware of the fraud.

If, however, the beneficiary acts in bad faith the bank is not only entitled but also bound to refuse payment, if, at the time of tender, it is privy to the beneficiary's fraud. In *Société Metallurgique v. British Bank for Foreign Trade*²⁶⁵) *Bailhache, J.*, said that if the person presenting the documents misdescribes the goods in such a way as to be guilty of fraud, the bank is justified in refusing to pay. And he continued:

'There is another case in which the bank would be entitled not to pay, i.e., if the goods were innocently misdescribed in the documents tendered to them - so far misdescribed that the goods

264) (1982) 2 All E.R. 720; see p.83

265) (1922) 11 Ll.L.Rep. 168, 170

might be rejected by the buyers and were so rejected by the buyers. Then in that case also the bank would be entitled to refuse on the grounds of security of action, and would be only liable for nominal damages,.....'

In the abovementioned United City Merchants case Lord Diplock said that the purpose of a confirmed irrevocable documentary credit is to assure the seller that he will be paid if he tenders documents which appear on their face to comply with the terms of the credit and that the bank will not use any dispute between buyer and seller for non-payment. And he added:

'....as to the contractual obligations of the confirming bank to the seller, there is one established exception: that is, where the seller, for the purpose of drawing on the credit, fraudulently presents to the confirming bank documents that contain, expressly or by implication, material representations of fact that to his knowledge are untrue. Although there does not appear among the English authorities any case in which this exception has been applied, it is well established in the American cases, of which, the leading or 'landmark' case is *Sztejn v. J. Henry Schroder Banking Corp* (1941) 31 NYS 2d 631. This judgement of the New York Court of Appeals was referred to with approval by the English Court of Appeal in *Edward Owen Engineering Ltd. v. Barclays Bank International Ltd.* (1978) 1 All ER 979, (1978) QB 159,.....'

In *Sztejn v. J. Henry Schroder Banking Corporation*²⁶⁶) the beneficiary who had contracted to sell to the plaintiff a quantity of bristles, loaded on board fifty crates with

266) (1941) 31 N.Y. Supp (2d) 631

worthless material and rubbish and procured a clean bill of lading and the other stipulated documents. He then drew a draft under the letter of credit, which had been issued by the defendants, to the order of the Chartered Bank of India, Australia and China, and passed it and the shipping documents to the bank for collection. The Chartered bank presented the draft, at maturity, accompanied with the shipping documents to the defendant bank but the plaintiff refused to accept them and brought an action against the issuing bank claiming an injunction in order to restrain the defendants from paying the draft. The Court held that

'It would be most unfortunate interference with business transactions if a bank, before honouring drafts upon it, was obliged or even allowed to go behind the documents, at the request of the buyer, and enter into controversies between buyer and seller regarding the quality of the goods shipped. If the buyer and the seller intended the bank to do this they could have so provided in the letter of credit itself, and in the absence of such a provision the court will not demand or even permit the bank to delay paying drafts which are proper in form, ...'

However it stated that

'It must be assumed that the seller has intentionally failed to ship any goods ordered by the buyer. In such a situation, where the seller's fraud has been called to the bank's attention before the draft and documents have been presented for payment, the principle of the independence of the bank's obligation under the letter of credit should not be extended to protect the unscrupulous seller. It is true that even though the documents are forged or fraudulent, if the issuing bank has already paid the draft before receiving notice of the seller's fraud, it will be protected if it exercised reasonable diligence before making such payment. However, in

the instant action Schroder had received notice of Transea's active fraud before it accepted or paid the draft. The Chartered Bank, which stands in no better position than Transea, should not be heard to complain because Schroder is not forced to pay the draft accompanied by documents covering a transaction which has reason to believe is fraudulent.'

In the abovementioned case the Court was aware of the beneficiary's fraud before the acceptance of his draft. It may, however, happen that the bank discovers the seller's fraud only after it has accepted his draft. In this case the bank cannot refuse to pay the draft at maturity and is entitled to claim reimbursement by the buyer. On the other hand, if the bank has not accepted the draft it is considered that it may refuse to accept it.²⁶⁷⁾

The 566/1932 decision of the Court of Appeal in Athens²⁶⁸⁾ states that the banker's duty is to examine the shipping documents and accept them if they, on their face, appear to be genuine. The banker is a third party, not involved in the sales contract, who cannot be regarded as the 'quasi insurer' of its customer, and therefore he is not liable to the buyer for the genuineness or the validity of the shipping documents. In any case, the Court said, the banker is liable only when he has omitted to examine the documents with reasonable care and only if such examination could enable the bank to discover the forgery. This case is based on article 30 par. 2 of the statute

267) Gutteridge p. 185

268) Ef.A. 564/1932 Th 1933. 326

of 17.7/13.8.1923²⁶⁹⁾ which provides

'The creditor (bank) is liable for its fraud and negligence including the negligence concerning the choice of its agent.'

The letter of credit usually includes the term that banks are not liable for any forgery or falsification of the shipping documents. As inferred from the above article 30 par.2, however, this term is not valid if the bank has acted negligently or fraudulently²⁷⁰⁾.

Article 137 of the Code of Private Maritime Law provides

'The carrier is not liable if the freighter or the shipper, to his knowledge, caused the falsification of the description, the weight or the price of the cargo in the charter-party or the bill of lading.'

As inferred from this article, the carrier who wishes to be discharged from liability has just to prove that the documents are false and that the shipper or the consignor was aware of the falsification. The carrier, however, is not protected by this rule if, when he completes the bill of lading, he knows that one or more particulars in it are false.²⁷¹⁾

In 1990 the Court of Appeal in Piraeus²⁷²⁾ decided on a case where the master of the ship was forced to issue a clean bill of lading because the shipper threatened to bring an action

269) see also ante p. 74

270) Simitis: p. 91

271) A.Pampouki-Kiantou: Maritime Law 1993 p.352

272) Ef.P. 237/1990 EEmpD 1990.690

against the carrier and restrain the ship's sailing. The dispute arose when the authorized inspector of the cargo found out that, of the 27.521.746 kg petrol which had been loaded in barrels on the ship, 211.407 kg were water, put in 523 barrels.

When the ship reached the port of destination the cargo was examined by a representative of the consignee who found out that a certain number of barrels were filled with water and not with petrol. Nevertheless, the following day, that is, after the consignee's representative had found out about the fraud, the goods were unloaded from the ship and the consignee paid the beneficiary the whole price of the goods as mentioned in the bill of lading without mentioning that the insurance policy covered a larger amount of goods than were in fact loaded. The consignee and the insurer sued the carrier claiming damages, but the Court of Appeal held that the consignee was not entitled to damages from the carrier because, by accepting the bill of lading, although he knew about the fraud, and paying the price of the whole cargo without mentioning anything about the over-insurance, he acted against the carrier's interests. The consignee's act in paying for the whole cargo could be considered as a waiver of his right to claim damages, but the Court of Appeal did not make any such reference.

5) Rejection of Documents

The bank may reject the shipping documents tendered when they are not in compliance with the credit or when it knows that though they are formally in order, they are forged or false.

If the bank decides to reject the documents it is usually expected to follow a certain procedure set out in article 14 B to F²⁷³⁾ of the Uniform Customs which in paragraph C states:

'If the Issuing Bank determines that the documents appear on their face not to be in compliance with the terms and conditions of the Credit, it may in its sole judgement approach the Applicant for a waiver of the discrepancy(ies). This does not, however, extend the period mentioned in sub-Article 13(B) .'

That is, the bank which decides to ask for its customer's permission to take up the shipping documents has to act, according to article 13 B, within the 'reasonable time' of not more than seven banking days following the day of receipt of the documents and inform the beneficiary whether it will reject or accept the documents.

Article 14 D II continues

'Such notice must state all discrepancies in respect of which the bank refuses the documents and must also state whether it is holding the documents at the disposal of, or is returning them to the presenter.'

As inferred from this paragraph of article 14 the bank is under no duty to identify every discrepancy existing in the documents but is required to draw attention to 'all' those which caused the rejection. The bank which rejects the documents for certain reasons does not warrant or represent that the documents are otherwise in order. Parker, J. stated

273) see ante pages 67, 87 and 105 , where article 14 B, 14D and 14F are dealt with

in *Kydon Company Naviera v. National Westminster Bank Ltd. (The Lena)*²⁷⁴⁾

'It cannot, as a matter of general principle, be right that a bank can never be estopped any more than it can that a bank by stating one reason impliedly represents that the documents are otherwise in order or impliedly promises that if the stated defect is rectified it will pay.'

After the beneficiary has rectified the bank's first objections, the bank which finds out that the documents contain further irregularities is justified in rejecting the documents, provided that it has not caused the beneficiary to believe that payment would be made if the irregularities first discovered had been rectified.²⁷⁵⁾ A similar decision was that of Greer, J. in *Skandinaviska Aktiebolaget v. Barclays Limited*²⁷⁶⁾, where the defendants refused to reimburse the plaintiffs, a Swedish bank, for the amount of certain payments made by the plaintiffs at the defendants' request because of *inter alia*, irregularities in the shipping documents. He said:

'It is suggested in the correspondence by the plaintiff bank that they have a grievance because the defendant bank did not in the first instance raise the objections that are now raised to the documents, but referred the matter to their customer in Hull, and simply sent forward the customer's complaints, which were not in the first instance based upon the documents but which were based on some untenable contention which he put

²⁷⁴⁾ (1981) 1 Lloyd's Rep.68, 79

²⁷⁵⁾ In *Floating Dock Ltd. v. Hong Kong and Shanghai Banking Corpn.* (1986) 1 Lloyd's Rep.65, according to the circumstances the beneficiary was justified in considering that the bank would not raise further objections.

