"THE DUTY ON THE BANK ISSUING A LETTER OF CREDIT TO RETURN THE DOCUMENTS: LEGAL PERSPECTIVES FROM CANADA, ENGLAND AND SOUTH AFRICA"

BY

J. FRANCOIS SCHOLTZ

MINOR DISSERTATION SUBMITTED IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR THE DEGREE

LLM IN COMMERCIAL LAW

IN THE FACULTY OF LAW AT THE UNIVERSITY OF JOHANNESBURG

NOVEMBER 2014

SUPERVISOR: PROF CHARL HUGO

INDEX

1 Prefatory remarks

In recent years international trade has become more reliant on the use of banking products to assist in effecting payment for the import and export of goods and to try and mitigate the risks involved in international trade. One such banking product is the letter of credit,[1] which is largely regulated by the Uniform Customs and Practice for Documentary Credits (UCP).[2] This set of rules aims to provide standard conditions that protect both a buyer and a seller in an international contract of sale and manage the risk involved. Even though the UCP 600 must be incorporated by agreement into a contract it is commonly used (if not always) in international trade involving letters of credit.

This study considers the duty of an issuing bank to return the documents presented to it for payment. The UCP 600 does not set out in detail within which period documents should be returned to the presenter and whether keeping of the documents can be seen as acceptance in terms of article 16(f) of the UCP 600, which will, as necessary consequence, lead to the issuing bank having to honour the letter of credit. Although disputes regarding credits are more often settled out of court, this issue and the interpretation of the UCP 600 regarding this issue, has been considered in two separate court decisions of different jurisdictions. In England the Court of Appeal considered the issue of returning documents presented for payment in the case of *Fortis Bank SA/NV and Another v Indian Overseas Bank*.[3] Across the Atlantic in the case of *Nareerux Import Co. Ltd. v Canadian Imperial Bank of Commerce* the Ontario Court of Appeal also considered the issue but from a different perspective where the documents could not be presented in the first place due to actions of the issuing bank.[4]

There is no South African case law directly in point. However, the courts in both Canada and England have explored the duties of the issuing bank. These cases are considered in detail within the context of the common practice in the South African banking sector and it is concluded that a bank must act in the manner indicated on a refusal notice and documents have to be returned promptly to the presenter.

[1] Also known as 'documentary letter of credit' or just 'credit'. See Schulze "The UCP 600: A New Law Applicable to Documentary Letters of Credit" 2009 21 *SA Merc LJ* 228 228.
[2] ICC "Uniform Customs and Practice for Documentary Credits" 2007 *ICC Publication No 600* (generally referred to below as the "UCP 600").
[3] *Fortis Bank SA/NV and Another v Indian Overseas Bank* [2011] EWCA Civ 58; [2011] 2 Lloyd's Rep 33.
[4] *Nareerux Import Co. Ltd. v Canadian Imperial Bank of Commerce* (2009) 97 OR (3d) 481 312 DLR (4th) 678 (CA).

2 *Introduction*

Over the last 20 years international trade has developed immensely mainly due to globalization and the improvement of technology. Barriers of entry to trade have also largely been reduced and it is easier to trade between countries. Paired with an increase in international trading comes an increase in the risks involved. Although these risks have always been a factor in international trade, recent developments have highlighted them, and methods for their mitigation or management have been developed. International trade has thus become more reliant on the use of banking products to assist in effecting payment for importing and alleviating the risks involved in international trade. The most commonly used banking product globally for international trade is probably the letter of credit which has a long historical background.[5] Documentary letters of credit are therefore often referred to as the "life blood of international commerce".[6]

A letter of credit can broadly be defined as a document whereby an issuing bank undertakes independently from the underlying contract to honour it by paying a sum of money in terms of the credit or provide an item of value (like a bill of exchange) upon the presentation of certain required documentation.[7] In terms of the UCP 600 a credit is "any arrangement, however

[5] See McCurdy "Commercial letter of credit" 1922 *Harv L Rev* 539 539. It has been suggested that the earliest traces of letters of credit (or a similar form of instrument) can be found in Ancient Egypt. In Ancient Greece a similar instrument was issued in the common market place to travellers and during the Roman period the *receptum argentarii* was used. This latter instrument was an informal guarantee by a banker or *argentarius* binding himself to ensure that payment would be made to the person indicated either by himself or a third party. During the medieval period letters of credit were often issued by kings to enable the lower or working classes to obtain money advances in foreign countries. The main development of these early instruments into the modern letter of credit occurred in the Anglo-American jurisdictions from the mid to late 1800s in line with the development of commercial practices and technology. Brown, Shipley & Co and Alexander Brown & Co were two merchant firms that issued letters of credit for open buyers, which meant that they would honour payment for delivered goods. They later also started to issue letters of credit on behalf of other merchants or buyers who did not have the same good name or known solvency as they did. They therefore guaranteed payment through the extension of credit to the buyers. The letter of credit guaranteed delivery of the goods to the buyer and payment to the seller. The major growth in the use and development of letters of credit occurred after World War I due to the world economy, which experienced increased international trade. For a comprehensive discussion on the history and development of the letter of credit see Mugasha *The Law of Letters of Credit and Bank Guarantees (*2003) 37-43 who cites Trimble "The Law Merchant and the Letter of Credit" 1948 16 *Harv L Rev* 981; Chinkin, Davidson and Ricquier *Current Problems of International Trade Financing* (1983) 381; Guiraud *Lectures Historique: La Vie Priveé et la Vie Publique de Grecs* (1894) 207; De Rooy *Documentary Credits* (1984) 3; Davis *The Law Relating to Commercial Letters of Credit* (1955) 2-10; Baldwin *Business in the Middle Ages* (1968) 76; Thayer "Irrevocable Credits in International Commerce: Their Legal Nature" 1936 *Col L Rev* 1032; Ellinger *Documentary Letters of Credit: A Comparative Study* (1970) 27-29. See also Hugo *The Law Relating to Documentary Credits from a South African Perspective with Special Reference to the Legal Position of the Issuing and Confirming Banks* (1996 thesis US) 54.

[6] *Harbotle (Mercantile) Ltd v National Westminster Bank Ltd* [1978] QB 146 155.

[7] Hugo "Documentary Credits: The Basis of the Bank's Obligation" 2000 *SALJ* 224.

named or described, that is irrevocable and thereby constitutes a definite undertaking of the issuing bank to honour a complying presentation".[8] Blair JA described it as follows:

> "Letters of credit are an important and unique type of financial instrument designed to facilitate the flow of goods and trade. They are frequently resorted to in transactions with international dimensions, where buyer and seller are strangers to, and distanced from, each other and looking for some assurances to reduce the risks of dealing with each other."[9]

In a contract of sale involving international trade the parties are not always familiar with each other. As a consequence both the seller and the buyer are exposed to various imminent and real risks including non-payment, late payment, poor quality of goods, security for credit and insolvency.[10] These risks can broadly be placed into two categories, namely risks relating to the contracting parties and risks relating to the economic and political circumstances. The former includes credit risk, which is where a buyer is unable or unwilling to make payment, or the seller is unable or unwilling to refund any advance payments made. It further also includes manufacturing or performance risk, which is where the buyer cancels or changes the order, or the seller is unable or unwilling to perform in terms of the sales contract. The involved parties themselves cause these risks. Political risk on the other hand refers to either the buyer or the seller being prevented from performing in terms of the contract due to political reasons or some or other form of state interference in either party's country. This is closely related to transfer risk which can result in payment being held back by either a government or public sector entity resulting in non-payment. This affects not only the seller but also the buyer who could be expecting a refund of an advanced payment.[11]

A main advantage of using letters of credit is that they are almost always (if not always) regulated by the UCP 600. It must be incorporated by agreement into the letter-of-credit transactions and sets out to provide standard conditions that protect both the purchaser and the seller.[12] The UCP 600 is a useful method of reducing certain risks and actually placing the different parties to an international-trade transaction on a similar footing. The UCP 600 achieves

[8] (n 2) a 2. See article 2 for other relevant definitions.
[9] *Fortis Bank SA/NV and Another v Indian Overseas Bank* [2011] EWCA Civ 58; [2011] 2 Lloyd's Rep 33 48.
[10] McCurdy (n 3) 540-542.
[11] Credit Suisse Documentary Credits – Documentary Collections (10th ed.) 2008 Credit Suisse AG 6 (https://www.credit-suisse.com/forms/ch/unternehmen/kmugrossunternehmen/doc/akkreditiv_dokumentarinkassi_4540004_en.pdf (25-8-2014)).
[12] (n 2) a 1.

this by setting out rules which have to be applied by the parties to an international contract of sale.

The UCP 600 lays its foundations on basically two important principles, namely autonomy and strict compliance. Autonomy refers to the independence of the letter of credit from the contract/s which gives rise to its existence.[13] This entails that any disputes that may arise from the contract, do not affect the validity or payment in terms of a letter of credit.[14] The principle of autonomy is entrenched in the UCP 600 in article 4 which states the following in sub-section (a):

> "A credit by its nature is a separate transaction from the sale or other contract on which it may be based. Banks are in no way concerned with or bound by such contract, even if any reference whatsoever to it is included in the credit. Consequently, the undertaking of a bank to honour, to negotiate or to fulfil any other obligation under the credit is not subject to claims or defences by the applicant from its relationship with the issuing bank or the beneficiary."[15]

The second principle, strict compliance, relates mostly to the documents that are presented for honouring.[16] This principle provides that the bank needs to follow the instructions of its client or applicant – if presented documents do not conform to the requirements they will not be accepted and honoured. Even though this principle mostly relates to the documents that have to be strictly in line with the requirements set out by the underlying contract, it does stretch further.[17] In the American case of *Fidelity National Bank v Dade County* the court explains the concept well and plainly that "Compliance with the terms of a letter of credit is not like pitching horseshoes. No points are awarded for being close."[18]

The documentary nature of letters of credit is one of the main advantages of using them for international trading. The letter of credit can indicate according to the purchaser's requirements which documents must be presented by the seller so that it can receive payment from the bank for the goods that have been delivered. This mechanism protects the purchaser in that it sets out the terms that have to be met in the form of certain complying documents before any payment will be made. It also protects the seller as the underlying contract for the sale of the goods is independent of the letters of credit and any terms they may contain. If a dispute were to

