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**DOCUMENTARY COLLECTIONS AS A METHOD OF PAYMENT IN INTERNATIONAL SALE
TRANSACTIONS**

by

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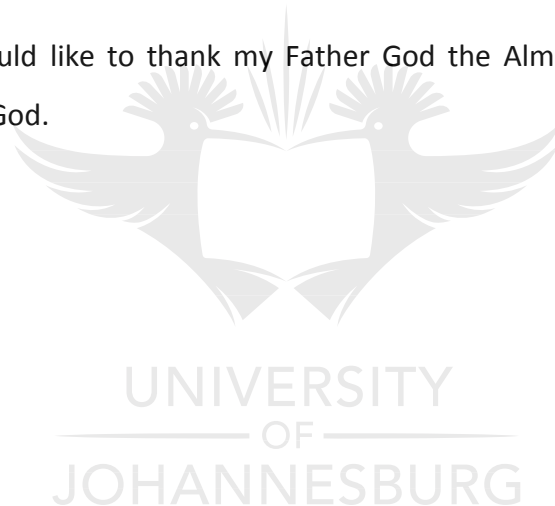
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FOREWORD

This mini-dissertation is dedicated to my greatest gift from God, my 'M'e Thunthung, without her unwavering love and support none of this would have been possible. I can never repay you for all your sacrifices and support I simply hope I can make you proud. "Kealeboha Letebele". To the rest of my family and friends especially Ts'epo Mosoang, you make me warm and fuzzy inside, your faith in me is humbling.

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SUMMARY

This dissertation proposes to examine in broad terms the nature of documentary collections in international sale transactions. The aim is to inter alia identify the limits and the duties and responsibilities of banks under this method of payment. It will further attempt to remove any doubts as to the extent of the duties of banks undertaken to facilitate the collection transaction.

Central to this paper is the discussion of the Uniform Rules for Collection (522) and its uniform application in international sale transactions.

The author is of the view that this method is not as explored as other methods of international trade payment. Documentary collections strike a balance of risks between the seller and the buyer dealing at arms' length. This paper will attempt to identify the implications of documentary collections for the buyer and the seller and how that impacts on the reliability of the arrangement as a mode payment in international trade.



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1 Introduction

International trade sale transactions are similar to domestic sales. The same legal principles apply. However, there are more risks involved in international sales especially regarding payment and transportation of goods.¹ Success in today's global marketplace and winning sales against foreign competitors depend heavily on exporters offering their customers attractive sales terms supported by appropriate payment methods.² Receiving full payment timeously is the basic goal for each export sale; therefore it is important that "an appropriate payment method must be chosen carefully to minimize the payment risk while also accommodating the needs of the buyer".³ Banks have been providing trade finance services for a long time.⁴ As stated by BAFT-IFSA⁵:

"Traditional Trade Finance products have existed in some form for hundreds of years. Generally speaking, banks have served as intermediaries to facilitate the flow of documents (information) and payments related to the flow of goods in international trade or to provide assurance relating to the performance or financial obligations of a person or company to another. Different products provide importers and exporters with varying levels of risk mitigation and/or financing."⁶

1.1 Methods of payment

There are basically four methods of payment in international trade: payment in advance; open account; documentary collection; and letters of credit.⁷

1.1.1 *Payment in advance*

In the case of payment in advance, the seller receives payment before shipping the goods or before they reach the buyer.⁸ Credit cards, bank drafts and swift payments are the most

¹ Carr *International Trade Law* (2010) 463.

² US Department of Commerce International Trade Administration *Trade finance guide; documentary collections*" (April 2008) (http://trade.gov/media/publication/abstract/trade_finance_guide_2008.desc.html) (30/04/2015) 3.

³ US Department of Commerce (n 2) 3.

⁴ That is, processing information, managing documents, providing financing and facilitating payments related to trade transactions through various products.

⁵ This is a leading international transaction banking association formed by a merger of the Bankers Association for Trade (BAFT) and the International Financial Services Association (IFSA).

⁶ BAFT-IFSA Global Trade Industry Council *Traditional Trade Finance Definitions Product Definitions for Trade Finance* (2012) 4.

⁷ Mizan "Factoring: a better alternative of international trade payment methods" 2011 *ASA University Review* 247 247.