²⁷⁶⁾ (1925) 22 Ll.L.Rep. 523, 525

forward; and it is suggested that by that means the defendants had either by estoppel or waiver, by some rule of law applicable in this country, deprived themselves of the right that they would otherwise have had of resisting the claim. I am clearly of opinion that they have not done so. They were in an intermediate position. They had the usual feelings of banking courtesy towards the foreign bank with whom they had had dealings for a long time, and they desired, and the intention was, to see whether, notwithstanding those objections which were being raised by the customer, the transaction could not be carried through as it ought to have been. I do not think that by doing that and by leaving unstated until the later stage the valid objections-valid in law- to the documents which had been taken by the plaintiff bank, English law can deprive them of any right whatsoever.'

Furthermore, the parties are not entitled to claim reimbursement because in the past the bank accepted without objection shipping documents containing similar irregularities.²⁷⁷⁾

When the letter of credit adopts the rules of the Uniform Customs the bank which decides to reject the shipping documents has to follow the procedure provided in article 14 B to F . Article 14 E of the Uniform Customs states:

'If the Issuing Bank and/or Confirming Bank, if any, fails to act in accordance with the provisions of this Article and/or fails to hold the documents at the disposal of, or return them to the presenter, the Issuing Bank and/or Confirming Bank, if any, shall be precluded from claiming that the documents are not in compliance with the terms and conditions of the Credit.'

277) Cape Asbestos Co. v. Lloyd's Bank Ltd. (1921) W.N. 274

If the bank does not act according to the rules of article 14 of the Uniform Customs, its defective rejection is inferred to constitute acceptance of the documents. That is, the Uniform Customs do not permit the bank to take other initiatives in respect of the documents or the goods.

In *Westminster Bank Ltd. v. Banca Nazionale di Credito and Others*²⁷⁸) Roche, J. said:

'.....if parties keep documents which are sent them, purporting to be sent them, or possibly sent them, in consequence of some mandate which they themselves have issued, and keep them for an unreasonable time, that may amount to a ratification of what has been done as being done within their mandate.'

6) Payment under Reserve and Payment under Indemnity

Shipping documents often contain discrepancies which could cause their rejection by the intermediary bank. If, however the bank refuses to accept the documents each time it discovers irregularities in the documents tendered, transactions would be hindered and its customers would be dissatisfied. Besides, only a small percentage of defective documents are in fact rejected by the buyer because either the seller is given the time to rectify the documents or the buyer accepts them

278) (1928) 31 Lloyd's L.R. 306, 312; see also *Bank Melli Iran v. Barclays Bank (Dominion, Colonial and Overseas)* (1951) 2 Lloyd's Rep. 367; see ante p. 79

despite their irregularities. Thus, banks use two different procedures to secure the risk they run when they pay the beneficiary although the shipping documents are not in order. In the first procedure, payment is made 'under reserve'²⁷⁹⁾ while in the second procedure, payment is effected 'under indemnity.'

When the intermediary bank and the seller contract, often not in writing, that payment will take place 'under reserve' the bank pays the seller and sends the documents to the issuing bank for acceptance. If the issuing bank rejects the documents the beneficiary will have to repay with interest. 'Payment under reserve' is made by banks when the irregularities in the documents do not seem to be so serious as to involve the invalidity of the contract of sale and the bank knows that it is dealing with a sound person. In *Banque de L' Indochine et de Suez S.A. v. J.H. Rayner (Mincing Lane) Ltd.*²⁸⁰⁾, Kerr, L.J. said:

'What the parties meant, I think, was that payment was to be made under reserve in the sense that the beneficiary would be bound to repay the money on demand if the issuing bank should reject the documents whether on its own initiative or on the buyer's instructions.'

'Payment under indemnity' differs from 'payment under reserve' mainly in that the contract between the intermediary bank and the beneficiary has to be in writing. Thus, both the bank and the seller are secured because the terms of the agreement cannot be disputed by the parties.

279) see ante p. 104-106

280) (1983) Q.B. 711

An indemnity contract may cover only the specific loss which caused the rejection of the documents. In this case, if the issuing bank or the buyer refuse the documents for a different reason than the reason in respect of which indemnity was given, the bank cannot allege that the indemnity covers 'all loss'. On the other hand, if the parties have stipulated that indemnity is given against 'all loss and liabilities' incurred by the bank, the beneficiary is obliged to indemnify the bank for any loss of the bank caused in connection with the credit. This is similar to the bank's security when the seller undertakes to indemnify the bank against the refusal of the buyer to accept the documents.

In Greece the procedure is more or less the same. When the documents do not comply with the credit or are not consistent with each other, banks agree to take up the documents and send them to the issuing bank provided that they are discharged from any liability should the issuing bank or the buyer reject the documents. In practice, the seller usually tenders a letter of indemnity by which he asks the bank to send the shipping documents to the issuing bank on his own responsibility and undertakes to cover 'all loss' caused to the bank because of the irregularities in the documents.

In *Moralice (London) Ltd. v. E.D. & F. Man & Co.*²⁸¹⁾ the bank refused to take up the documents because the bills of lading tendered by the beneficiary plaintiff covered 499.700 kilos of sugar while the credit stipulated 500.000 kilos. The

281) (1954) 2 Lloyd's Rep. 526

defendants delivered a document promising the plaintiffs general indemnity . The plaintiffs , in reliance upon it, accepted the short delivery of goods and paid the defendants the amount of the invoice. The plaintiffs, who had contracted to resell the goods to a third party ,executed and delivered another document to the purchaser's bank promising indemnity. When the sub-purchaser refused to accept the documents and the plaintiffs were called upon by the bank to refund to it the money they had received under indemnity, the plaintiffs negotiated with the bank and the sub-purchaser and agreed to make an allowance of £ 500 to the sub-purchaser, which was paid to the bank on his behalf. Thus, delivery was accepted and the plaintiffs were discharged from their obligation to the bank under the indemnity. Thereafter the plaintiffs sued the defendants claiming the sum of £ 500 pursuant to their agreement of indemnity.

In Westminster Bank Ltd. v. Banca Nazionale di Credito and the Others²⁸²⁾ the plaintiffs opened a letter of credit on the instructions of the defendants in favour of the Union Cold Storage Company Ltd. which had contracted to sell a cargo of frozen beef to the defendant bank's customer Borasio . The seller gave a letter of general indemnity to the plaintiff bank because the bills of lading were not in compliance with the credit. Banca Nazionale di Credito, however, following its customer's instructions cancelled the credit because the

282) (1928) 31 Lloyd's L.R.306; see also ante p.72

goods were found not to be in accordance with the terms of the sales contract. The sellers argued that they were not liable because the indemnity was given to hold the plaintiff bank harmless from any consequences which might arise from specific matters, and that Borasio did not reject these documents because of the absence of the bills of lading but because of the condition of the cargo. Therefore, they added, the consequences to the plaintiff bank did not follow from the absence of the bills of lading but from something else.

Roche, J. said:

'That argument seems to me to be erroneous; it is I think, to look at the remote cause and not at the immediate and actual cause. The inquiry which I find I have to conduct is not why did Messrs. Borasio not take the goods, but why are the Banca Nazionale not liable in this suit.'

The question of whether the confirming bank may demand payment on the ground that the issuing bank has rejected the documents because of discrepancies not specified by the confirming bank has not clearly been answered yet. In *Banque de l'Indochine et de Suez v. J.H. Rayner (Mincing Lane) Ltd.*²⁸³ Kerr, L.J. inclined to the opinion that the issuing bank should reject the shipping documents for reasons or at least for one of the reasons notified by the confirming bank.

Another important question is whether a contract of indemnity is valid when the parties conclude it on the ground that a clean bill of lading is issued though the condition of the shipped goods are not such as to justify such issue.

283) (1983) Q.B. 711

In *Brown, Jenkinson & Co., Ltd. v. Percy Dalton (London) Ltd.*²⁸⁴) the plaintiffs, loading brokers and chartering agents, agreed to issue a clean bill of lading only against indemnity because the orange juice they received for transport was not in a proper condition. The sellers agreed and delivered an indemnity in which they admitted that the goods had been put in old, frail and leaking containers. Besides, the defendants undertook to indemnify the plaintiffs against 'all loss' which might arise from the issuance of that particular clean bill of lading. When the loading brokers and chartering agents sued the sellers, the latter alleged that the indemnity contract was based on an illegal consideration and was therefore unenforceable. The Court of Appeal, by a majority, gave judgement for the defendants. As to this subject, Pearce, L.J. said:

In the last 20 years it has become customary, in the short sea trade in particular, for shipowners to give a clean bill of lading against an indemnity from the shippers in certain cases where there is a bona fide dispute as to the condition or packing of the goods. This avoids the necessity of rearranging any letter of credit, a matter which can create difficulty where time is short. If the goods turn out to be faulty, the purchaser will have his recourse against the shipowners, who will in turn recover under his indemnity from the shippers. Thus no one will ultimately be wronged.

This practice is convenient where it is used with conscience and circumspection, but it has perils if it is used with laxity and recklessness. It is not enough that the banks or the purchasers who have been misled by clean bills of lading may

have recourse at law against the shipowner. They intend to buy goods, not law suits. Moreover, instances have been given where their legal rights may be defeated or may not recoup their loss. Trust is the foundation of trade; and bills of lading are important documents. If purchasers and banks felt that they could no longer trust bills of lading, the disadvantage to the commercial community would far outweigh any conveniences provided by the giving of clean bills of lading against indemnities.'