[13] Hugo "Discounting Practices and Documentary Credits" 2002 *SALJ* 104 104-105.
[14] Rodrigo "UCP 500 to 600: A Forward Movement" 2011 *eLaw J* 1 5.
[15] (n 2) a 4.
[16] The doctrine of strict compliance is regulated by article 15 of the UCP 600 but relevant provisions are found in articles 14 and 16 as well.
[17] Hugo (n 13) 104.
[18] *Fidelity National Bank v Dade County* (1979) 371 So 2d 545.

arise between the purchaser and the seller with regards to the sale contract, it will have no effect on the seller receiving payment if the documents comply with what is required and the issuing bank is satisfied. The principle of independence of the contracts is a very important part of letters of credit because it serves as a protection mechanism to try and put the parties on equal footing. Typical documents that need to be presented to the bank could be the bill of lading (or other transport documents), the insurance policy and the invoice for the commercial trade.[19]

The documents presented for payment play an integral part in letters of credit: ideally the documents can either conform to the requirements and payment will be made, or the documents will not be conforming and payment will be rejected. This may seem simple, and as if there are only two options, but in fact there are numerous other potential scenarios. One such scenario, and the focus of this study, is where the documents are presented for payment but the issuing bank, confirming bank or nominated bank does not return the documents. This could be either after notice has been given that the documents will be returned or if the confirming bank has not sent out a notice.[20]

Banks have an important role in scrutinising the documents received upon tendering for payment and confirming that they meet the requirements in terms of the credit and the applicant's instructions. If the documents do not conform to the requirements they are usually returned and payment is refused. The UCP contains standard procedures to be followed by a bank performing these duties. The latest UCP document (UCP 600) still, however, has certain issues that require interpretation and discussion to establish how the process works in practice.[21] One issue which is open for interpretation is that of the returning of documents presented for honouring, and more specifically what it would mean if the issuing bank does not return the documents. The question remains how the presenter of the documents can interpret the actions, or lack thereof, with regards to the compliance with the requirements in ultimately receiving payment in terms of the letter of credit if the documents are not returned and no notice is given that payment will not be made.

This dissertation aims to consider the duty of an issuing bank to return the documents presented to it for payment. The UCP 600 does not set out in precise terms within which period the documents should be returned to the presenter or whether keeping of the documents can be

[19] Oelofse *The law of documentary letters of credit in comparative perspective* (1997) 7-8.
[20] Adodo "A Presentee Bank's Duty When Examining a Tender of Documents under the Uniform Customs and Practice for Documentary Credits 600" 2009 *JIBLR* 566 566.
[21] Adodo (n 20) 566.

seen as a breach of the rules set out in the UCP (which may lead to the bank being prevented from relying on any discrepancy). Although there is no case law in South Africa directly in point, guidance can be found in judgments from England and Canada. In England the case of *Fortis Bank v Indian Overseas Bank*[22] explored the issue of a bank not acting according to the notice given by it or its representative, and in Canada, in *Nareerux Import Co. Ltd. v Canadian Imperial Bank of Commerce*[23] the Ontario Court of Appeal considered the issue of a bank being precluded from relying on a discrepancy caused by its own actions. Although the facts and circumstances of these cases differ starkly, they both explore the duties of the issuing bank regarding the documents that have been presented or need to be presented for honouring.

I deal first shortly with the history and application of the UCP. This is followed by a discussion of the *Fortis* and *Nareerux* cases. Finally the South African practice is considered against this background. In establishing the South African norm and practices an interview was held with a senior executive of a leading international bank that operates in South Africa. The information obtained from the bank provides a good indication of the commonly accepted practice in South Africa.

[22] *Fortis* case (n 3).
[23] *Nareerux* case (n 4).

3 The UCP and its main provisions relating to documents

3.1 Background on the UCP[24]

The Uniform Customs and Practice for Documentary Credits finds its origin in 1933 when the International Chamber of Commerce (ICC) proceeded to codify informal common practices and standards regarding letters of credit into one formal document. This single document contained bankers', transporters', insurers' and other merchants' standard customs and practices.[25] The UCP's importance in modern day letters of credit is two-fold according to Hugo: it is firstly a vehicle for the standardisation of letters of credit and secondly it is not a static set of rules but instead adapts to mirror the changes in practice and law.[26] The UCP document has been revised six times resulting in the current version known as the UCP 600.[27]

The predecessor to the UCP 600, namely the UCP 500,[28] proved to be somewhat problematic mainly due to its complexity and wording that was not easy to interpret and apply. Courts were often placed in difficult situations when attempting to apply the UCP 500 in line with the general interpretation of the document. Courts of different jurisdictions used their own interpretive techniques and rules in the process that sometimes led to conflicting decisions and interpretations. The UCP 600 was thus the ICC's attempt to improve this situation.[29]

It came into effect on 1 July 2007 and is a vast improvement on the previous version for three main reasons.[30] Firstly it addresses modern developments in the industries of banking, communication and transportation. Secondly it is phrased and structured in a simpler and understandable manner which means it is easier to interpret and apply. Lastly, and very importantly, it has reduced the number of refusals upon presentation of documents. Under the UCP 500 many presentations were refused due to discrepancies; this meant that letters of credit

[24] For a comprehensive discussion on the development of the UCP see Hugo "The Development of Documentary Letters of Credit as Reflected in the Uniform Customs and Practice of Documentary Credits" (1993) 5 *SA Merc LJ* 44; Hugo "The Legal Nature of the Uniform Customs and Practice for Documentary Credits: Lex Mercatoria, Custom or Contract" (1994) 6 *SA Merc LJ* 143; Hugo "The 1993 Revision of the Uniform Customs and Practice for Documentary Credits" (1996) 8 *SA Merc LJ* 151.
[25] Mugasha *The Law of Letters of Credit and Bank Guarantees* (2003) 47.
[26] Hugo (n 24) 1993 *SA Merc LJ* 45.
[27] Rodrigo (n 14) 1.
[28] ICC "Uniform Customs and Practice for Documentary Credits" 1993 *ICC Publication No 500.*
[29] Sutton "The Documentary Credit Phoenix – UCP 600 Boasts Fair Rules for Trade Customers, hard Rules for Banks" 2012 *DAJV* 62 63.
[30] See Schulze (n 1) 228 for a breakdown and discussion on the UCP 600.

lost some viability as an appropriate means of payment in international-trade transactions. The rules were adapted to ensure that banks could not reject presentations too lightly.[31]

The main goal of these rules is to assist in the facilitation of transactions by mitigating the risks of the parties. The UCP 600 addresses many of the problems of the UCP 500 but some remaining problems of interpretation are dealt with in paragraphs 4 and 5 below.[32]

3.2 Application of the UCP 600

The UCP 600 consists of 39 articles which is a simplification of its predecessor. Article 1 of the UCP 600 provides that the articles of the document are considered to be rules and reads as follows:

> "The Uniform Customs and Practice for Documentary Credits, 2007 Revision, ICC Publication No 600 ("UCP") are rules that apply to any documentary credit (including, to the extent to which they may be applicable any standby letter of credit) when the text of the credit expressly indicates that it is subject to these rules. They are binding on all parties thereto unless expressly modified or excluded by the credit."[33]

This means that if the parties to an agreement reach consensus that the UCP 600 will apply to the contract in question, the parties are bound by the rules set out in the document. The only way this can be modified is if the parties expressly agree in writing to certain exclusions.[34] The intention of the ICC has been to establish a self-regulatory and voluntarily adopted set of rules that only apply to letters of credit if expressly indicated. If no written indication is given that the UCP will apply to a certain letter of credit, banks can and often use the rules to establish trade practices regarding documentary credits.[35] In the South African context the UCP has not been enacted into national legislation unlike certain other countries. Together with the UCP the general principles of contract law will apply in the absence of any applicable legislation.[36]

An important part of the rules is set out in articles 14 to 16. These articles deal with the presentation to the bank of the documents required by the letter of credit. If the documents are discrepant, the bank must issue a notice stating its refusal to accept them and return the documents. Problems, however, arise when a bank issues the notice and indicates that it will return the documents, but does not do so within a reasonable period.

---

[31] Sutton (n 29) 62-63.
[32] Schulze (n 1) 248.
[33] (n 2) a 1.
[34] Rodrigo (n 14) 4.
[35] ICC *Commentary on UCP 600* 2007 ICC Publication No 680 12.
[36] Schulze (n 1) 228-229.

3.3 Examination of documents

Once documents are presented to a bank for examination under a letter of credit the bank will examine the documents and determine whether they comply with the requirements set out in the credit. This is largely regulated by article 14 of the UCP 600 which sets out the process. It should be noted at this point that the documents can be presented to the issuing bank if, for example, the issuing bank is a large global bank and has branches/offices across the world. It is, however, more common that the documents will be presented to a confirming bank or a nominated bank in the locality of the seller.[37] If the documents are first presented to the nominated bank for examination and it is satisfied that they comply, the letter of credit will be honoured or negotiated.[38] The documents will then be sent to the issuing bank for examination as well.[39]

Article 14 sets out the standard for examination of documents which is an integral part in the process of letters of credit. It is quite a large improvement on the UCP 500 as it provides three new provisions, namely examination of documents "on their face", the time for examining and the consistency between documents presented. A nominated bank, confirming bank or issuing bank has a duty to examine all documents presented to it and decide within five business days whether they conform on their face to the requirements set out in the letter of credit.[40] The documents must be presented by (or on behalf of) the beneficiary within 21 days after shipment and before the expiry date of the letter of credit.[41] The information (or 'data' as the UCP refers to it) does not have to be exactly the same when read with the whole credit, international banking practice or the document itself, but must not be in conflict with information in the document or the credit.[42]

The changes made in the UCP 600 regarding the examination of documents are welcomed as they aim to reduce the number of rejections by making it easier for documents to comply.[43] If documents do not, however, comply a notice of refusal must be sent which is discussed below.