⁸ Van Niekerk and Schulze *The South African Law of International Trade: Selected Topics* (2011) 249.

likely settlement method.⁹ This method is mostly preferred by the seller where he is not sure of either the political or economic stability of the buyer's country. It may also be used by the seller to secure funding for manufacturing and or obtaining the merchandise.¹⁰ The buyer faces the risk of goods not materializing or being substandard. He may safeguard against this by requesting a performance guarantee from the seller.¹¹

1.1.2 Open account

In the case of payment by open account, the seller transfers the goods and all the documents of title before any payment is made and usually without guarantee.¹² The seller is exposed to major risks in this type of payment and it is seldom used in international sale transactions¹³ other than in well-established trade relationships where there is a high level of trust between the parties.¹⁴ The seller is responsible for financing the sale at the risk of no or late payment.¹⁵

1.1.3 Letters of credit

A letter of credit (also known as a documentary credit) is an undertaking by the bank on behalf of the importer that payment will be made to the exporter on presentation of conforming documents.¹⁶ This is arguably the most secure method of payment in international sales, but also the most expensive.¹⁷

1.1.4 Documentary collections

A documentary collection, the main focus of this dissertation, refers to the collection of commercial documents that may or may not be accompanied by financial documents.¹⁸

⁹ US Department of Commerce (n2) 4.

¹⁰ Chatterjee *Legal Aspects of Trade Finance* (2006) 4.

¹¹ Chatterjee (n 10) 5.

¹² Mizan (n 7) 255.

¹³ Adodo *Letters of Credit the Law and Practice of Compliance* (2014) 6.

¹⁴ Adodo (n 13) 5.

¹⁵ Van Niekerk and Schulze (n 8) 254.

¹⁶ Hugo "Discounting practices and documentary credits" 2002 *SALJ* 101 101.

¹⁷ Carr (n 1) 468.

¹⁸ A 2(a) of the Uniform Rules for Collection 522 (1995).

1.2 Selecting a suitable method of payment

In considering the payment method most suitable for a particular transaction, the parties must consider first of all the availability of exchange and the political and economic stability of the importing country.¹⁹ Further, in a country where the foreign exchange regulations are rigid, the seller has to ensure that the buyer is in possession of any necessary licences to import the goods concerned.²⁰

1.2.1 The country risk

The control and exchange of money in an export sale ultimately depends on the importer's country.²¹ Some developing countries have import regulations and exchange-control mechanisms that tend to make payment in hard currency tough at times. This is due to the fact that they hang onto certain minimums of "hard currencies...to enable them to pay off foreign debts and obtain financing".²² The parties must also take into account the possibility of changing foreign-exchange policies and or laws. Also of importance is the relations of the importing country with other countries, the nature of its domestic laws and the rule of law as a whole.²³

1.2.2 The reputation of the exporter's bank

In a transaction where payment is by a letter of credit or draft drawn on a bank, or if the bank is in any way obligated to make payment, the reputation and international financial stability of that bank is an issue as well as the relative stability of the currency in which the bill is denominated.²⁴ Further, proper research done on the buyer's bank can assist in deciding whether to work with it or not. Sometimes, an exporter's strategy may include requiring the buyer to use the bank recommended by its own bank in order to complete the transactions.²⁵

¹⁹ Carr (n1) 463.

²⁰ Chatterjee (n 10) 3.

²¹ Food Export Association of the Midwest USA "Introduction to payment methods and strategies" ([http://www.foodexport.org/Gettingstarted/content.cfm?ItemNumber-1294 \(/23/06/2015\) topic 9](http://www.foodexport.org/Gettingstarted/content.cfm?ItemNumber-1294 (/23/06/2015) topic 9)).

²² Food Export Association of the Midwest topic 9(n 21) unnumbered.

²³ Adodo (n 13) 7.

²⁴ Adodo (n 13) 7.

²⁵ Food Export Association of the Midwest USA (n 21) unnumbered.

1.2.3 The competition

Competition becomes high if the seller is faced with other sellers offering similar products with better credit terms. Naturally importers prefer open accounts. This can be considered by the exporter if business is good and the buyer can insure the receivables. Otherwise open account is not the best method available for the exporter.²⁶

2 Types of collection

The International Chamber of Commerce's (ICC) Uniform Rules for Collection²⁷ defines collection as the "handling of financial documents and/or commercial documents by a bank for the purpose of obtaining payment and/or acceptance, delivering documents against payment and/or acceptance or delivering documents on other terms or conditions".²⁸ The URC draws a distinction between two types of collections namely clean and documentary collections.²⁹ For the URC to apply to collections in an international sale, it must in fact be incorporated in the text of the collection instruction.³⁰

2.1 Clean collection

A clean collection refers only to collection of financial documents³¹ that is bills of exchange, promissory notes, cheques or other similar instruments used for obtaining the payment of money.³² It does not include commercial documents such as invoices, transport documents, documents of title or other similar documents, or any other documents whatsoever, not being financial documents.³³ The bank merely presents the financial document or documents concerned to the buyer for payment or acceptance.³⁴ Clean collections are divorced from performance of the primary contract.³⁵

²⁶ Mizan (n 7) 255.