In Greece the contract of indemnity is regulated by the Law of obligations which constitutes the second part of the Greek Civil Code. As to its legal basis, the contract of indemnity is an abstract promise or acknowledgement of debt governed by articles 873 to 857 of the Greek Civil Code.

Article 873 states about the notion and validity of this contract:

'A contract whereby a promise is given or a debt is acknowledged in such a manner as to give rise to an obligation irrespective of the consideration for the obligation shall be valid if the promise or the declaration of acknowledgement with no reference to consideration for the obligation shall in case of doubt be deemed to be made for the same purpose.'

II) Damages for the Dishonour of a Commercial Credit

The bank has to examine the documents tendered by the beneficiary very carefully and reject them only if there is a well-founded reason to do so. If the bank refuses, without lawful excuse, to purchase or accept the beneficiary's drafts or the shipping documents, it is liable for breach of the contract it has concluded with the beneficiary.

The bank's liability is not regarded as one to pay solely a sum of money, but as one including damages which may fairly and reasonably be considered as arising naturally from the breach of the contract in question as well as damages which may reasonably be supposed to have been in contemplation of both parties at the time they made the contract²⁸⁵⁾.

In *Prehn v. The Royal Bank of Liverpool*²⁸⁶⁾ the defendants issued a letter of credit in favour of the plaintiffs, who were grain merchants at Alexandria and Liverpool, and agreed to accept the drafts when presented by the plaintiffs' Alexandria firm. The plaintiffs, on their side, agreed to put the bank in funds and pay 0,5% commission.

Although the plaintiffs had put the defendants in funds, the latter, before the bills became due, informed the plaintiffs that they would not meet the bills they had already accepted.

285) *Hadley v. Baxendale* (1854) 9 Ex.341, cited also in *Victoria Laundry (Windson) Ltd. v. Newman* (1949) 2 K.B.528, 537

286) (1870) L.R. 5 Ex. 92

The plaintiffs arranged with another bank to take up their bills and thus they paid 2,5% commission, the expenses of protesting the bills and the expenses of telegraphing to Alexandria. When Prehn sued the issuing bank claiming damages, the latter contended that the case was one of dishonour of a bill ,therefore they had only to recover the amount of the bill with interest.The Court held that the action was brought because of the breach of the contract to honour the bill and that the plaintiffs had to recover the damages which were the reasonable and probable consequences of that breach.

In *Trans Trust S.P.R.L. v. Danubian Trading Co. Ltd.*²⁸⁷⁾, a case which has already been dealt with ²⁸⁸⁾ Denning, L.J. said:

'A banker's confirmed credit is a different thing from payment. It is an assurance in advance that the seller will get paid. It is even more than that. It is irrevocable by the banker; and it is often expressly made transferable by the seller. The seller may be relying on it to get the goods himself. If it is not provided, the seller may be prevented from getting the goods at all. The damages he will then suffer will not in fact be nominal.....It was said that the breach here was a failure to pay money, and that the law has never allowed any damages on that account. I do not think that the law has ever taken up such a rigid standpoint. It did undoubtedly refuse to award interest until the recent statute [Law Reform (Miscellaneous Provisions) Act, 1934, s.3 (1)], see *London, Chatham & Dover Rly. v. South Eastern Rly. Co.*, (1893) A.C. 429, but the ground was that interest was 'generally presumed not to be within the contemplation of the

287) (1952) 2 Q.B. 297

288) p. 187

parties': see Bullen & Leake, 3rd ed., p.51 [note(a)]. That is, I think, the only real ground on which damages can be refused for non-payment of money. It is because the consequences are as a rule too remote. But when the circumstances are such that there is a special loss foreseeable at the time of the contract as the consequence of non-payment, then I think such loss may well be revocable.'

The following two cases which are similar to the above case, are nevertheless of different importance because they establish the beneficiary's right to sue the bank without proving that he has suffered any loss by the bank refusing payment.

In *Larios Arthur v. Antonio Bonany y Gurety* ²⁸⁹⁾ the appellants who had agreed to open a credit of \$ 9.400 and honour drafts up to this amount in the respondent's favour, because certain property had been transferred to them, made, at the beginning, some advances, but then refused to accept a bill for \$ 1.000 drawn upon them and soon after that did not make any other payment. On an action brought by the respondent the appellants said that the cause of action was merely the breach of an agreement to pay a sum of money, and that accordingly nothing could be recovered by way of damage but the principal money contracted to be paid and interest. The Privy Court held that the contract was a special one and that the appellants were liable to the respondent for damages over and above the principal money and interest.

In *Belgian Grain and Produce Co. v. Cox & Co.* ²⁹⁰⁾ the defendant

289) (1873) L.R. 5 P.C. 346

290) (1919) 1 Ll.L.Rep. 256

bank issued a letter of credit according to the instructions of its customer, who had contracted to buy goods from the plaintiffs. When the goods were shipped, the plaintiffs tendered the shipping documents but the defendants refused payment. The plaintiffs brought an action against the issuing bank claiming the price of the goods. Rowlatt, J. gave judgement in favour of the defendants on the ground that the documents were not in order. The plaintiffs appealed to the Court of Appeal, where the defendants argued that under that letter of credit the plaintiffs' remedy would be a remedy in damages merely, and the measure of those damages would be the amount which would be recoverable as damages by the plaintiffs against the purchasers of the goods. Bankes, L. J. said:

'It would seem to me that the contention, if sound, would defeat the object of letters of credit in this form, which, as I understand it, is to secure payment of the amount of the purchase price of the goods or of the actual amount named in a letter of credit, in exchange for the particular document mentioned therein, and one of the objects is to avoid any controversy in reference to the amount of damage and to secure that, as against the documents, if they are in order, the amount of money named in the letters of credit should be paid over.'

In the Trans Trust S.P.R.L. case the Court did not decide for the sellers to be indemnified by the buyers because it held that such a loss was not contemplated by the parties. On the other hand, damages caused because of special circumstances are recoverable if they are known or ought to have been known to the bank at the issue of the letter of

credit²⁹¹⁾.

In *Urquhart, Lindsay & Co. Ltd. v. Eastern Bank Ltd.*²⁹²⁾ the defendant bank refused to take up documents which included an amount for extra cost of labour on the ground that they were not in conformity with the credit. The beneficiaries brought an action against the bank for breach of the contract because according to the sales contract they were entitled to increase the price of the goods if, in the time between the conclusion of the contract and the completion of the manufacture, an increase took place in wages or cost of materials or transit rates. The defendants alleged that 'the letter of credit must be taken to incorporate the contract between the plaintiffs and their buyers; and that according to the true meaning of that contract the amount of any increase claimed in respect of an alleged advance in manufacturing costs was not to be included in any invoice to be presented under the letter of credit, but was to be subject to subsequent independent adjustment.' Rowlatt, J. held that the plaintiffs were entitled to damages, stating that 'any adjustment must be made by way of refund by seller and not by way of retention by the buyer.'

291) *Hammond & Co. v. Bussey* (1887) 20 Q.B.D. 79; *British Columbia and Vancouver's Island Spar, Lumber and Saw Mill Co. Ltd. v. Nettleship* (1868) L.R. 3 CP 499; *Hydraulic Engineering Co. Ltd. v. McHaffee Goslett & Co.* (1878) 4 Q.B.D. 670 and *H. Hall Ltd. v. Pim* (1928) Com.Cas. 324

292) (1922) 1 K.B. 318; see ante p. 80

As to the measure of damages he said:

'These damages are not for non-payment of money. It is true that non-payment of money was what the buyer was guilty of; but such non-payment is evidence of a repudiation of the contract to accept and pay for the remainder of the goods, and the damages are in respect of such repudiation. I confess I cannot see why the refusal of the bank to take and pay for the bills with the documents representing the goods is not in the same way a repudiation of their contract to take the bills to be presented in future under the letter of credit; nor, if that is so, why the damages are not the same.'

He continued:

'The damages to which the plaintiffs are entitled are the difference between on the one hand the value of the materials left on their hands and the cost of such as they would have further provided, and, on the other hand, what they would have been entitled to receive for the manufactured machinery from the buyers, the whole being limited to the amount they could in fact have tendered before the expiry of the letter of credit.'

In *Stein v. Hambros Bank of Northern Commerce*²⁹³⁾ the defendant bank rejected the shipping documents and refused to honour the draft tendered by the beneficiary for the purchase price. Rowlatt, J. held that the bank had acted wrongfully²⁹⁴⁾ and gave judgement for the plaintiff for the amount of the draft with interest, without imposing any duty on the plaintiff.

293) (1921) 9 Ll.L. Rep. 507

294) As to this, he did not receive the approval of the Court of Appeal

In the above two cases the plaintiff was not considered to be obliged to perform his part of bargain, that is, to take steps in order to minimise the loss he had suffered because of the wrongful decision of the bank to reject the documents.

However, though not definitely settled yet, the plaintiff is usually under the duty to take all reasonable steps to mitigate damages. The sort of steps he has to take are a question of fact and not of law.²⁹⁵⁾

In *British Westinghouse Electric & Manufacturing Company v. Underground Electric Railways of London*²⁹⁶⁾ Haldane, L.J. said:

The fundamental basis is thus compensation for pecuniary loss naturally flowing from the breach; but this first principle is qualified by a second, which imposes on a plaintiff the duty to take all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of this damage which is due to his neglect to take such steps.'