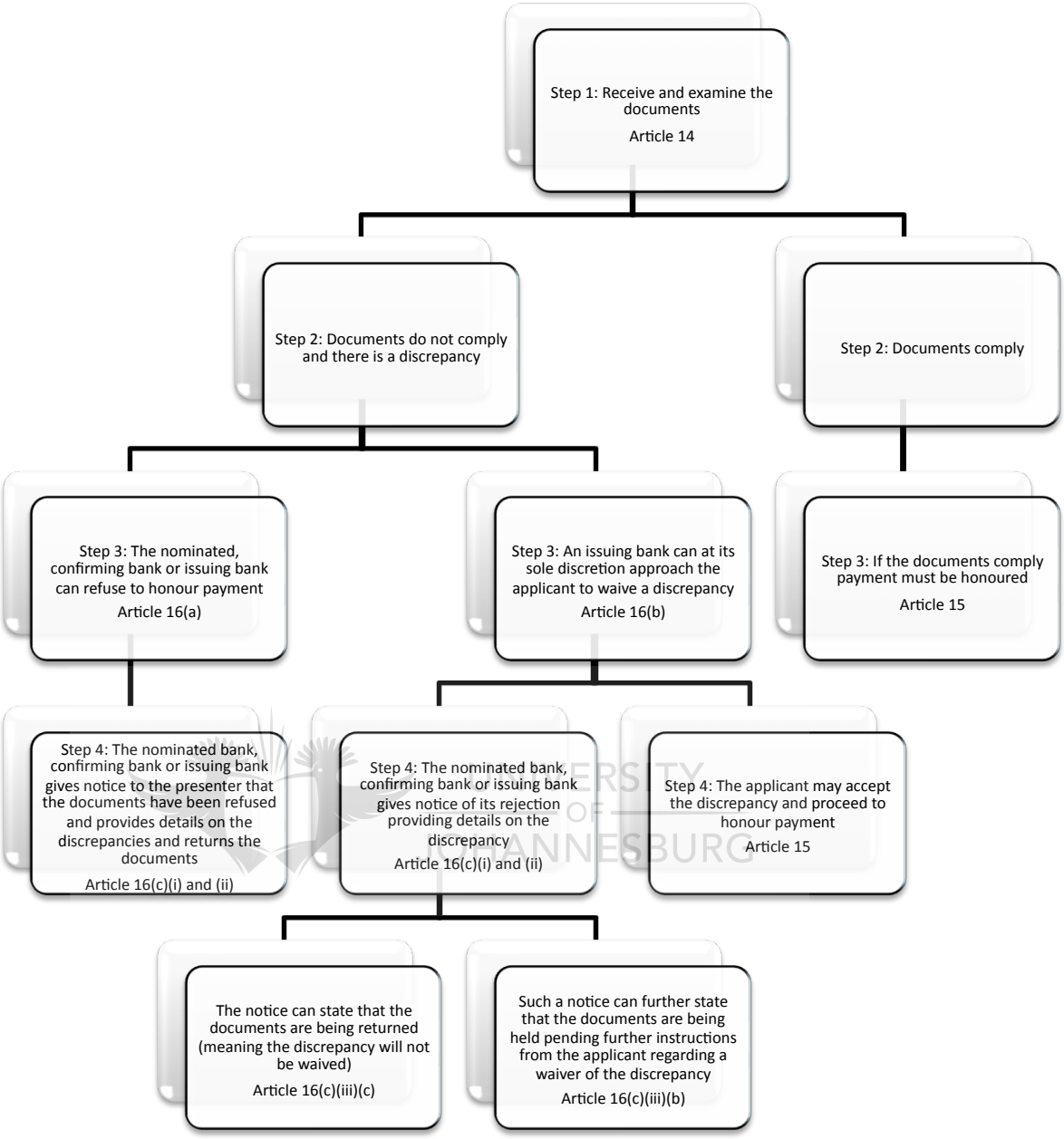
[37] Malek and Quest *Jack: Documentary Credit* (2009) 106.
[38] (n 2) a 15.
[39] (n 2) a 14(a).
[40] (n 2) a 14(a)-(b).
[41] (n 2) a 14(c).
[42] (n 2) a 14(d).
[43] Rodrigo (n 14) 12.

3.4 Notice of refusal

3.4.1 Process for accepting or refusing documents

Once these documents are presented by the seller to the bank (whether a confirming bank, nominated bank or issuing bank) it will examine the documents to check on their compliance. If the documents comply they will be accepted and payment will proceed. If the documents do not comply either a waiver can be sought from the applicant (the purchaser) or they will be rejected summarily. The decision to approach the applicant for a waiver lies solely with the issuing bank.[44] If the issuing bank does not deem it prudent in the specific circumstances to approach the applicant for a waiver or if the documents clearly do not comply, it (or the nominated bank or confirming bank) must give a single notice to the presenter. This process is set out in article 16 of the UCP 600 and the illustration below lays out the process briefly. The process set out in article 16 is very important in light of the provision under article 16(f) which states that if a confirming bank or issuing bank fails to act within the rules set out in article 16, it will be precluded from relying on a discrepancy to refuse payment.

[44] (n 2) a 16(a) and (b).



3.4.2 Period and method of notice of refusal

The required notice must be sent via telecommunication or "other expeditious means" and the notice must be given within five banking/calendar days from the day following presentation of the documents.[45] This means that notice must be given effectively by the quickest way possible like telephone, fax, email, or probably the most popular due to its efficiency – a

[45] (n 2) a 16(d).

Society for Worldwide Interbank Financial Telecommunication (SWIFT) message.[46] The UCP 600 provides five days within which to issue such a notice and this is the maximum time allowed. It will, however, generally be determined by the common practices of a specific country within which period a notice should be issued. Hwaidi and Harris advise that in England, for instance, the standard practice is for the notice to be sent one to two days after receiving the documents.[47]

Once a bank has made its decision and sent a notice informing the presenter of the outcome, that decision is final; this would mean that if documents are accepted and this is indicated in the notice sent, the acceptance cannot be withdrawn or changed. Most banks issue such an unequivocal notice by using the SWIFT message system. If, however, a bank issues an equivocal notice, it is possible to issue a further notice that may clarify the final position of the bank. This could be in a situation where, on the day of presentation, the presenter asks for an update on consideration of the documents and the bank would advise the presenter that there is a possible discrepancy and has referred it to the applicant for a waiver. This could, however, be interpreted as the bank having a different intention initially if a later notice is sent – this due to article 16 requiring only a single notice of refusal. It would thus be advisable for a bank rather to issue one notice informing a presenter of the refusal in order to avoid any confusion regarding the interpretation of a scenario in line with the UCP rules.[48]

During the period of application of the UCP 500[49] many queries were raised regarding the interpretation and application of article 14, so much so that the International Chamber of Commerce issued an educational note.[50] This note tried to clarify the process prescribed by the UCP 500 to examine documents as well as the process to be followed should the issuing bank wish to seek a waiver of discrepancies from the applicant. Although this note provided a good breakdown of the process, it did not provide any clarification on the application of article 14(f), which is similar to article 16(f) of the UCP 600.[51]

[46] Malek and Quest (n 37) 114-115 and Mugasha (n 25) 122-123.
[47] Hwaidi and Harris " The Mechanics of Refusal in Documentary Letters of Credits: An Analysis of the Procedures Introduced By Article 16 UCP 600" 2013 *JIBLR* 146 151.
[48] Hwaidi and Harris (n 47) 151,152 and 155.
[49] (n 28).
[50] ICC *Examination of Documents, Waiver of Discrepancies and Notice under UCP 500* 2002 ICC Document No 470/952rev2.
[51] (n 2).

3.4.3 Nature of the notice of refusal

Article 16(c) provides the following:

> "The notice must state:
> i. that the bank is refusing to honour or negotiate; and
> ii. each discrepancy in respect of which the bank refuses to honour or negotiate; and
> iii. a) that the bank is holding the documents pending further instructions from the presenter; or
> b) that the issuing bank is holding the documents until it receives a waiver from the applicant and agrees to accept it, or receives further instructions from the presenter prior to agreeing to accept a waiver; or
> c) that the bank is returning the documents; or
> d) that the bank is acting in accordance with instructions previously received from the presenter."[52]

If the bank rejects the documents and gives notice in terms of article 16(c) to the presenter this must be done within the five business day period. The bank to which the documents were presented may, after giving notice in terms of article 16(c)(iii)(a) or (b), return the documents to the presenter at any time.[53] This means that once notice is given there is no duty on the bank to return the documents if the bank is waiting on further instructions from the presenter or a waiver from the applicant. This is quite clear and does not leave much room for broad interpretations. Article 16(e), however, does not refer to the provisions of article 16(c)(iii)(c) and (d) – this is probably due to the fact that the documents have to be returned once the notice is given as there is no room for further interpretation or decision-making whether the documents will comply.

The confusion, however, comes in with article 16(f) which reads as follows:

> "If an issuing bank or a confirming bank fails to act in accordance with the provisions of this article, it shall be precluded from claiming that the documents do not constitute a complying presentation."[54]

This sub-article provides that if the bank fails to act in terms of the provisions of article 16, it is prohibited from stating that the documents presented do not conform to the requirements set out in the credit. In both the cases discussed below we will be able to establish how both a court in England and in Canada interpreted this provision (and its predecessor provision in the UCP 500[55]).

[52] (n 2) a 16(c).
[53] (n 2) a 16(e).
[54] (n 2) a 16(f).
[55] (n 28).

3.5 Application of article 16(f)

Article 16(f) can apply to two basic situations: firstly, where the confirming bank or issuing bank does not give any notice within a reasonable time regarding its decision to accept or reject the documents; and secondly, where notice is given, but the bank does not act in accordance with the indication it has given. The first scenario can be explained by an example where the seller presents certain documents to the bank, the bank takes the documents but does not give any indication of whether it has accepted the documents and will make payment or that it is refusing to make payment due to a discrepancy in the documents. This makes complete sense in that the UCP 600 imposes important rules to ensure the process for using letters of credit in international trade is consistent. A bank has an important duty to examine documents, make its decision based on the requirements set out in the letters of credit and then notify the presenter of the decision.