²⁷ ICC Publication 522 of 1995 (hereinafter referred to as the URC).

²⁸ URC a 2 and Moorcroft *Banking Law and Practice* (2009) par 32.2.

²⁹ URC a 2 (c) & (d).

³⁰ International Chamber of Commerce *ICC Uniform Rules for Collection – A Commentary* ICC Series Publication 550 (1995) http://court-inter.us/sites/default/files/users/user8/uniform_rules_for_collections.pdf (01/06/2015) 8 and Moorcroft (n 28) par 32.2.

³¹ URC a 2(c).

³² URC a 2(b) (1) & (2); see also Bridge *Benjamin's Sale of Goods* (2014) 1998 par 22-034 (hereinafter Benjamin).

³³ Moorcroft (n 28) par 32.2.

³⁴ Van Niekerk and Schulze (n 8) 251; see also Maduegbuna "The limits of the duties and responsibilities of banks in collection of bills in international trade" 1992 4 *African Journal of International and Comparative Law* 649 657.

³⁵ Bridge *The International Sale of Goods* (2013) 258.

2.2 Documentary collections

A documentary collection refers to the collection of financial documents accompanied by commercial documents or commercial documents not accompanied by the financial documents.³⁶ Commercial documents refer to invoices, transport documents, documents of title or any other documents that are not financial documents³⁷ (like the insurance documents, packing list, certificates of origin and/or certificates of quality of the goods) as opposed to financial documents which refer to documents used for obtaining payment as stated above.³⁸ The specific commercial and financial documents required in each transaction depend on the underlying contract of sale. However the following documents are typical:

(i) *The bill of exchange*: The bill of exchange is often referred to as the draft. This is the financial document most often encountered. In international trade the drawer is normally the seller and the drawee the buyer or his bank. As stated by Wolff, “[A] bill of exchange allows the importer to pay the purchase price at a later point of time while providing the exporter with a negotiable instrument which he can ‘negotiate’ i.e., sell to receive cash immediately.”³⁹ In international trade a bill of exchange can also be documentary or avalised. The avalised bill refers to a time bill with a signature (the aval). It works as a guarantee as the signatory guarantees payment of the bill when it is due.⁴⁰ A documentary bill of exchange, on the other hand, has a bill of lading (and/or other commercial document) attached to it which is only released against acceptance of the bill of exchange.⁴¹ This is the process in the case of documents against acceptance (D/A) documentary collection.⁴²

(ii) *The transport document (bill of lading/air waybill)*: Due to the length of time that goods are in transit in international sale transactions, a bill of lading is used as title

³⁶ URC a 2(a).

³⁷ URC a 2(a).

³⁸ URC a 2(b)(i).

³⁹ Wolff *The Law of Cross-Border Business Transactions Principles, Concepts, Skills* (2013) 166.

⁴⁰ Wolff (n 39) 166.

⁴¹ Wolff (n 39) 166 and Chuah *Law of International Trade: Cross-Border Commercial Transactions* (2013) 233.

⁴² See par 2.2.2 below on D/A method of payment.

document. It also embodies the contract of carriage and is evidence of receipt of the goods.⁴³ The holder of the bill of lading can claim the goods at the port of destination and can also sell goods in transit by simply transferring or endorsing the bill of lading.⁴⁴ In *Sanders Bros v Maclean*⁴⁵ the court stated that

“Cargo at sea while in the hands of a carrier is necessarily incapable of physical delivery. During this period of transit and voyage, the bill of lading by law merchant is universally recognised as its symbol, and the indorsement and delivery of the bill of lading operates as a symbolical delivery of the cargo. Property in the goods passes by such indorsement and delivery of the bill of lading, whenever it is the intention of the parties that property should pass by an actual delivery of the goods.”

Although the air waybill is also a transport document, it is not a document of title. It is not negotiable and only serves as a contract of carriage and evidence of receipt of goods.⁴⁶

- (iii) *Commercial invoice*: This document is used for purposes of the customs and tax required normally by domestic laws. The invoice would normally include the names and addresses of the parties, the date and reference of the buyer’s order and a full description of the goods and purchase price.⁴⁷ The invoice must comply strictly with the terms of the contract and must link properly with other documents. Any discrepancy may cause problems on presentation of the documents.⁴⁸
- (iv) *Insurance document*: This document is normally required in CIF sales, as well as in other sales where it is the duty of the seller to insure the goods in transit.⁴⁹
- (v) *Quality inspection certificate and certificate of origin*: The quality inspection certificate is issued by an independent inspection company to verify that the goods were checked prior to transportation (to assure the quality and quantity of the

⁴³ DiMatteo *International Contracting Law and Practice* (2013) 113.