On the other hand, the Uniform Customs make no provision as to the beneficiary's duty to mitigate. This could be attributed to the fact that mitigation complicates the procedure of letters of credit and restrains the completion of the transaction. Contrary to the contention that the issue of a letter of credit, assures the beneficiary that he will get paid when he presents the shipping documents, the allowance of amounts in mitigation of damages minimizes this security. Furthermore, intermediary banks would not be willing to honour the credit if, soon after that, they had to

²⁹⁵⁾ *Payzu Ltd. v. Saunders* (1919) 2 K.B. 581

²⁹⁶⁾ (1912) A.C. 673, 689

realize the goods represented by the shipping documents and sue the issuing bank which rejected the documents for a wrongful reason.

In Greece, as has already been said above, the relationship between the seller and the issuing and/or the intermediary banks is an abstract promise of debt, ruled by articles 873 to 875 of the Greek Civil Code. A contract which imposes an abstract obligation is not influenced by a rule of mitigation and the debt is actionable even if the underlying contract is void or does not exist. However, if the bank pays the beneficiary although he has not acted according to the terms of the credit, the beneficiary becomes richer without lawful cause and he may be asked to return this money with interest.

Article 904 of the Greek Civil Code states:

'Notion. A person who has become richer without a lawful cause by means or to the detriment of the patrimony of another person shall be bound to restore the benefit. Such obligation shall arise particularly by reason of a payment made which was not due, or of payment for a consideration that did not materialize or that ceased to exist, or that was illegal or immoral.

An acknowledgment by contract of the existence or non-existence of a debt shall be assimilated to a payment.'

Similarly the beneficiary whose documents have been rejected by the bank without lawful reason may sue the bank and claim either the price of the goods and indemnity for established loss if he has despatched the goods, or an indemnity for the damages he has suffered if he is still in possession of the goods. In the latter case the defendant bank may raise the plea

of 'enrichment without just cause'²⁹⁷⁾ or sue the beneficiary and demand that the amount of the value of the goods be subtracted from the amount of the damages claimed.

On the other hand, the beneficiary may allege and possibly prove that the bank was aware of this when it contracted to pay him against the presentation of shipping documents. In this case the bank is considered to have validly given up its right to raise the plea of enrichment without just cause.²⁹⁸⁾ The claim of enrichment without just cause is subject to the limitation period of twenty years provided in article 249 of the Greek Civil Code, while the alternative plea is, according to article 273 of the same Code, not subject to a limitation period.

297) 'Enrichment without just cause' is regulated by articles 904 to 913 of the Greek Civil Code.

298) A.P. 83/1976 NomV 24. 609

F I F T H P A R T

1) Transfer of the Letter of Credit

As already shown, when the letter of credit is transferable the beneficiary makes the credit available in whole or in part to one or more other parties (second beneficiary/ies).

In modern transactions transferable credits are very common, because they contribute to the collection of payment for great quantities of goods, which one supplier could not easily obtain within the time provided in the credit. That is, the first beneficiary very often sells the buyer goods which he does not possess, but which he will obtain from others, the second beneficiary/ies.

According to some earlier opinion the credit could be transferred more times than once provided that the last beneficiary would tender the originally stipulated documents.²⁹⁹⁾

The Uniform Customs have solved the problem by providing in article 48 G

'Unless otherwise stated in the Credit, a transferable Credit can be transferred once only. Consequently, the Credit cannot be transferred at the request of the second Beneficiary to any subsequent Third Beneficiary. For the purpose of this Article, a retransfer to the the First Beneficiary does not constitute a prohibited transfer.'

299) Simitis: p.103

Article 46 e of the 1974 Revision of the Uniform Customs expressly stated that 'a transferable credit can be transferred once only'. However there existed uncertainty about the bank's attitude towards the subject, if the credit permitted the transfer of the credit by the second beneficiary. Accordingly, the Commission on Banking Technique and Practice was asked to indicate whether there existed any means to prevent the issue of a letter of credit permitting "vertical" transfer, that is, a credit which makes it possible for the second beneficiary to instruct the issuing bank to make the credit available to a third party. Many members of the Commission were opposed to "vertical transfer" contending that it was dangerous and stating that the applicant for the credit may set out whatever credit conditions he found appropriate, but that banks were free to express their disagreement. The Commission in its meeting of 1 December 1978³⁰⁰⁾ decided that issuing banks should be encouraged not to issue credits allowing vertical transfers. Moreover, the buyer who wished the credit to be non-transferable had, according to the above opinion, to mention that expressly in the credit, otherwise the credit was transferable.

However, article 48 B of the Uniform Customs states:

'A Credit can be transferred only if it is expressly designated as 'transferable' by the Issuing Bank. Terms such as "divisible", "fractionable", "assignable" and "transmissible" do not render the Credit transferable. If

300) ICC Documents 470/315, 470/331, 470/342

such terms are used they shall be disregarded'.

A) The Terms of the Transfer

When the applicant for a credit requires the credit to be made transferable, he acts in compliance with the contract of sale, which usually provides for the method of payment, or he follows the terms of a separate agreement between the seller and himself. If the buyer fails to open the type of credit which he has already agreed to open, he is liable to the seller for breach of the contract of sale. On the other hand, if the bank issues a transferable credit without its customer's consent it is liable to him for breach of the contract between them, and the buyer will be entitled to refuse reimbursement or indemnification. After the intermediary bank has advised a transferable credit, it has to permit the transfer of it if the beneficiary instructs it to do so. Otherwise the bank has to advise the issuing bank immediately that it is not willing to make the transfer.

Article 48 C of the Uniform Customs states:

'The Transferring Bank shall be under no obligation to effect such transfer except to the extent and in the manner expressly consented to by such bank.'

The Commission on Banking Technique and Practice in its meeting on 1 December 1978³⁰¹⁾ decided that the advising bank was always free to refuse the beneficiary's transfer

301) ICC Documents 470/315, 470/331, 470/342

instructions, giving as sole grounds for its refusal the provisions of the article about the transferable credit of the Uniform Customs³⁰²⁾.

As may be inferred from the above, the intermediary bank, which acts according to the issuing bank's instructions, usually has no reason to refuse the transfer of the credit, because it will be indemnified by the issuing bank.

After the intermediary bank has advised the credit to the second beneficiary at the request of the first beneficiary it has the same duties towards the transferee as the duties it had towards the first beneficiary before the transfer. The intermediary bank may also advise the issuing bank that the specific credit has been transferred. As to this action of the intermediary bank it has been argued whether this bank is entitled to reveal the name of the second beneficiary and the amount of the payment to be made available to the second beneficiary. According to some opinion this is common and standard practice because 'the negotiating bank was carrying out a mandate conferred upon it by the issuing bank: it was understandable, under those conditions, that the negotiating bank should wish to report to the issuing bank on the way in which it had carried out that mandate, but it would be quite abnormal if the issuing bank, in turn, were to notify the applicant for the credit'. The Commission on Banking Technique and Practice

302) It was then article 46(b) of the 1974 Revision similar to article 48C of the 1994 Revision

in its meeting on March 1976³⁰³⁾ confirmed that, whilst the bank responsible for the transfer might reasonably advise the issuing bank of the fact that the credit had been transferred, it was not customary practice to give the latter bank any further details.

As regards the terms of the credit which is transferred, they are not changed, and the documents tendered by the transferee have to be in strict compliance with the credit.

Article 48 H of the Uniform Customs makes provision of the contents of a credit transferred

'The Credit can be transferred only on the terms and conditions specified in the original Credit, with the exception of:

- *The amount of the Credit,
- *any unit price stated therein,
- *the expiry date,
- *the last date for presentation of documents in accordance with Article 43,
- *the period for shipment,
- *any or all of which may be reduced or curtailed.

The percentage for which insurance cover must be effected may be increased in such a way as to provide the amount of cover stipulated in the original Credit, or these Articles.

In addition, the name of the First Beneficiary can be substituted for that of the Applicant, but if the name of the Applicant is specifically required by the original Credit to appear in any document(s) other than the invoice, such requirement must be fulfilled.'

When the second beneficiary has the invoices and the other stipulated documents ready, he has to deliver them to the first

beneficiary within the time provided in the credit and especially in time for the latter to tender the documents to the intermediary bank before the expiry date of the credit.

Then the first beneficiary may substitute his own invoices for those of the second beneficiary as stated in article 48 I of the Uniform Customs:

'The first Beneficiary has the right to substitute his own invoice(s) and Draft(s) for those of the Second Beneficiary(ies), for amounts not in excess of the original amount stipulated in the Credit, and for the original unit prices if stipulated in the Credit, and upon such substitution of invoice(s) and Drafts(s), the First Beneficiary can draw under the Credit for the difference, if any, between his invoice(s) and the Second Beneficiary's(ies') invoice(s).

When a Credit has been transferred and the First Beneficiary is to supply his own invoice(s) and Draft(s) in exchange for the Second Beneficiary's(ies') invoice(s) and Draft(s) but fails to do so on first demand, the Transferring Bank has the right to deliver to the Issuing Bank the documents received under the transferred Credit, including the Second Beneficiary's(ies') invoice(s) and Draft(s) without further responsibility to the First Beneficiary.'

The intermediary bank has to examine the documents carefully and pay the second beneficiary the amount of his invoice if it decides that the documents are in order.