In the second scenario the situation becomes a bit more intricate and difficult. An example of this is where the bank considers the documents, decides there are discrepancies and notifies the presenter that it will not be making payment. This can include situations under article 16(c)(iii)(b) where the bank has referred the discrepancy to the applicant to consider whether a waiver of the discrepancy is ultimately possible. If the waiver is not granted or it has been indicated under article 16(c)(iii)(c) that the documents will be returned and they are not returned within a reasonable time, the bank will also be precluded from relying on the discrepancy. The practical application of article 16(f) is further discussed below.[56]

[56] Hwaidi and Harris (n 48) 148-150.

4 *Fortis Bank SA/NV and Another v Indian Overseas Bank*[57]

4.1 Facts

This case concerns five separate contracts that were entered into during 2008 whereby Stemcor, an English company based in London, would sell containerised scrap metal to SESA International, an Indian company based in Kolkata. The contracts were facilitated by and concluded through MSTC Ltd, a company owned by the Ministry of Steel of India, and they incorporated Incoterms 2000. Payment was agreed to take place through the issuing of five letters of credit by Indian Overseas Bank in favour of Stemcor and they were expressly agreed to be subject to the rules set out in the UCP 600.[58]

Stemcor presented three sets of documents to Fortis during August 2008 for payment in terms of the requirements of the credits one to three. Fortis, the nominated advising bank acceptable to Stemcor as being a first class Belgian bank, accepted these documents and proceeded to pay the amount due. The documents for letters of credit four and five were also presented but were forwarded by Fortis to Indian Overseas Bank together with the documents for credits one to three. During November 2008 Indian Overseas Bank rejected the documents for letters one to four due to discrepancies and refused to reimburse Fortis for payments they had already made to Stemcor. Indian Overseas Bank gave notice in terms of article 16(c)(ii)(c) that it was returning the documents for letters of credit one, two, four and five. In terms of letter of credit number three it stated that it was exercising its right under article 16(c)(iii)(a) to await instructions from the presenter for a possible waiver. Fortis gave those further instructions in January 2009 but Indian Overseas Bank only returned the documents on 16 February 2009.[59]

Legal proceedings were instituted by Stemcor and Fortis to recover damages in excess of $8 million from Indian Overseas Bank; Fortis claimed as confirming bank for the payments made under letters of credit one to three and Stemcor claimed as beneficiary for the payments not made in terms of letters of credit four and five. The plaintiffs applied for summary judgment which was heard in September 2009. The four main issues raised were:

i) whether the documents presented contained any discrepancies;

ii) whether Fortis was indeed a confirming bank;

[57] This matter consists of four cases – each case and its relevance will be discussed below.
[58] *Fortis Bank SA/NV and Another v Indian Overseas Bank* [2009] EWHC 2303 (Comm); [2010] 1 Lloyd's Rep 227 par 1-3, 6-9.
[59] *Fortis* case (n 58) par 10-16.

iii) whether under article 16(f) Indian Overseas Bank should be excluded from claiming that the documents did not comply due to the late return of the documents; and

iv) whether the date on the bill of lading was the issue date or the date of shipment, and consequentially, if it is the latter, whether Indian Overseas Bank would then have a counterclaim against Fortis due to their non-compliance in presenting it more than 21 days later.[60]

4.2 *Ratio decidendi* and decisions

4.2.1. Summary judgment

Hamblen J, in the summary judgment decision, found that there was a discrepancy in the documents.[61] The court considered the application of the doctrine of strict compliance and found that there was slight leeway for trivial discrepancies.[62] It took the view that all the discrepancies referred to in the court documents were not material discrepancies except for the beneficiary's consolidated certificate which stipulated that the negotiating bank would dispatch documents by courier at Indian Overseas Bank's costs instead of Stemcor's costs. The court considered Fortis and Stemcor's arguments that this discrepancy was trivial from a legal perspective and would have had no effect on the process. The court however stated that the banker checking the documents would have had to consider more than what appeared on the face of the documents, which cannot be expected.[63]

On issue ii) above, he found in favour Fortis and Stemcor. The issuing bank authorised Fortis that it "may" add its confirmation to documents which is sufficient to show express agreement by Indian Overseas Bank that Fortis would act as confirming bank.[64] Fortis further argued that even if it was not an authorised confirming bank it was entitled to claim in terms of the letter of credit from Indian Overseas Bank as the nominated bank. Indian Overseas Bank however disputed this in that Fortis did not comply with article 7(c) of the UCP which required the issuing bank to reimburse the nominated bank if it had honoured or negotiated a complying presentation and forwarded the complying documents to the issuing bank. The court rejected this

[60] *Fortis* case (n 58) par 17.
[61] *Fortis* case (n 58) par 54.
[62] *Fortis* case (n 58) par 18-20.
[63] *Fortis* case (n 58) par 53-54.
[64] *Fortis* case (n 58) par 60-61.

and stated that Fortis did comply as it negotiated on a complying presentation and forwarded the documents on to Indian Overseas Bank.[65]

Regarding issue iii) above, the court stated that this would have to be determined at the trial and granted Indian Overseas Bank the opportunity to bring evidence in support of its defence against the preclusion of reliance on the discrepancies under article 16(c) due to the rule contained in article 16(f).[66] Fortis and Stemcor argued that this provision required the issuing bank to act in accordance with its notice which indicated that the documents would be returned but it did not do so within a reasonable time and Fortis saw this as waiver of any discrepancies. Indian Overseas Bank argued that there was no express requirement in article 16 for the documents to be returned and therefore no waiver could arise regarding the return of documents if there was no such duty. Fortis, however, argued that if it is stated in a notice that documents would be returned, this had to be done within a reasonable time.[67] The court held that it was necessary to determine whether such a term could be implied, and if it could what the nature of the term was, and lastly what compliance of such a term would entail.[68]

The last issue regarding the date on the bill of lading the court decided was irrelevant in the circumstances. It found that the letter of credit was presented within 21 days from its issuing. That date according to the court was more important than the date of shipment.[69]

4.2.2 Trial

The matter then went on trial before Hamblen J. This case was mainly concerned with determining of the preliminary issue iii) above.[70] Fortis and Stemcor argued that Indian Overseas Bank was precluded from relying on any discrepancies in the documents. They argued that article 16(c)(iii) required an issuing bank to give notice if it elected to refuse to honour the credit or was holding on to the documents pending instructions from the applicant. If an issuing bank failed to act in accordance with any of the provisions of article 16 it would be precluded from relying on a discrepancy in terms of article 16(f).[71]

[65] *Fortis* case (n 58) par 62-64.
[66] *Fortis* case (n 58) par 65.
[67] *Fortis* case (n 58) par 66-69.
[68] *Fortis* case (n 58) par 70.
[69] *Fortis* case (n 58) par 72-73.
[70] *Fortis Bank SA/NV and Another v Indian Overseas Bank* [2010] EWHC 84 (Comm); [2010] 2 Lloyd's Rep 641.
[71] *Fortis* case (n 70) par 3-4.

In determining this question he found that it was necessary to investigate whether article 16(f) applied to all actions or lack of action by an issuing bank at the time or subsequent to notice being given in terms of article 16(c)(iii). If the answer to this question was positive the court would then have to determine what the content of the obligation was in relation to the return notice (i.e. the notice to return the documents) and the hold notice (i.e. the notice to hold the documents for consideration). He also stated that it was necessary to determine whether the actions of Indian Overseas Bank, or lack thereof, after the notices were sent in terms of article 16(c)(iii) precluded it from relying on the discrepancy.[72]

Indian Overseas Bank argued that there was no express provision in article 16 requiring it to act in accordance with its notice. They contended that proving presumed intention would be an "insuperable hurdle" and that there was a presumption against adding a term that was not expressly included in the contract. They argued that such a term was not required and that the contract functioned perfectly well without it. They added that their election to return the documents was not clear or unequivocal.[73]

The court moved on to interpret the UCP, the underlying letters of credit and the arguments put forward by the respective parties. The court applied a purposive approach to the effect that the UCP should be interpreted in such a manner as to reflect "the best practice and reasonable expectations of experienced practitioners".[74] The expert witness testified that a presenting bank's reasonable expectation when it received a notice in terms of article 16 would be that the issuing bank would act according to the notice – this would be the normal and expected practice. Even though article 4(e) of the UCP 500 stated that an issuing bank was required to act in accordance with the notice it issued, and this provision was subsequently removed in the UCP 600, it was the commonly accepted best practice to act in accordance with the notice. The court pointed out that there were potentially serious consequences in the event of the documents not being returned which could lead to significant economic losses. The court therefore concluded that article 16 required an issuing bank to act in accordance with its refusal notice.[75]

The court referred to *Attorney General of Belize v Belize Telecom Ltd* where the Privy Council decided that the main question to be answered in similar situations was what the

[72] *Fortis* case (n 70) par 5.
[73] *Fortis* case (n 70) par 34-39.
[74] *Fortis* case (n 70) par 43.
[75] *Fortis* case (n 70) par 55-58.

instrument as a whole, in the context of its background, would reasonably be understood to have meant.[76] The trial court also referred to a decision of Lord Simon in *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* wherein he set out five considerations in answering the aforementioned question, namely: it must be just and equitable; it must be necessary for the business efficacy of the contract; it must be so obvious that it is capable of clear expression; and, finally it must not be contrary to any express term in the contract.[77] The trial court looked at these five considerations and ultimately concluded that there was an obligation on the bank to act in accordance with the refusal notice and to return the documents with reasonable promptness.

Hamblen J found that Indian Overseas Bank had failed to return the documents as indicated on the refusal notice with reasonable promptness.[78] It had also failed to act in accordance with Fortis's instructions to return the documents.[79] The court accordingly held that Indian Overseas Bank was indeed precluded under article 16(f) from relying on the discrepancies in the beneficiary's certificate.