In a case tried in 1957 by the Highest Court in Greece, Arios Pagos³⁰⁴), it was held that the intermediary bank may not raise

304) A.P. 81/1957 EEmpD 1957.139 approving the 1329/1956 decision of the Court of Appeal in Athens

the plea of 'set off' against the second beneficiary. According to the facts the appellant Bank of Greece issued a letter of credit following its customer's instructions in favour of N.B. On 6/6/1953 the issuing bank ordered its branch-office in Corfu to honour for its account part of the credit which should be a confirmed, irrevocable and transferable credit against documents in favour of N.B. When the credit was notified to N.B. the latter transferred it to P.Z. and S.M. and informed the branch-office about the transfer. When P.Z. and S.M. tendered the shipping documents for the price of 964.981.000 Drachmas, the bank set off a claim which it had against N.B. of 400.671.900 Drachmas, and paid PZ and SM only 564.309.100 Drachmas. Arios Pagos said:

'According to article 887 of the Civil Code if a debtor has accepted the delegation or assignment of the debt which he owes in regard to the assignee, the debtor shall not be entitled to raise as against the new assignee pleas flowing from the legal relationship that existed between the debtor and the person previously entitled to the debt. Furthermore, the assignor is not entitled to raise such pleas and therefore the first bank which ordered the confirmation of the credit may not raise the plea of 'set off' against the new beneficiary who conformed to the terms of the letter of credit by tendering the stipulated shipping documents, on the ground that the bank had made advances against the credit issued in favour of the first beneficiary.'

Moreover, the first beneficiary has, according to article 48 F of the Uniform Customs, to pay bank charges in respect of transfers of a letter of credit including commissions, fees, costs or expenses unless otherwise stipulated. The

transferring bank may refuse to make the transfer until all charges are paid.

B) Legal Basis

In a transferable credit there arise legal relationships between the intermediary bank, the first beneficiary and the second beneficiary. English Theory has not defined the legal effect of the transfer. However, it has been admitted that a letter of credit does not give any authority to the transferee because it is neither a negotiable instrument³⁰⁵⁾ nor an assignment of moneys which it undertakes to pay³⁰⁶⁾.

When the transfer has taken place, the first beneficiary is under no further responsibility to the intermediary bank, because the transfer of a credit is not an assignment of a contract, but a substitution of parties or a novation³⁰⁷⁾. The intermediary bank has to act in compliance with the first beneficiary's instructions as far as the transfer is concerned, but, nevertheless, it is under no further obligation to the first beneficiary. Besides, there is no legal relationship between the issuing bank and the transferee when a second bank, the intermediary bank, intervenes in the transaction and accepts the transfer.

On the other hand, there is a new contract between the first beneficiary and the second beneficiary which is regulated by the terms of the credit and the rules of the Uniform Customs and Practice referring to the transfer of a credit. The

305) Paget p.629

306) Davis p. 110

307) Gutteridge p.103

intermediary bank is probably the third party to this new contract.

In Greece the subject has been dealt with mainly by Theory. As far as the underlying contract is concerned, when the credit has been transferred, it (the contract) is considered to be a contract of remunerated mandate or a contract of agency but not a contract of sale³⁰⁸⁾. This is explained by the fact that according to article 513 of the Greek Civil Code 'through a contract of sale the seller undertakes to transfer the ownership of the thing sold or the right sold and to deliver the thing and the purchaser undertakes to pay the price agreed', while in a transferable credit the first beneficiary is not obliged to transfer the thing sold or the right sold. He is merely under a duty to find suppliers who will provide the goods specified in the terms of the credit. Nevertheless the second beneficiary (the supplier) is not responsible to the ultimate buyer under any contract, and he does not know the terms of the contract of sale. His duty is to act according to the terms of the credit transferred. Consequently, the buyer, who is not in privity with the second beneficiary, may not set off the amount of a claim arising from the underlying contract with the first beneficiary against his debt to the second beneficiary, because there is no reciprocity between the two claims³⁰⁹⁾ (article 440 of the Greek Civil Code)³¹⁰⁾.

308) Perdikas p.205

309) Pol.Prot.A. 2593/1981 EEmpD 1983.232

310) According to article 440 GCC 'Reciprocal claims between two persons shall be extinguished by operation of the 'set off' to the extent to which they cover each other.'

The legal basis of the transfer of a credit has not been clearly defined. It is said to be a contract of mandate if the credit has been opened in favour of the first beneficiary, while it is a contract of sale if the credit has been opened in favour of the second beneficiary.³¹¹⁾ In practice the distinction between these two contracts is not always easy. It has been accepted that a contract of furnishing sale exists when it is apparent to the other party that the supplier first agrees to sell goods and then buys them from the second beneficiary. This, however, is not always clear and several theories which have been expressed have not solved the problem.

C) Whole and Partial Transfer

The terms of the letter of credit may permit the transfer of the credit either to one person or to more than one person, specified or not, but only as a whole. In this case the first beneficiary may not transfer fractions of the credit separately and the shipping documents tendered have to be issued for the whole cargo. The fact is that the first beneficiary does not usually transfer the whole amount of the credit to the second beneficiary but only part of it, which does not necessarily mean that he has not acted according to the terms of the credit, but that the difference between the amount of the original credit and the amount of that credit which is transferred is his profit, which he usually receives

311) Loukopoulos: p.241, comments on the decision of the Pol.Prot.A. 2593/1981 EEmpD 1983.232

when the documents have been tendered to the bank.

Nevertheless, the first beneficiary may transfer parts of the credit if this is not expressly prohibited in the letter of credit. Article 48G Par.2 of the Uniform Customs states:

'Fractions of a transferable Credit (not exceeding in the aggregate the amount of the Credit) can be transferred separately, provided partial shipments/drawings are not prohibited, and the aggregate of such transfers will constitute only one transfer of the Credit.'

Though the term 'divisible', provided in earlier revisions of the Uniform Customs, is no longer used³¹²⁾, it is nevertheless used to express the function of the credit described in the above article.³¹³⁾

Thus, if division of a transferable credit is not prohibited, the issuing bank is obliged to accept the partial transfer of the credit, provided that the shipping documents are tendered by the stipulated date.

2) Assignment

The Uniform Customs make provision for assignment only in article 49 and confine the subject to the assignment of the proceeds of a credit. It states:

312) see article 48 b of the Uniform Customs

313) *Établissements Esefka International Anstalt v. Central Bank of Nigeria* (1979) 1 Lloyd's Rep. 445 ; *European Asian Bank A.G. v. Punjab and Sind Bank* (1983) 1 Lloyd's Rep. 611, C.A.; *Perdikas* :p. 204

'The fact that a Credit is not stated to be transferable shall not affect the Beneficiary's right to assign any proceeds to which he may be, or may become, entitled under such Credit, in accordance with the provisions of the applicable law. This Article relates only to the assignment of proceeds, and not to the assignment of the right to perform under the Credit itself.'

In England the rights of the beneficiary under a credit are a chose of action, normally assignable under section 136 of the Law of Property Act 1925 or by way of equitable assignment.

In the case of an assignment the assignor or the assignee has to inform the paying bank that an assignment has taken place so that payment will be made to the assignee. The bank has, as soon as it receives notification of the assignment, to verify it with the beneficiary assignor.

English Law allows the assignment of a debt which is already due or which is not yet due, but in the latter case it becomes enforceable in equity when the debt becomes due and there is consideration for the assignment.

In Greece the assignment of a credit is regulated by articles 455 to 470 of the Greek Civil Code. Article 455 GCC states:

'Notion. An assignor may by contract transfer to another party his claim without the consent of the debtor (assignment)'.

The assignor, is under the duty to tender the documents as stipulated in the credit and provide the assignee with information referring to the latter's right to receive payment. Article 456 of the Greek Civil Code states:

'Delivery of evidence. An assignor shall be obliged to furnish the assignee with necessary information for the pursuit of the assigned claim and to deliver to the assignee the documents in

his possession that establish the claim. Upon the assignment of part of a claim there shall be delivered duly certified copies of such documents, the right of the assignee to demand the presentation of the originals being reserved '.

The assignee who wants to be sure that he will be paid may ask the assignor to deliver the documents to him, and, after examining them, tender them to the bank.

This happened in *Singer and Friedlander v. Creditanstalt Bankverein*³¹⁴⁾, a case tried before the Austrian Commercial Court. In this dispute the defendants issued an irrevocable letter of credit in favour of A.M. Aronson, who was financed by the plaintiffs. Aronson assigned to the plaintiffs all his rights and benefits under the credit, and in due course delivered to them the documents called for by the credit. Singer and Friedlander tendered the documents to the defendant bank, which refused payment. The Court held that the right to present documents under a non-transferable letter of credit cannot be assigned. It said:

'If the right to present (or not to present) the documents were declared transferable the non-transferable letter of credit would come close to a transferable letter of credit, so that the two notions could hardly be distinguished.'

As stated in article 49 of the Uniform Customs the beneficiary's right to assign the benefit of a credit to a third party is not excluded even when the credit is not

transferable. The benefit of a credit is not assignable only if there is an express stipulation between buyer and seller that the contract has to be performed by the beneficiary, that no other contract has to be performed by the beneficiary and that no other person may intervene. In this case the buyer should make sure that the bank which issues the letter of credit includes in it that the benefit of the credit is non-assignable.

In *Brice v. Bannister*³¹⁵) Bramwell, J. said:

'...it does seem to me a strange thing and hard on a man that he should enter into a contract with another, and then find that because that other has entered into some contract with a third, the first man is unable to do that which is reasonable he should do for his own good. But the law seems to be so; and anyone who enters into a contract with A must do so with the understanding that B may be a person with whom he will have to reckon. Whether this can be avoided, I know not; maybe if in the contract with A it was expressly stipulated that an assignment to B should give no rights to him, such a stipulation should be binding. I hope it would be.'

And Brett, L.J. added:

'I cannot bring myself to agree that, either by virtue of the Judicature Act or otherwise, business transactions are hampered by any doctrine which will prevent a man from doing what he otherwise might do, merely because something has happened between other parties. I would therefore confine this remedy to a case where a debt has actually accrued due

315) (1878) 3 Q.B.D. 569; see also *Tolhurst v. Associated Portland Cement Manufacturers Ltd.* ((1902) 2 K.B. 660 and (1903) A.C. 414

from one person to another, or at least I certainly would confine it simply to the case where nothing remains to be done by the person who is the assignor. In that case nothing remains to be done by him but to receive money from the person who is to pay him, and that money he makes over to the equitable assignee. But I cannot bring my mind to think that this doctrine should be extended, so as to prevent the parties to an unfulfilled contract from either cancelling or modifying, or dealing with regard to it in the ordinary course of business.'

SIXTH PART

The Banker's Security

The bank which lends money to its customer wants to be sure that it will get back not only the equivalent amount but also the amount of accrued interest and its commission. The guarantee of a third party, the mortgage of land or the pledge of goods or documents would provide the bank with better security, but in case of a letter of credit customers are not always willing to offer such security. Thus, banks are content to rely on their customer's solvency and integrity as well as on the claim against the carrier under the bill of lading. If, however, both the buyer and the carrier are proved to be insolvent banks which are forced to realise the goods themselves, can never be sure that the proceeds will cover all their expenses. This is because banks do not examine the quality and quantity of the goods shipped, and can never be sure that they will not be damaged during the transfer. Besides, banks run the risk of not being able to sell the goods themselves and of having to pay expensive storage charges until they manage to dispose of them at a satisfactory price. Nevertheless, it is indisputable that goods provide an alternative form of security for banks which want to safeguard their right to reimbursement.

1) The Lien

The lien is the issuing or intermediary bank's security, by which it has the right to retain possession of the shipping documents, which in the case of a bill of lading are treated as

equivalent to the goods belonging to its customer. This is the banker's lien which arises by operation of law, not by agreement to its creation, and is independent of any other security the bank may take by express agreement.

In *Brandao v. Barnett and Others*³¹⁶⁾ Lord Campbell said:

Bankers most undoubtedly have a general lien on all securities deposited with them, as bankers, by a customer, unless there be an express contract, or circumstances that show an implied contract inconsistent with lien. Lord Kenyon says in *Davis v. Bowsher* (5 Term Rep. 491), "bankers have a general lien on all securities in their hands for their general balance, unless there be evidence to show that any particular security was received under special circumstances, which would take it out of the common rule." And Lord Denman, in pronouncing this very judgment in the Exchequer Chamber, says (6 Man. and Gr. 670), "If indeed there had been an agreement, express or implied, inconsistent with a right of lien as to return them absolutely, at all events, to the depositor, the case would have been different."

The bank is entitled to retain possession of the bill of lading and the goods represented by it until it has received payment, or it may sell the goods and retain the proceeds if the buyer fails to reimburse the amount which it has advanced in payment of the beneficiary's drafts within a reasonable time after the bank has required reimbursement. As to the bank's right to sell the goods, the banker's lien approximates to a pledge. In *Rosenberg v. International Banking Corporation*³¹⁷⁾

316) (1846) 12 Cl. & Fin. 787

317) (1923) 14 Ll.L.R. 344, 347; see also *Burdick v. Sewell* (1883) 10 Q.B.D. 363 and *Re Morritt* (1887) 18 Q.B.D. 222 per Cotton, L.J.p.232

Scrutton, L.J. said:

'Bankers' liens or bankers' pledges effected in such a way give, according to the views of merchants, the bankers a right of sale. Whether you talk about it as an express pledge, or whether, as Lord Campbell does, you talk about it as an implied pledge, in my view such a transaction gives an independent right, or right of property, to the bank to secure the amount which they have advanced, and the bank are not put on inquiry unless there is something obviously wrong with the transaction.'

However, it was held in *Burdick v. Sewell*³¹⁸⁾ that a lien gives the bank the right to retain the shipping documents, but it does not transfer the ownership of the goods represented by them to the bank, although it has power to sell them.

If the issuing bank instructs a second bank, the intermediary bank, to pay the amount of a bank commercial credit against documents, the former becomes the latter's customer, and the latter can have a lien on the shipping documents and must be indemnified by the issuing bank for the advances it has made.³¹⁹⁾

Beside the issuing or intermediary bank, no other party may claim a lien over shipping documents or charge to the goods. In *Robey & Co.'s Perseverance Ironworks v. Ollier*³²⁰⁾ one Brown consigned to the defendants by the ship 'Acacia' a cargo of maize which had been purchased at the joint risk of himself and the defendants. The defendants agreed to accept bills drawn on them by Brown to his order. Brown indorsed to the plaintiffs three of the bills which were drawn: "Pay to the order of

318) (1883) 10 Q.B.D. 363

319) *Aschkenasy v. Midland Bank Ltd.* (1934) 51 T.L.R. 34

320) (1872) L.R. 7 Ch. App. 695

myself the sum ofsterling, which place to account cargo per 'Acacia'". The plaintiffs received the drafts and forwarded them to the defendants, who returned them unaccepted, Brown having in the meantime stopped payment. Thereafter the defendants received and sold the cargo. The plaintiffs brought an action claiming a lien on the proceeds of the sale for the amount of the three bills. The Master of the Rolls dismissed the plaintiffs' action and the plaintiffs appealed. James, L.J. said:

'I am not prepared to say that merely because a bill of exchange purports to be drawn against a particular cargo it carries a lien on that cargo into the hands of every holder of the bill'.

Mellish, L.J., who was of the same opinion, added:

'The indorsement of a bill gives only a right to the bill, and I do not think that any mercantile man would suppose, because he saw in the bill the words "which place to account cargo per A.", that he was to have a lien on that cargo. A mercantile man who is intended to have a lien on a cargo expects to have the bill of lading annexed; if there is no bill of lading annexed he only expects to get the security of the bill itself.'

In *Frith v. Forbes* ³²¹) it was held that the third party (the indorsee) who takes the bill of exchange together with the shipping documents acquires a lien on the goods, which is really a pledge, and may sell the goods or recover the proceeds if the goods have already been sold by the beneficiary. This decision was, however, overruled by *Brown, Shipley & Co. v.*

321) (1862) 4 De G.F. & J. 409

Kough³²²⁾ where the Court held that the holder of the bill was not entitled to claim the goods as against the trustee in bankruptcy of the seller.

In Guaranty Trust Co. of New York v. Hannay & Co. ³²³⁾ it was held that when a bank accepts the indorsee's bill of exchange, the lien which exists in his favour is extinguished and another lien arises in favour of the bank which gives security to it for the advances. Scrutton L.J. said:

'The bank will have the documents of title as security for its liability on the acceptance, and the purchaser can make arrangements to sell and deliver the goods. Before acceptance, the documents of title are the security, and an unaccepted bill without documents attached is not readily negotiable. After acceptance the credit of the bank is the security, ...'

The principle that no other party may claim by way of lien against the goods is also stated in the case Harmood W. Banner and J. Joung v. Carruthers C. Johnston³²⁴⁾ where it was held that the bill-holders have no lien over the goods in the hands of the bankers, even if the letter of credit provides an express undertaking by the bank to honour these persons' drafts. In this case a merchant at Liverpool obtained from Bamed's Banking Company, also at Liverpool, a letter of credit by which

322) (1885) 29 Ch. D. 848

323) (1918) 2 K.B. 623, 660

324) (1871) L.R. 5 H.L. 157, 168; see also Ex parte Dever, in re Suse (1884) 13 Q.B.D. 766

he authorised the sellers, cotton merchants at Pernambuco, to draw on them ' against cotton purchased in conformity with instructions.' The bank undertook to honour the drafts covered by shipping documents on receipt. Thereafter the bank accepted some of the bills tendered, but before any of them was due, it became bankrupt and refused to accept any other bills.

Lord Hatherley said:

'If that be the doctrine of the Court of Equity, which I venture to say it has never yet been affirmed to be, notwithstanding the many attempts made at different times by parties, interested in bills of this description, to obtain injunctions to prevent the disposal of goods against which the bills were supposed to be drawn,- or, in other words, to acquire a distinct lien over the goods by that means,- the result would be that in the case of every one letter of credit of this kind, the bankers giving it would be held to constitute themselves trustees for every bill-holder, whatever number of bills there might be, whether ten, or twenty, or fifty, or more, and they would be held bound, as trustees for the various bill-holders, to keep a separate account of the proceeds of the goods consigned to them by way of security. No one can doubt that in that case all bankers of good credit, dealing largely in these transactions, as most banks in London and Liverpool do, would, as a consequence, have a responsibility cast on them of a kind which would be enough to stop the business of any bank.'

There is, however an instance, as mentioned in the above case, where the holder of the bill is entitled to the goods. This is stated in the case *Waring, Inglis, Clarke, Ex parte*³²⁵⁾, where it was held that when the buyer remits bills to his banker to

325) (1815) 19 Ves. 345; see also *Ex parte Dewhurst* (1873) L.R. 8 Ch.App. 965

meet acceptances, and afterwards both the drawer of the bills and the bank become insolvent, the holder of the bills may claim the goods to meet the drafts, provided that the goods have not been realised yet. This is because of the equity rule that where two persons are liable for the same debt (e.g. principal debtor and guarantor) and both of them are insolvent, any security given by one debtor to the other to indemnify the latter is appropriated for the benefit of the creditor of the debt. This rule, however, cannot be applied when the drawer of the bills or the acceptor is an incorporated company which has been ordered to be wound up, and the company is not actually insolvent, as provided in *Re New Zealand Banking Corporation*³²⁶⁾, a case where it was also held that the rule in *ex parte Waring* does not apply when the drawer is a debtor of the bank. In such a case the creditor bank has a general lien on the debtor's (drawer's) property given the bank as security.