4.2.3 Appeal

Indian Overseas Bank appealed the above judgment and submitted that the judge erred in its application of article 16(f) and that it was not under a duty to return the documents – that the only duty it had was to give notice.[80] Stemcor and Fortis cross-appealed against the finding that there was no discrepancy in the documents, and even if there was, that it was trivial in the circumstances.[81] The appeal thus considered three issues. The first two related to Indian Overseas Bank's appeal – the one being whether they were precluded from relying on the discrepancies due to the provision in article 16(f), and the other whether the date on the bill of lading was the date of shipment. The third issue, which was raised by Stemcor and Fortis in their cross-appeal, was whether there was indeed a discrepancy on the consolidated certificate of the beneficiary.[82]

Arden LJ, Thomas LJ and Etherton LJ found that there was a discrepancy and that this discrepancy was not trivial to the issue at hand. The beneficiary's consolidated certificate

[76] *Attorney General of Belize v Belize Telecom Ltd* (PC) [2009] 1 WLR 1988 par 21 and 25.
[77] *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266 282 and 283.
[78] *Fortis* case (n 70) par 84.
[79] *Fortis* case (n 70) par 89.
[80] *Fortis Bank SA/NV and Another v Indian Overseas Bank* [2011] EWCA Civ 58; [2011] 2 Lloyd's Rep 33 par 24.
[81] *Fortis* case (n 80) par 16-17.
[82] *Fortis* case (n 80) par 10.

referred to the "issuing bank's" costs instead of "our" costs. The certificate thus stated that the costs were not Stemcor's but the issuing bank's. The word "our" referred to "we" which actually referred back to Stemcor and not the issuing bank.[83]

The court moved on to consider the issue of preclusion by considering and interpreting the UCP 600. The court stated that Stemcor and Fortis could only rely on the exclusion in terms of article 16(f) if an obligation arose for the documents to be returned under article 16. If an issuing bank rejected documents and stated that it would return them, there was no dispute that the duty came into being; the real issue according to the court was whether this duty fell within or outside the ambit of the UCP.[84] In its view the court had to consider the nature of the UCP and the way it was drafted. It was drafted in plain English so that it could easily be translated into some 20 languages and be applied by merchants and bankers across the globe. A literal and national approach towards its interpretation therefore had to be avoided; instead the proper approach was to consider the intention of the UCP as a "self-contained code for those areas of practice which it covers and to reflect good practice and achieve consistency across the world."[85] The court considered the evidence at hand and decided that it was clearly an international practice by bankers and merchants that upon rejection the issuing bank would hold the documents as per the instructions of the presenter or return them without delay.[86]

Article 16(c) contains an obligation on the issuing bank to act in line with the notice issued. It is vital for the operation of letters of credit that the issuing bank acts in accordance with its decision once it has rejected the documents; where a bank indicated it would return the documents, this must be done promptly.[87] Indian Overseas Bank failed to act accordingly and only returned the documents in February 2009 after Fortis had informed them that their failure to return the documents confirmed a complying presentation in terms of article 16(f).[88] Even though Indian Overseas Bank alleged that the documents could not be endorsed and could therefore not be returned, the court agreed with Hamblem J that even if Fortis was not entitled to the endorsed documents, Indian Overseas Bank did not have the right to retain the documents. The unendorsed documents should have been returned.[89]

---

[83] *Fortis* case (n 80) par 12-19.
[84] *Fortis* case (n 80) par 21 and 25.
[85] *Fortis* case (n 80) par 29.
[86] *Fortis* case (n 80) par 31-35.
[87] *Fortis* case (n 80) par 36, 37 and 45.
[88] *Fortis* case (n 80) par 65-66.
[89] *Fortis* case (n 80) par 68-70.

The last issue considered by the court was that of the date which appeared on the bill of lading for the third letter of credit. The court considered that article 14(c) of the UCP 600 states that a presentation must be made within 21 calendar days after the date of shipment as described in the rules. Clause 48 of the third letter of credit mirrored this by requiring the presentation to be done within 21 calendar days from the date on the bill of lading. Article 20(a)(ii) provides that the date of issuance of a bill of lading can be deemed as the date of shipment.[90] The date on the face of the bill of lading was 14 November 2008 which was the date of shipment.[91]

Accordingly the cross-appeal and appeal was dismissed by Thomas LJ, and Etherton LJ and Arden LJ concurred.[92]

4.2.4 Final trial

The fourth and last decision of this matter was a trial relating to the remaining claims brought by Stemcor as a consequence of Indian Overseas Bank having failed to honour the letters of credit.[93] The court had to consider whether Stemcor was entitled to a claim for damages due to Indian Overseas Bank's failure to honour the letters of credit, or in the alternative, whether it was entitled to restitution.[94] Stemcor submitted that it was entitled to costs incurred for port storage and container demurrage due to Indian Overseas Bank's failure to honour the letters of credit.[95] The defendants, however, argued that there was no breach of contract as Fortis had honoured the first three letters of credit and the breach was between Fortis and Indian Overseas Bank.[96]

Hirst J found that Indian Overseas Bank was in breach of its obligation towards Stemcor in relation to the fourth and fifth letters of credit but not in relation to the first three letters of credit.[97] He stated that the obligation to return the documents with reasonable promptness was to be read in the context of the UCP 600 which sets five banking days to accept or reject the documents. There was, however, some flexibility and one needed to balance the relevant factors;

[90] (n 2).
[91] *Fortis* case (n 80) par 75-77.
[92] *Fortis* case (n 80) par 78-80.
[93] *Fortis Bank SA/NV and Another v Indian Overseas Bank* [2011] EWHC 538 (Comm); [2011] 2 Lloyd's Rep 190.
[94] *Fortis* case (n 93) par 1.
[95] *Fortis* case (n 93) par 16.
[96] *Fortis* case (n 93) par 29.
[97] *Fortis* case (n 93) par 30 and 38.

he concluded that if a bank does not dispatch the documents within three days it has failed to act with reasonable promptness.[98] Ultimately Stemcor's claims failed.[99]

4.3 Interpretation

This case was met with predominantly positive criticism. In determining whether the documents were conforming or discrepant Thomas LJ quite rightly considered them as a whole. Although the court *a quo* and court of appeal took the view that there was a discrepancy and that the discrepancy was not trivial, the court was mindful of the possibility that the doctrine of strict compliance could be interpreted differently in different cultures. This was indeed true as Fortis (in England) regarded the documents as compliant whilst Indian Overseas Bank in India was of the opposite view. Ideally it is the aim of the ICC to standardize the interpretation and application of documentary compliance especially through its International Standard Banking Practice (ISBP) document.[100] The problem, however, remains that a banker in country A who checks the documents will not necessarily interpret a discrepancy in the same manner as a banker from country B, due *inter alia* to language and cultural differences.[101] Against this background it is submitted that the court was correct in its finding and its interpretation technique was effective in the circumstances.

In terms of article 16(c) a notice must be sent informing the presenter that the documents have been rejected and payment or negotiation will not be taking place. In the current case such notice was sent by Indian Overseas Bank upon rejection of the documents, but the documents were only sent back six weeks later. This, Fortis argued, precluded Indian Overseas Bank from claiming that there was a discrepancy, as they had not complied with the notice. They relied on article 16(f) which has not been applied or interpreted by courts often, probably due to the fact that most cases settle out of court. The court's approach and decision in deciding this issue was commendable. Thomas LJ interpreted the UCP as intended by its drafters, namely to "reflect good practice and achieve consistency across the world" as a self-contained code.[102] In applying

[98] *Fortis* case (n 93) par 34 and 35.
[99] *Fortis* case (n 93) par 76.
[100] ICC *International Standard Banking Practice for the Examination of Documents under Documentary Credits* 2007 ICC Publication No 645.
[101] Ellinger "Rejection of Documents Tendered Under a Letter of Credit" 2013 *Lloyd's Maritime and Commercial Law Quarterly* 1 2-3.
[102] *Fortis* case (n 80) par 29.

this approach the court came to the conclusion that banks are obliged to act in accordance with the statements on the notice.

Even though the court interpreted article 16(f) in the manner discussed above, the article does not deal with the specific type of situation in the *Fortis* case where the issuing bank does not act in the manner indicated by it. This issue would not have arisen if it were clear from the wording of article 16(f) that it applied also to situations where a bank failed to act in accordance with its notice, by failing to return the documents with reasonable promptness. The court relied on expert evidence in reaching its decision and also considered general international banking practice. This approach is prudent and logical. Hwaidi and Harris agree that the UCP should be interpreted through an "international lens" of business practice to promote uniformity in letter-of-credit practice. They state that the court's decision regarding the formality of refusal represents international practice and should be applied in English law.[103] Adodo agrees that this is the preferred approach and is more market relevant than the practice under the UCP 500 in terms of which the documents had to be returned within one or two banking days if the notice was to the effect that they would be returned.[104]

[103] Hwaidi and Harris (n 48) 154.
[104] Adodo "Article 16 of UCP 600: The Time Frame for Returning Rejected Documents and Consequences of its Breach" 2011 *JIBLR* 553 553.

5 *Nareerux Import Co Ltd v Canadian Imperial Bank of Commerce*[105]

5.1 Facts

During the early 1990s the American company Douglas R Robertson International Inc ("Robertson") concluded an agreement with Thai Fisheries Co Ltd ("Thai Fisheries") for the supply of shrimp to Sam's Club, a subsidiary of Wal-Mart Stores Inc. Robertson required financing to bridge the time between Thai Fisheries delivering shrimp and demanding payment and Sam's Club receiving the shrimp and paying Robertson if they are satisfied. Robertson thus approached Canadian Imperial Bank of Commerce ("CIBC") who agreed to extend a $20 million line of credit; the bank would issue letters of credit to facilitate this finance gap.[106] The agreements entered into for the supply of shrimp could broadly be split into the 1993 agreements and the agreements concluded after 1994. The letters of credit from mid-1994 contained an unusual "special condition" as CIBC felt that it was overly exposed to risk due to the time period between paying Thai Fisheries and being paid by Robertson for the line of credit.[107]

The sequence of the transactions from June 1994 can be broken down as follows: Thai Fisheries shipped the shrimp and forwarded the documents to CIBC. CIBC released the documents to Robertson and they acquired Food and Drug Administration (FDA) inspection clearance, which would then be passed on to CIBC. Different to the process before 1994, CIBC would no longer pay Thai Fisheries as this stage. Instead Sam's Club would order shrimp from time to time from Robertson providing the purchase orders and delivery receipts referred to in the special condition, and then only paid Robertson. Robertson would pass the aforementioned documents on to CIBC and CIBC then paid Thai Fisheries; finally Robertson would pay CIBC.[108] This change in process meant that the seller no longer controlled the satisfaction of conditions necessary for payment which meant that CIBC was protected. However, it also meant that Thai Fisheries ceded control over when it would receive payment from Robertson. CIBC and Robertson could control the flow of money to Thai Fisheries by delaying delivery. Although this case occurred before the implementation of the UCP 600, the UCP 500 was incorporated into the relevant letters of credit.[109]

[105] *Nareerux* case (n 4).
[106] *Nareerux* case (n 4) par 7-10.
[107] *Nareerux* case (n 4) par 11-12.
[108] *Nareerux* case (n 4) par 13-19.
[109] *Nareerux* case (n 4) par 16-22.