2) The Pledge

A pledge arises when the possession of goods or documents of title is delivered by the customer (pledgor) to the bank (pledgee) and the parties agree that a pledge has been created. Delivery of possession may be either actual or constructive. By actual delivery of possession the pledgor who has the goods in his physical possession, effects the pledge by handing them over to the pledgee. However, when actual delivery is not possible, the pledge is effected by constructive delivery³²⁷⁾, which can take place in various

326) (1867) L.R. 4 Eq.226

327) *Lord Atkinson in Dublin City Distillery Ltd. v. Doherty* (1914) A.C. 823, 843

ways, such as is some symbolic act e.g. handing over the key of the warehouse where the goods have been stored.

If the goods are in the possession of a third party who holds them on behalf of the pledgor, the pledge is usually effected when the pledgor, after handing over the documents relating to the goods, notifies the third party that he holds the goods as a bailee on behalf of the pledgee, and the third party 'attorns' to the pledgee i.e. acknowledges that this is so.

In *William Mc Ewan & Sons v. James and Archibald Smith*³²⁸⁾ the Court held that the issue or transfer of a delivery order instructing a warehouse keeper to deliver goods does not operate as a constructive delivery of the goods to which it relates nor does it deprive the owner of the goods, who gave it, of his right of lien for their price if the keeper has not attorned to the pledgee.

The operation of a pledge was described by Lord Wright, who gave judgment in *Madras Official Assignee v. Mercantile Bank of India Ltd.* ³²⁹⁾ and said:

'...But where goods were represented by documents, the transfer of the documents did not change the possession of the goods, save for one exception, unless the custodier (carrier warehouseman or such) was notified of the transfer and agreed to hold in future as bailee for the pledgee. The one exception was the case of bills of lading, the transfer of which by the law of merchants operated as a transfer of the possession of, as well as the property in, the goods.... A pledge of the documents (always excepting a bill of lading) is merely a pledge of the ipsa corpora of them; the common law continued to regard them as merely tokens of an authority to receive

328) (1849) 2 H.L. Cas. 309

329) (1935) A.C. 53

possession....³³⁰⁾

In the case of a letter of credit the pledge on the goods arises only by the transfer of the bill of lading and the agreement between the parties that a pledge is being effected.³³¹⁾ If there is no agreement, the mere delivery of the goods to the pledgee does not constitute an effective pledge. In *Barber Charles and Others v. William Meyerstein*³³²⁾ it was held by the House of Lords that a pledge of goods by means of the deposit of documents may be effected only if the documents are negotiable instruments or bills of lading which are still current. In *Madras Official Assignee v. Mercantile Bank of India Ltd.*³³³⁾ the Court held that railway consignment notes, warehouse warrants or other documents could not be treated in the same way as bills of lading.

As can be inferred from the above mentioned, if the goods are represented by a bill of lading, the pledge is created when the parties agree about it and the bill of lading is delivered to the pledgee. On the other hand, if the goods are represented by other documents such as delivery orders or dock warrant,

330) Lord Wright seems to be of the opinion that bills of lading are the only documents of title which, if transferred to the bank, amount to a pledge of the goods.

331) *Sewell v. Burdick* (1884) 10 A.C. 79; *Bristol Bank v. Midland Railway Co.* (1891) 2 Q.B. 653; *North Western Bank v. Poynter* (1895) A.C. 56

332) (1870) L.R. 4 H.L. 317

333) (1935) A.C. 53

notice of the transfer must be given to the person who possesses the goods and the latter must attorn to the pledgee. However, banks making advances to mercantile agents are protected by legislation³³⁴⁾. Namely, under the Factors Act 1889, if the pledgor is a factor, a pledge of any documents of title to the goods, whether a bill of lading, a rail or road consignment note, an airway bill, a dock or warehouse warrant or a delivery order, creates a valid pledge of the goods to which the document relates.

Furthermore, section 2(1) of the Factors Act 1889 provides:

'Where a mercantile agent is, with the consent of the owner, in possession of the documents of title to goods, any sale, pledge or other disposition of the goods made by him when acting in the ordinary course of business of a mercantile agent, shall, subject to the provisions of this Act, be as valid as if he were expressly authorised by the owner of the goods to make the same, provided that the person taking under the disposition acts in good faith, and has not at the time of the disposition notice that the person making the disposition has not authority to make the same.'

In order for a pledge to be enforceable, the bill of lading has to be drawn in favour of the shipper and indorsed in blank or in favour of the paying bank. If the bill of lading is drawn on the buyer, the bank which receives the shipping documents has merely a lien on the bill of lading and the goods, but no power to sell them.

Furthermore, the pledgor has to be the proprietor of the goods given as a pledge. It may be either the seller or the buyer who gives the charge on the goods.

334) Lloyds Bank Ltd. v. Bank of America National Trust and Savings Association (1938) 2 K.B. 147

In *Kwei Tek Chao v. British Traders and Shippers Ltd.*³³⁵⁾ the plaintiffs contracted to buy from the defendants a quantity of goods, shipment to take place not later than 31 October 1951 and payment to be against letter of credit. The buyers, who had contracted to re sell them to other Hongkong merchants, opened the letter of credit and pledged the goods to their bank. After shipment, which actually took place on 3 November 1951, bills of lading were presented to the bank bearing as date of shipment the 31 October, the sellers having no knowledge of the falsification. The buyers, although knowing the exact date of shipment, received the goods but were unable to resell them because of the late shipment of the goods. Later the buyers discovered that the bills of lading had been falsified and sued the sellers for return of the price, purporting to reject the goods. The defendants argued, inter alia, that the plaintiffs had lost their right of rejecting the goods because they had taken delivery of them. Devlin, J. said:

'I think that the true view is that what the buyer obtains, when the title under the documents is given to him, is the property in the goods, subject to the condition that they revert if upon examination he finds them to be not in accordance with the contract. That means that he gets only conditional property in the goods, the condition being a condition subsequent. All his dealings with the documents are dealings only with that conditional property in the goods. It follows, therefore, that there can be no dealing which is inconsistent with the seller's ownership unless he deals with something more than the conditional property. If the property passes altogether, not being subject to any condition, there

335) (1954) 2 Q.B. 459, 487

is no ownership left in the seller with which any inconsistent act under section 35 of the Sale of Goods Act 1893 could be committed. If the property passes conditionally the only ownership left in the seller is the reversionary interest in the property in the event of the condition subsequent operating to restore it to him.'

Another question which arose in this case was whether the buyer, having pledged the goods to the bank, was in a position to reject them. Devlin, J. declined to answer. He said:

'That, again, raises a question of some theoretical difficulty: can a buyer in effect defeat a pledge by exercising his right of rejection? One view might be that although the property is conditional property which is subject to a condition subsequent, he cannot by his own voluntary act in putting the condition subsequent into operation defeat the pledge. The other view would be that it cannot have been contemplated as between banker and seller that when the buyer pledged the documents he was intending to abandon or impair his right of rejection.'

In Greece the pledge given to a company (creditor) as security for a loan is regulated by articles 35 to 47 of the statute of 17.7/ 13.8.1923 which are supplemented by articles 1209 to 1256 of the Greek Civil Code. According to article 36 of the statute

'1. For the constitution of a pledge shall be required a contract of pledge and delivery of the thing pledged.-2.The contract of pledge must be incorporated either in a notarial deed or in a private deed. -3. This contract of pledge is subject to stamp-duties of 5°/oo on the price of the credit.'

As to the pledge given under a letter of credit, articles 25 to 34 of the above statute are applied. Article 25 par. 2 states

that: '.....The company (creditor) obtains a right of pledge on the goods represented by the bill of lading, as soon as it makes payment', provided that the document of title has been tendered to the bank³³⁶⁾. It is of no importance whether the bill of lading has been indorsed or issued to its order, or issued in its favour or even if it has been assigned to it by the shipper.³³⁷⁾ If the customer refuses to receive the goods, the bank may sell them according to the rules about the sale of a pledge (article 31 par. 1). This sale may take place only after the expiration of the period set out by the Law, which is 24 hours for goods that can easily be damaged and ten days in any other case. (article 31 par. 2). Which goods can easily be damaged is decided by the judge of the Court of First Instance, provided the chairman of the Chamber of Commerce has given his opinion within 24 hours after he received the judge's application. The chairman's opinion is not compulsory if there is no Chamber of Commerce in the specific place (article 31 par. 3).

Beside the pledge which the bank obtains over the goods, article 29 of the statute of 17.7/13.8.1923 states that if the debtor gave the creditor money or negotiable bonds as security for the issue of the credit, the creditor obtains a right of pledge over those assets, even without the observance of the conditions provided by Law for the constitution of a pledge.

336) Ef.A. 629/31 Th. MB 744

337) Prot. P.138/89 EEmpD 1990. 695; Ef.A.882/33 Th.1934. 123; Ef.A. 1398/1956 EEN 25. 647

That is, no contract between the parties is needed for the pledge to be constituted and the bank obtains the pledge on the money or the bonds as soon as it receives them. In no case does the bank become the proprietor of the subject matter of the pledge³³⁸⁾. The seller maintains the property of the goods at the latest until he receives payment by the bank or the bank accepts his draft (article 25 par.2). It has, however been accepted that as soon as the seller tenders the bill of lading to the bank, he transfers the property in the goods to the buyer, the bank becomes the pledgee and the carrier remains the possessor of the goods and he has to deliver them to the holder of the bill of lading³³⁹⁾. According to the 5/1957 decision of the Court of First Instance in Piraeus³⁴⁰⁾ the intermediary bank does not, in the case of a confirmed letter of credit, become the pledgee of the goods, this right being only of the issuing bank, because the relationship between the intermediary and the issuing bank is a mandate, a contract in which the legal consequences arise only for the mandator. This, however does not appear to be the prevailing opinion in Legal Case Law³⁴¹⁾.

In order for a pledge to be valid, it has to be given by the

338) Anastasiadis Ilias: Greek Commercial Law, 4th edit.
p.923

339) Mazis: p.366; Prot.P. 2551/1934 Th.1935. 399

340) Prot.P. 5/1957 EEmpD 1957. 32

341) Ef.P. 186/1978 EEmpD 1979. 233 where it is indirectly inferred that the intermediary bank has a pledge on the goods as long as it is in possession of the bills of lading.

owner of the goods, except if the pledgee is in good faith.³⁴²⁾

Article 1243 GCC states:

'A right of pledge shall be extinguished in particular:

1).....2) through the restitution of the thing by the creditor to the pledgor or the owner.' Consequently, the bank loses the pledge on the goods if it delivers the bill of lading to the buyer, even temporarily, or if it hands over the keys of the warehouse where it has stored the goods.³⁴³⁾ On the contrary, the bank does not cease to be entitled to the pledge if it obtains physical possession of the goods and hands over to the carrier the original bill of lading.

3) Other Forms of Security

a) Hypothecation

Hypotheca was a term used by Roman Law meaning a pledge over goods as security for an advance made but unaccompanied by delivery of the goods to the pledgee³⁴⁴⁾. In Maritime Law hypothecation refers to a transaction by which the ship, the

342) Mazis: p. 367

343) Simitis: p. 96

344) The term is nowadays used by Greek Law to mean the real right constituted on the immovable of a debtor with a view of securing the satisfaction of a creditor's claim by way of priority on the thing. A hypothecation may only be obtained on immovables susceptible to be alienated as well as on the usufruct thereof for the acquisition of a hypothecation (articles 1257 to 1345 GCC).

ship's cargo or the freight is given as security for a debt. In banking, this term denotes an agreement to give a charge over goods or over documents of title, usually when a pledge is not possible, either because possession of the goods cannot be given to the bank or because the goods do not yet exist. When a hypothecation is effected, neither ownership nor possession passes to the creditor, but, in English Law, only an equitable charge over the goods³⁴⁵⁾. Thus, the bank which lends against the hypothecation of goods runs the risk of not having the right to call upon the letter of hypothecation against a bona fide purchaser to whom the bank's security has not been notified. In a bankruptcy, however, a letter of hypothecation is valid against the liquidator³⁴⁶⁾ or the trustee³⁴⁷⁾ .

b) Letter of Trust

It would be safer for banks if they collected the goods themselves from the carrier, stored them and arranged for their sale. Banks, however, are not inclined to do this and therefore prefer to release the goods on which they already have a pledge to their customer, who undertakes to hold the goods and their proceeds of sale in trust for the bank.

345) Cf. Reg. v. Townshend (1984) 15 Cox C.C. 466 where it was held that a letter of hypothecation was declaration of an express trust within the meaning of sect. 80 of the Larceny Act, 1861.

346) Re Hamilton Young & Co., Ex parte Carter (1905) 2 K.B. 772

347) Lutscher v. Comptoir d'Escompte (1876) 1 Q.B.D. 709

In order for banks not to lose possession of documents of title, that is, possession of the goods, the customer signs a letter of trust by which he accepts redelivery of the goods for a limited purpose, which is to receive the goods, sell them and give the bank their proceeds. The customer has to act according to the bank's instructions. Otherwise he is guilty of breach of the trust and the bank may sue him for detention or conversion of the shipping documents.³⁴⁸⁾ Thus, banks, although parting with possession of the goods, do not lose their right as pledgees, provided that purchaser or other third party who acquires the goods for value has been given notice about the existing pledge on the goods. If the third party has dealt with the bank's customer bona fide, not knowing the bank's charge on the goods, his claim will prevail over that of the bank.

In *North Western v. Poynter, Son and Macdonald*³⁴⁹⁾ a Liverpool firm pledged with a Liverpool bank certain bills of lading to secure advances. The bills of lading were then redelivered to the pledgors, so that they could sell the goods and the pledgors signed a letter of trust by which they constituted themselves agents of the bank. The goods were sold and the Liverpool firm received part of their price. Thereafter the pledgors became insolvent. A debtor of the pledgors arrested the unpaid price in the hands of the purchaser arguing that the price belonged to him. The Court held that the fact that the bank gave its customer a limited authority to sell the goods as

³⁴⁸⁾ *Midland Bank Ltd. v. Eastcheap Dried Fruit Co. Ltd.* (1962)
1 Lloyd's Rep. 359

³⁴⁹⁾ (1895) A.C. 56

its agent did not affect the pledge, which continued to exist in favour of the bank because the possession of the agent was the possession of the pledgee.

The facts and the judgement were similar in *Re David Allester Ltd.*³⁵⁰) where the company, which had pledged bills of lading to a bank as security for documents, went into liquidation before all goods were sold. The liquidator claimed both the unsold goods and the proceeds of those sold. Astbury, J. said:

' The bank as pledgee had a right to realise the goods in question from time to time, and it was more convenient to them, as is common practice throughout the country, to allow the realisation to be made by experts, in this case by the pledgors. They were clearly entitled to do this by handing over the bills of lading....for realisation on their behalf without in any way affecting their pledge rights: see *North Western Bank v. Poynter* (1895) A.C.56.'

The liquidator argued that the letter of trust should be registered at the Companies Registry either because it was a bill of sale within the meaning of Bills of Sale Acts or, alternatively, a mortgage of book debts within the meaning of the Companies Act. Astbury, J. said that the letter of trust is not a bill of sale because it is a document used in the ordinary course of business as proof of the possession or control of goods and, as this, it falls within the exceptions to the registration requirements, provided by section 4 of the Bills of Sale Act, 1878. As to the liquidator's second allegation,

350) (1922) 2 Ch.211

Astbury, J. said that the letter of trust was not a mortgage of book debts within the meaning of the Companies Act, 1908 section 93(now Companies Act 1985,s.395) and refused to follow the decision in *Ladenburg & Co. v. Goodwin, Ferreira & Co. Ltd.* (in liquidation) and *Carnett*³⁵¹) because the facts in the *Allester* case were completely different. He said:

'Now in that case (the *Ladenburg* case) the bank had no pledge or other right in the goods at all before the transaction in question; the transaction was one which notwithstanding its form could not and did not give the bank any right except a charge over the company's book debts, and as *Pickford J.* pointed out, it was simply and solely a mortgage or charge on the company's book debts, and as such was avoided by the Act. There was, as I have stated, no previous right in the bank at all under which they could claim as against the liquidator. The charge was explicit, and there was nothing at the date of the charge that the company could charge except its book debts, which it expressly and plainly charged to the bank as security. That case does not appear to me to have any bearing upon the present case at all. Here, if I may repeat myself again, the bank as pledgee created a trust agency in the company for the purpose of the realization of the bank's security. That trust agency was acknowledged and recorded in the letter of trust. That is the whole of the transaction. The letters of trust are neither bills of sale within s. 93, sub-s.1 (c), nor are they in any sense mortgages or charges on book debts within clause (e) or any other clause of the section.'

In some cases, however, banks take a letter of trust to secure advances they have already made for various reasons without having first obtained a pledge or a charge on goods.

351) (1912) 3 K.B. 275

In *Mercantile Bank of India v. Chartered Bank of India, Australia and China and Another*³⁵²⁾ Porter, J. said that the general effect of these documents was to give the bank an equitable charge and not to create a trust and thus they were not void for want of registration. As to these documents, Professor Gutteridge³⁵³⁾ said:

'Unless there is a pledge they are not documents used in the ordinary course of lending against produce, and it can hardly be said that they are documents used to give a security over produce or 'used in the ordinary course of business as proof of the possession or control of goods' within the meaning of s.4 of the Bill of Sale Act, 1878.'

Consequently, in order for the bank to avoid any risk it is essential for the goods to be validly pledged to the bank before they are redelivered to the customer on a trust receipt. By the letter of trust the applicant acknowledges that he will hold the bill of lading or other shipping document as a bailee for the bank and that he will dispose of the goods as the bank's agent and hold the proceeds of sale in trust for the bank. Therefore there is no charge over goods to register.

In Greece, letters of trust are not used. Although their meaning under English Law is that the bank (creditor) first obtains possession of the goods, thus becoming a pledgee, and then redelivers them to its customer (pledgor) this term appears to be contrary to articles 1213 and 1214 of the Greek Civil Code which state:

352) (1937) 43 Com.Cas. 80

353) p. 217

Article 1213 GCC

'An agreement between creditor and pledgor that the latter will remain in the possession of the thing on the strength of a certain legal relationship shall not constitute a valid delivery.'

Article 1214 GCC

'A pledge may be constituted solely by consent without delivery if the relevant agreement has been registered in a public register created by the law for this purpose.'

Public registers provided in article 1214 GCC have been created ,until now, only for a few sorts of pledges³⁵⁴⁾. As there is no register of the pledge on documents of title, delivery of the bill of lading has to take place in order for a pledge on the goods to take place.

When a bank has to part with the shipping documents, it loses, as we have already seen, the pledge on the goods. Therefore it usually receives as security a bill of exchange drawn by its customer to its order as well as a promissory letter by which the customer promises to pay the amount of the letter of credit on a stipulated date.

354) Register of the pledge a) on industrial equipment b) on mining equipment c) on cinema films; Georgiadis-Stathopoulos: Law of Property, VI, 1985 p. 299