The exact facts of what happened are unclear due to the lack of witnesses from Robertson and Sam's Club but the relationship between the parties broke down by the end of 1994. Thai Fisheries was unable to meet documentary conditions in order to be paid for the shrimp sold by Robertson. CIBC only received purchase orders and receipts for the raw shrimp but nothing for the cooked shrimp and accordingly it did not pay for this portion of the shrimp. Robertson went insolvent and Thai Fisheries, or more specifically its successor Nareerux Import Co ("Nareerux"), sued CIBC for the payment outstanding on the shrimp it had shipped totalling over $10 million.[110]

5.2 *Ratio decidendi* and decision

5.2.1 Reasons for the decision

In the court of first instance the judge found in favour of Nareerux who was awarded the full amount they had claimed. The court provided that by CIBC accepting money for the payment of the loans it made to Robertson it acted as a lender who sought what it was owed. In doing this it failed in its separate duties as the issuing bank of letters of credit.[111] The court further decided that CIBC had breached an implied duty of good faith in the contractual relationship between CIBC and Thai Fisheries. CIBC acted in a manner to overcome the purpose of the letters of credit by accepting money paid for the reduction of loans instead of holding the funds on the account of the seller (Thai Fisheries). There was no respect for the principle of autonomy of the letters of credit – CIBC in its role as lender arranged for the sale of shrimp outside the terms of the letters of credit not providing any security or peace of mind to Thai Fisheries (as is the intention of letters of credit).[112]

CIBC took the matter on appeal, where the Ontario Appeal Court agreed with the trial court's finding in favour of Nareerux. The court pointed out that all parties understood the change of the special condition and its application. CIBC only raised one defence which was that Thai Fisheries did not comply with its obligations under the special conditions in the letters of credit due to the receipts from Sam's Club never being delivered to CIBC. It is true that strict

[110] *Nareerux* case (n 4) par 24-28.
[111] *Nareerux* case (n 4) par 35 and 37.
[112] *Nareerux* case (n 4) par 36.

compliance is an integral part of letters of credit but the appeal court provided that CIBC was not entitled to rely on the defence of non-compliance.[113]

The court provided two reasons for this decision. Firstly CIBC consciously contributed to undermining the principle of strict compliance and relied on this to justify the refusal of payment in co-operation with Robertson ("the strict compliance issue"). It knowingly applied the proceeds from the sale of shrimp to reducing the line of credit held by Robertson instead of paying Thai Fisheries in terms of the letters of credit.[114] Secondly CIBC failed to give notice to Thai Fisheries timeously regarding the dishonouring of the letters of credit ("the notice issue"). Thai Fisheries was placed in a situation where it reasonably thought that the letters of credit would be honoured by CIBC once the problem of the discrepant receipts was resolved.[115]

5.2.2 Strict compliance

The court considered a number of cases in reaching its decision on the strict compliance issue. The court relied mainly on the American case of *E & H Partners v Broadway National Bank.*[116] In this case the issuing bank had been persuaded by its client to dishonour a letter of credit that violated both the independent obligations of the issuing bank in terms of the letters of credit and the principle of good faith. The court in this case held that the applicant should have no influence in the decision whether to accept the documents or reject them due to a discrepancy; this decision rested solely with the issuing bank.[117] The appeal court in *Nareerux* agreed with this approach. It stated that "the use of the Letters of Credit by the issuer and its customer as a tap for payments, depending upon when the Bank and its client wanted to effect such payment – in order to better their own positions *vis-à-vis* each other as debtor and credit – nullifies the entire autonomy principle and the independent role required of the Bank under the Letters of Credit."[118]

The appeal court rejected the argument of CIBC that by Thai Fisheries accepting the special condition, it also accepted the risk involved. Thai Fisheries, however, assumed that the risk merely delayed acceptance of the shrimp, which as a necessary consequence would have delayed payment by Sam's Club, delivery of the receipts, and ultimately payment to it under the letters of credit. Thai Fisheries did not, however, accept the risk of CIBC participating in a scheme with its

[113] *Nareerux* case (n 4) par 39 and 43.
[114] *Nareerux* case (n 4) par 44.
[115] *Nareerux* case (n 4) par 45.
[116] *E & H Partners v Broadway National Bank* 38 F Supp 2d 275 (SDNY 1998).
[117] *E & H Partners* case (n 116) par 284-285.
[118] *Nareerux* case (n 4) par 67.

lending client, Robertson. Acceptance of the special condition in the letters of credit did not do away with CIBC's inherent obligations to apply the principles of independence and autonomy or free it of an implied duty of good faith.[119]

This implied duty of good faith is not a "stand-alone duty of good faith" established by Canadian law; instead it is a duty the court read into the performance under letters of credit. The appeal court referred to principles of equity and the underlying terms of the UCP 500 which lean towards an implied duty of good faith. Certain Canadian cases support the view of the court that an implied duty of good faith is created whereby a party to a letter of credit cannot act in any way that overcomes the purpose of the agreement.[120] The appeal court agreed with the court *a quo* that CIBC did not act in good faith when it breached its contractual obligation by acting in a way contrary to the purpose of the contract.[121]

5.2.3 Timeous notice of dishonour

The court referred to articles 13(b) and 14(d) and (e) of the UCP 500 when rationalizing its decision on the notice issue (it should be noted that these articles are very similar to the corresponding articles in the current UCP 600).[122] Even though the court *a quo* found that the UCP 500 was not applicable to the letters of credit at hand, the appeal court decided differently and confirmed that it does apply. The clear wording that the letters of credit were subject to the UCP 500 shows the intention to incorporate the rules into the agreements.

In terms of article 13(b) the issuing bank has a reasonable time not exceeding seven days after receipt of the documents to examine them and to decide whether to accept or refuse them. If the documents are not accepted a notice of refusal, with a description of any discrepancies, must be issued by the end of the seventh day.[123] If no such notice is given the issuing bank is precluded from claiming that the documents are non-conforming.[124] CIBC never sent a notice informing Thai Fisheries it would not honour the presentation of the documents; it also did not take any steps to enforce Robertson's undertaking to provide the receipts for the sold shrimp. CIBC further only cancelled the letters of credit fifteen months later. The court held that there

[119] *Nareerux* case (n 4) par 76-78.
[120] See *Transamerica Life Canada Inc. v ING Canada Inc.* (2003) 68 OR (3d) 457 (CA) 53 and 87 and *CivicLife.com Inc. v Canada (Attorney General)* (2006) 215 OAC 43 (CA) 49.
[121] *Nareerux* case (n 4) par 68 and 73.
[122] (n 28).
[123] (n 28) a 14(d)(i)-(ii).
[124] (n 28) a 14(e).

was a distinction between the current situation in which documents could not be presented and the situation where the issuing bank needed to respond to the documents presented. This distinction was, however, not necessary in principle according to the court – the purpose of giving notice is so that the presenter can remedy any discrepancy if possible. In the current situation CIBC prevented Thai Fisheries from protecting its interest in providing documents on which it would receive payment. Due to CIBC's silence on the matter with no notice given within any reasonable time, it was prohibited from relying on non-compliance with the special condition.[125]

5.2.4 Decision

The court, in the concluding paragraphs of the judgment, stated that this case raised interesting but difficult questions. Although letters of credit play an important role in international trade and certainty in interpretation and application is vital, the principles of fairness and equity need to be considered and were indeed considered in this case. The court ultimately found in favour of Nareerux and dismissed the appeal with costs.[126]

5.3 Interpretation and criticism

The decision by the court was ultimately fair on the set of facts but the case received much criticism for its bold line of reasoning. Dolan is of the opinion that the way in which the agreements were structured was commercially irresponsible. Thai Fisheries should not have agreed to this.[127] He states that the court could have relied on the provisions of the UCP to resolve the issues. However, despite finding that the UCP was contractually incorporated by the parties (and that the view of the court *a quo* in this regard was wrong), the court of appeal nevertheless ignored it. The court instead based its decision on an implied duty of good faith that in its view arose from the situation where the issuer of the letters of credit was also a credit provider to the applicant. Dolan, however, makes the point that such relationships are not unusual in international transactions – letters of credit are often issued as an unfunded loan to its (often long standing) client and are simply charged against its line of credit.[128]

[125] *Nareerux* case (n 4) par 89-91.
[126] *Nareerux* case (n 4) par 95-98.
[127] Dolan "Concerns Regarding the Ontario Court's Judgment in the *Nareerux* Case" 2011 *Wayne State University Law School Legal Studies Research Paper Series* 1 2 (http://ssrn.com/abstract=1956700 (1-10-2014)).
[128] Dolan (n 127) 3-4.

According to Dolan the court infringed upon the principle of independence by imposing a good-faith duty on the issuer while disregarding the purpose of that principle, namely to prevent the parties from relying on the underlying contractual relationship. Dolan puts it thus:

> "The purpose of the independence principle is to prevent that inquiry. It is to prevent any inquiry, except in the case of fraud, into related contracts or relationships when evaluating the issuer's duties under the credit. Those duties are and must be ministerial – examination of documents on their face. The Ontario Court's rule transmutes the issuer's duties, rendering them opaque and judgmental. The Court refashions the letter of credit into something akin to a suretyship undertaking."

He feels that the actions of the court has spoiled the letter of credit for Ontario commerce and has made enquiries into letters of credit costly and unnecessarily voluminous.[129]

Crawford is of the opinion that the reasoning that Blair JA gave in his judgment is not a reliable basis for creating an implied duty of good faith. He takes the view that the court's decision did not consider sufficient precedent to create this duty and that it should not have implied terms into international rules like the UCP.[130] He emphasizes that the Ontario Court of Appeal used American law as a basis for its decision of an implied duty of good faith. However, the common law of Canada does not recognize this same duty. Hence the court should rather have interpreted the UCP strictly with reference to its language.[131] Crawford further states that both the *a quo* decision and appeal decision "renders the law uncertain". He raises the question of how one will be able determine whether a bank is in a "ploy" with its client – must the bank be aware of all the dealings of the client or would this be too onerous on a bank and unnecessary for the purpose of letters of credit?[132]

Although Crawford makes valid points and I fully agree that one needs to consider the law applicable in your country together with the intention of the international rules (i.e. the UCP), if one were to consider the situation from Thai Fisheries' stance, imposing the duty of good faith makes sense and is reasonable. I agree that an issuing bank should not have an extra duty to interrogate a client regarding its intention as this could be costly and lead to a breakdown of the banking relationship. In this case, however, CIBC should reasonably have been aware of the clashing of its rights and duties as issuing bank with its rights and duties as lender to Robertson. It must be borne in mind that Thai Fisheries was never aware of the dealings between

[129] Dolan (n 127) 5-6.
[130] Crawford "Nareerux Import Co. Ltd. v Canadian Imperial Bank of Commerce: A New Implied Duty of Good Faith For Banks Issuing Letters of Credit?" 2010 *Can Bus LJ* 130 145.
[131] Crawford (n 130) 133-134.
[132] Crawford (n 130) 140-141.

CIBC and Robertson which ultimately lead to their failure to present the correct documents to CIBC for payment of the shrimp they had delivered. The appeal court relied partly on the UCP 500 and partly on considerations of justice and equity to arrive at what probably was the fairest decision: CIBC was excluded from relying on the discrepancies on the presented documents. Even though the decision is fair, however, it was clearly not based on well-established law creating certainty.

According to Hugo and Kelly-Louw this case cannot merely be adopted in South Africa due to a different approach to good faith and fiduciary relationships.[133] It can, however, provide guidance to South African banks to the effect that non-compliance with documents can probably not be raised as a defence when the bank is complicit in preventing the presenter to obtain and present the correct documents. This, they argue, is in line with the South African law of contract regarding tacit and implied terms.

[133] Hugo and Kelly-Louw "Documentary Credits and Independent Guarantees" 2010 *Annual Banking Law Update* par 3.

6 The duty of an issuing bank in South Africa to return presented documents

6.1 The South African approach regarding the returning of documents

As mentioned previously there is no South African case law which considers the issues surrounding article 16, especially article 16(f). Independent empirical research was therefore conducted with a leading international bank that has a strong presence in South Africa to establish the norm and common practice in the South African banking sector with regards to letters of credit. The information was obtained by means of an interview with a senior officer of the bank who oversees the sales and operations of among other products, letters of credit. Although it was established that other means of payment in facilitating international trade are becoming popular, the use of letters of credit is still important and is often insisted on by certain traders.

It is a trend not only in South Africa but globally that the turnaround times on the processing of letters of credit will establish one bank as having a competitive advantage over another bank. In this day and age where banks are service driven, providing the fastest quality service is necessary to maintain a good reputation and ultimately retain clients.[134] As mentioned previously, article 16(d) provides that a bank has five banking days within which to issue a notice of refusal if the documents are discrepant.[135] In practice, however, most banks in South Africa aim either to accept the documents or provide a notice of refusal within 24 hours. There are nevertheless different factors that determine the turnover time in issuing the notice if there is a discrepancy. Such factors include, but are not limited to, the time of day of submitting the documents, the volume of the documents presented, the number of discrepancies contained in the documents and the nature of the discrepancies. If, for example, the documents are presented on the morning of a normal business day and the discrepancies are clear and material, it could take as little as four hours within which to issue a notice of refusal. If, however, the documents are only presented in the afternoon, or if there are trivial discrepancies which require a waiver from the applicant, it could take 24 hours to issue a notice of refusal or accept the documents and honour the letter of credit.

[134] KPMG South Africa "Banking in Africa – the importance of innovation and customer service" 2013 (http://www.sablog.kpmg.co.za/2013/09/banking-in-africa-the-importance-of-innovation-and-customer-service/ (22-8-2014)).
[135] (n 2).

Once the notice of refusal is sent, it is common practice in South Africa to return the documents immediately. There should ideally be not more than one banking day to return the documents. This means that the bank not only has to act within the manner it indicates on the notice of refusal (that is to return the documents) but also to act in a fast and efficient manner. This is mainly done to avoid liability under article 16(f) which would mean that if the issuing bank or confirming bank does not act within the rules laid down by article 16, it will not be able to rely on any discrepancies to refuse payment and will consequentially be liable to honour payment under the letter of credit.

6.2 Is there really an extra duty of good faith?

In the *Fortis* case the court relied on article 16(f) and expert evidence when it decided that the issuing bank must act in accordance with the notice it has issued. If it does not act according to this notice it is precluded from relying on non-compliance as a defence to refuse payment.[136] In the *Nareerux* case the situation was different and the court considered that CIBC's silence on the operation of the special condition precluded Thai Fisheries from receiving the documents it required, together with it not giving notice within any reasonable time prohibited it from relying on the doctrine of strict compliance.[137]

In the South African banking sector the bankers who deal with letters of credit believe there is a duty of good faith implied under article 16(f). This duty requires the bank to ensure that it keeps to the rules laid down in article 16, but even more importantly, to ensure that it acts in a manner that not only shows its commitment to adhere to the rules of the UCP 600 but also to provide excellent service in executing its banking product, namely a letter of credit. It can be deduced that not only must a bank act according to the provisions of article 16, but also in accordance with the manner indicated by it on any notice issued. If, for example, a bank issues a notice of refusal due to discrepancies on the documents presented, and indicates that it will be returning the documents but it does not do so promptly, it is not acting in good faith and will therefore not be able to rely on the discrepancies. The bank will then be required to honour the letter of credit.

The imposition of such an implied duty of good faith may, however, be difficult in South Africa from a legal perspective bearing in mind certain well-established principles of the law of

[136] *Fortis* case (n 3).
[137] *Nareerux* case (n 4).

contract. Although there have been numerous court decisions that discuss (or merely touch on) this subject, two fundamentally important cases need to be considered. The first is the Supreme Court of Appeal's decision in *Brisley v Drotsky* where the court decided that good faith could not be used as basis to set aside a valid contract.[138] The court reasoned mainly that good faith was not a "free-floating" basis to encroach on a contract that was voluntarily reached with consensus.[139] The second is *Barkhuizen v Napier CC* where the Constitutional Court agreed mostly with the development of this issue in the Supreme Court of Appeal[140] but incorporated an important constitutional element.[141] The court held that if a term in a contract is contrary to any constitutional provision it will be against public policy and therefore not enforceable.[142]

In terms of letters of credit it is important to find a balance between the provisions of contract law, the UCP, international commercial standards and the Constitution. The *Drotsky* case provides an important facet to the application of article 16(f) in South Africa; good faith should not be used as a free-floating principle to set aside a valid contract which makes provision for the use of letters of credit. One must, however, be mindful of the fact that the purpose of the UCP is to promote international certainty in letter-of-credit practice. The implication is that they should preferably be interpreted in South Africa in such a manner as to give effect to commonly accepted commercial practices. Our courts will nonetheless always consider the law of contract and the application of the Constitution[143] (if constitutionality were to be an issue) in applying the rules of article 16.

[138] *Brisley v Drotsky* 2002 (4) SA 1 (SCA) 14-15.
[139] *Brisley* case (n 138) 15.
[140] See *Brisley v Drotsky 2002 (4) SA 1 (SCA)*, *Afrox Healthcare Bpk v Strydom 2002 (6) SA 21 (SCA)* and *South African Forestry Co Ltd v York Timber Ltd 2005 3 SA 323 (SCA)*.
[141] *Barkhuizen v Napier CC 2007 (5) SA 323 (CC).*
[142] *Barkhuizen* case (n 141) 333.
[143] Constitution of the Republic of South Africa, 1996.

7 *Conclusion*

One of the main advantages of using letters of credit is that most of the time they will be regulated by the ICC's UCP 600[144] which must be contractually incorporated. These rules aim to protect both a purchaser and a seller in an international trade contract by mitigating risks and actually placing the different parties on a similar footing. The UCP 600 achieves this by setting out rules which have to be applied by the parties to an international contract of sale. Although the UCP 600 is an improvement on its predecessor (UCP 500[145]) especially in the sense of many rules being clearer, there remain issues surrounding the application of certain rules such as those contained in article 16.

Although the two cases discussed above each have very different facts and circumstances, the basis of both decisions is that the doctrine of strict compliance could not be applied in either scenario. In *Fortis Bank v Indian Overseas Bank*[146] the court considered the issue of a bank not acting in terms of the notice given by it or its representative. In *Nareerux Import Co Ltd v Canadian Imperial Bank of Commerce*[147] the court decided that the issuing bank was precluded from relying on a discrepancy caused by its own actions. Blair JA stated that letters of credit play an important role in international trade, and that certainty in interpreting and applying their rules was vital, but that the principles of fairness and equity could be considered. Both cases explore the duties of the issuing bank surrounding the documents that have been presented or need to be presented for honouring. It is ultimately the intention of the ICC to standardize the interpretation and application of its rules regarding letters of credit, but a bank's document checkers in one country will not always have the same view as the document checkers in another country regarding the conformity of documents.

Neither of the cases has binding force on South African courts but they do hold persuasive power. The interview referred to above was held in the context of these cases. It was established that the common practice in South Africa is to return presented documents immediately once the notice of refusal has been issued. Although there is no clear answer as to what exactly this means, the industry ideal is that it should not be more than one banking day. A

[144] (n 2).
[145] (n 28).
[146] *Fortis* cases (n 58, 70, 80 and 93).
[147] *Nareerux* case (n 4).

bank therefore has to act not only in accordance with the manner indicated by it on the notice of refusal, but also in a fast and efficient manner.

If a bank were to act within the confines of article 16 it will avoid liability under article 16(f). Bankers in South Africa believe that there is a duty of good faith implied under article 16(f) which requires the bank to ensure that it keeps to the rules laid down in article 16. Although the rules set out in article 16 do not depart much from its predecessor (article 13 of the UCP 500), the ICC could consider changing the wording in a future version of the UCP to take account of scenarios like that in the *Fortis* case, and to reflect possible changes in industry norms. It could perhaps provide clarity on the time frame within which documents should be returned to the presenter. These, however, are future possibilities; for the time being it is necessary to deal with the current rules that need to be applied.

The important lesson learnt from the *Nareerux* case is that a bank should not evade its duties as issuer of a letter of credit. An issuing bank must act in good faith when receiving documents by complying with the rules of the UCP and cannot escape liability when it is part of the reason why conforming documents cannot be presented. The *Fortis* case showed how a bank can act against the UCP, and generally accepted norms, by temporarily disregarding the documents instead of returning them promptly – and that this can lead to liability in terms of article 16(f). Although South Africa does not have case law confirming these interpretations, it seems likely that a South African court faced by these questions would arrive at the same answers in light of the persuasive authority of foreign case law and expert evidence from local bankers.

[Words:14739]

ANNEXURE 1 – INTERVIEW QUESTIONS AND ANSWERS FROM A LEADING BANK IN SOUTH AFRICA

1) Is the UCP 600 applied more often than not in letters of credit issued from South Africa?

Yes, we won't accept a letter of credit if it is not subject to the UCP.

2) Has the application of the UCP 600 ever been problematic from an interpretation perspective with regards to articles 14-16? If so, which specific sub-articles?

Interpretation of the UCP has tightened quite a lot from the UCP 500 to the UCP 600. Generally there are no issues in the application of article 14-16. If there are, it is possible to refer the dispute to the ICC but this happens very rarely.

3) If documents are presented for payment, what period passes before notice is given to the presenter?

It mostly takes 4-8 hours before a notice is issued. Depending on the circumstances (like the time of presentation, the volume of documents or nature of the discrepancies) the maximum time we are comfortable with would be 24 hours.

4) Do you ever not give notice when payment will not be made?

No, never. This will only occur by error. It does, however, sometime occur that a waiver will be sought from our client, which could mean that the notice is not issued immediately.

5) Which telecommunications method do you most commonly use to give notice to the presenter?

We mostly use SWIFT messages.

6) If the documents are refused, how long does it take before those documents are returned to the presenter?

We return documents either on the same day the refusal notice is given or the following business day. There is a risk involved in not sending the documents back immediately so we prefer to do it as soon as possible after notice is given.

7) What is a reasonable period within which to return the documents in the South African banking sector?

One to two business days are a reasonable period.

8) Do you ever have any issues with returning documents? If so, can you provide any examples?

No, we don't have problems in returning documents.

9) Do you think there is an extra duty of care created by article 16(f) of the UCP 600? In other words do you think the bank needs to ensure it stays within the time limits of refusal and do what is required and ultimately do what it says it will in a notice once it is issued?

Yes, we believe there is a duty of good faith created under article 16(f).

BIBLIOGRAPHY

Articles and books

Adodo E "A Presentee Bank's Duty When Examining a Tender of Documents under the Uniform Customs and Practice for Documentary Credits 600" 2009 *JIBLR* 566

Adodo E "Article 16 of UCP 600: The Time Frame for Returning Rejected Documents and Consequences of its Breach" 2011 *JIBLR* 548

Baldwin S *Business in the Middle Ages* (1968) Copper Square New York

Chinkin CM, Davidson PJ and Ricquier WJM *Current Problems of International Trade Financing* (1983) Butterworths Singapore

Crawford B "*Nareerux Import Co Ltd. v Canadian Imperial Bank of Commerce*: A new implied duty of good faith for banks issuing letters of credit?" 2010 *Can Bus LJ* 130

Credit Suisse "Documentary Credits – Documentary Collections" 2008 *Credit Suisse AG* 6 (https://www.credit-suisse.com/forms/ch/unternehmen/kmugrossunternehmen/doc/akkreditiv_dokumentarinkassi_4540004_en.pdf (25-8-2014))

Davis AG *The Law Relating to Commercial Letters of Credit* (1955) Sir Isaac Pitman and Sons London

De Rooy FP *Documentary Credits* (1984) Kluwer Deventer

Dolan "Concerns Regarding the Ontario Court's Judgment in the *Nareerux* Case" 2011 *Wayne State University Law School Legal Studies Research Paper Series* 1 (http://ssrn.com/abstract=1956700 (1-10-2014))

Ellinger EP *Documentary Letters of Credit: A Comparative Study* (1970) University of Singapore Press Singapore

Ellinger EP "Rejection of Documents Tendered Under a Letter of Credit" 2013 *Lloyd's Maritime and Commercial Law Quarterly* 1

Guiraud P *Lectures Historique: La Vie Priveé et la Vie Publique de Grecs* (1894) Librairie Hachette et Cie Paris

Holbrook D "Documentary letters of credit: Bank's obligation to payee may involve duty of good faith" 2010 *Banking LJ* 857

Hugo C "Discounting Practices and Documentary Credits" 2002 *SALJ* 104

Hugo C "Documentary Credits: The Basis of the Bank's Obligation" 2000 *SALJ* 224

Hugo C "The Development of Documentary Letters of Credit as Reflected in the Uniform Customs and Practice of Documentary Credits" 1993 5 *SA Merc LJ* 44

Hugo C *The Law Relating to Documentary Credits from a South African Perspective with Special Reference to the Legal Position of the Issuing and Confirming Banks* (1996 thesis US)

Hugo C "The Legal Nature of the Uniform Customs and Practice for Documentary Credits: Lex Mercatoria, Custom or Contract" 1994 6 *SA Merc LJ* 143

Hugo C "The 1993 Revision of the Uniform Customs and Practice for Documentary Credits" 1996 8 *SA Merc LJ* 151

Hugo C and Kelly-Louw M "Documentary Credits and Independent Guarantees" 2010 *Annual Banking Law Update* 1

Hwaidi M and Harris B "The Mechanics of Refusal in Documentary Letters of Credits: An Analysis of the Procedures Introduced By Article 16 UCP 600" 2013 *JIBLR* 146

KPMG South Africa "Banking in Africa – the importance of innovation and customer service" 2013 (http://www.sablog.kpmg.co.za/2013/09/banking-in-africa-the-importance-of-innovation-and-customer-service/ (22-8-2014))

Malek A and Quest D *Jack: Documentary Credit* (2009) Tottel Hayward's Heath

McCurdy WE "Commercial letter of credit" 1922 *Harv L Rev 539*

Mugasha A *The Law of Letters of Credit and Bank Guarantees (*2003) Federation Press Sydney

Oelofse AN *The law of documentary letters of credit in comparative perspective* (1997) Interlegal Pretoria

Rodrigo T "UCP 500 to 600: A Forward Movement" 2011 *eLaw J* 1

Schulze WG "The UCP 600: A New Law Applicable to Documentary Letters of Credit" 2009 21 *SA Merc LJ* 228

Sutton WB "The Documentary Credit Phoenix – UCP 600 Boasts Fair Rules for Trade Customers, hard Rules for Banks" 2012 *DAJV* 62

Trimble RJ "The Law Merchant and the Letter of Credit" 1948 *Harv L Rev* 981

Thayer PW "Irrevocable Credits in International Commerce: Their Legal Nature" 1936 *Col L Rev* 1032

Van Huyssteen LF, Van der Merwe SWJ and Maxwell CJ *Contract Law in South Africa* (2010) Kluwer Law International Amsterdam

American case law

E & H Partners v Broadway National Bank 38 F Supp 2d 275 (SDNY 1998)

Fidelity National Bank v Dade County (1979) 371 So 2d 545

Canadian case law

CivicLife.com Inc. v Canada (Attorney General) (2006) 215 OAC 43 (CA) 49

Nareerux Import Co. Ltd. v Canadian Imperial Bank of Commerce (2009) 97 OR (3d) 481 DLR (4th) 678 (CA)

Transamerica Life Canada Inc. v ING Canada Inc. (2003) 68 OR (3d) 457 (CA) 53

English case law

Attorney General of Belize v Belize Telecom Ltd (PC) [2009] 1 WLR 1988

BP Refinery (Westernport) Pty Ltd v Shire of Hastings (1977) 180 CLR 266

Fortis Bank SA/NV and Another v Indian Overseas Bank [2009] EWHC 2303 (Comm); [2010] 1 Lloyd's Rep 227

Fortis Bank SA/NV and Another v Indian Overseas Bank [2010] EWHC 84 (Comm); [2010] 2 Lloyd's Rep 641

Fortis Bank SA/NV and Another v Indian Overseas Bank [2011] EWCA Civ 58; [2011] 2 Lloyd's Rep 33

Fortis Bank SA/NV and Another v Indian Overseas Bank [2011] EWHC 538 (Comm); [2011] 2 Lloyd's Rep 190

Harbotle (Mercantile) Ltd v National Westminster Bank Ltd [1978] QB 146

South African case law

Afrox Healthcare Bpk v Strydom 2002 (6) SA 21 (SCA)

Barkhuizen v Napier CC 2007 (5) SA 323 (CC)

Brisley v Drotsky 2002 (4) SA 1 (SCA)

South African Forestry Co Ltd v York Timber Ltd 2005 3 SA 323 (SCA)

South African legislation

Constitution of the Republic of South Africa, 1996

ICC rules and publications

ICC "Commentary on UCP 600" 2007 *ICC Publication No 680*

ICC "Examination of Documents, Waiver of Discrepancies and Notice under UCP 500" 2002 *ICC Document 470/95rev2*

ICC "International Standard Banking Practice for the Examination of Documents under Documentary Credits" 2007 *ICC Publication No* 645

ICC "Uniform Customs and Practice for Documentary Credits" 1993 *ICC Publication No 500*

ICC "Uniform Customs and Practice for Documentary Credits" 2007 *ICC Publication No 600*