⁴⁴ Chuah (n 41) 230 and Wolff (n 39) 166.

⁴⁵ (1888) 11 QBD 327 341 per Bowen L.J. For a discussion of the case see Chuah (n 41) 230.

⁴⁶ DiMatteo (n 43) 121.

⁴⁷ Wolff (n 39) 167.

⁴⁸ Murray, Holloway and Timson-Hunt *Schmitthoff’s Export Trade; the Law and Practice of International Trade* (2007) 41 (hereinafter Schmitthoff).

⁴⁹ Wolff (n 39) 167.

shipped goods, and that they were in accordance with the contract of sale).⁵⁰ The certificate of origin is essential to verify the country of origin of the merchandise. It is normally required by customs for compliance purposes.⁵¹

- (vi) *Other documents:* The contract may also require any of several other documents such as packaging and weight list(s).⁵²

There are two main modes of documentary collection namely collection against payment (D/P) and collection against acceptance (D/A).⁵³ The collection instruction will indicate whether the collection of the documents should be against payment or against acceptance.⁵⁴

2.2.1 Documents against payment (D/P)

Under the D/P method, the documents are sent to the presenting or drawee bank with instructions on how to collect payment from the importer. The collecting bank can only release the documents against immediate payment.⁵⁵ In international trade terms, immediate means “no later than the arrival of the goods”.⁵⁶ In the D/P method, if a bill is to be presented it has to be a sight bill.⁵⁷ Once payment is made, the funds will be remitted to the remitting bank to be paid to the seller. However, the seller can request that payment should be made when the documents are first presented. This must be included in the collection instruction. The bank is expected to act only within the ambit of the collection instruction and must do nothing beyond that.⁵⁸ If the collecting bank releases the documents to the buyer contrary to instructions by not first insisting on payment, the bank

⁵⁰ DiMatteo (n 43) 114.

⁵¹ Chuah (n 41) 79-80.

⁵² Wolff (n 39) 165. This list is by no means exhaustive.

⁵³ Wolff (n 39) 174 and URC a 2(a).

⁵⁴ Schmitthoff (n 48) 180 and Bridge (n 35) 258.

⁵⁵ DiMatteo (n 43) 111.

⁵⁶ Credit Suisse *Documentary Credits-Documentary Collections; Greater Security in International Trading* (2008) 85.

⁵⁷ Wolff (n 39) 174.

⁵⁸ URC a 4.

could be liable in damages to the principal for breach of contract. In English law the bank can also potentially be liable for “conversion of the documents”.⁵⁹

In the case of *Midland Bank v Eastcheap Dried Fruit Co*,⁶⁰ the instruction was that the bank should release the documents against payment in cash. The collecting bank released the documents without payment but under a collection note which stated that the documents were released in trust to the buyer only for inspection. The documents were to be returned to the bank if no payment was made. However, the buyer sold the goods. The bank was liable to, and indeed paid the seller and sued the buyer. The court held the buyer liable for breach of contract and conversion of the bill of lading.

In the South African case of *Motani Lounge (Pty) Ltd v Standard Bank of South Africa Ltd*,⁶¹ the collection order provided for the release of documents against payment in cash. However, the collecting bank by agreement with the buyer as its customer released the documents subject to the payment in full within 48 hours or return of the documents. The court held *obiter* that subject to the provisions of the URC, the collecting bank would be liable for any damages which it might cause to the seller by any breach of contract in failing to carry out the mandate it had undertaken. The court further held that if the collecting bank, by breaching the tripartite contract, caused the remitting bank any damages, it would also be liable to the remitting bank for such damages.

2.2.2 Documents against acceptance (D/A) collections (usance collections)

In the case of this type of collection the documents are sent by the principal to the presenting bank and delivered to the drawee (buyer) against acceptance of the time draft. The buyer accordingly undertakes to pay at a future date. Credit is extended by the use of a time draft.⁶² The buyer, in accordance with his acceptance, becomes legally obliged to pay upon presentation of the bill when it becomes due. Although the bank is not bound to pay,

⁵⁹ Schmitthoff (n 48) 182; see also *Calico Printers Association Ltd V Barclays Bank* (1930) 36 Commercial Cases (ComCas) 197 (CA).

⁶⁰ 1962 1 Lloyd's Rep 359.

⁶¹ 1995 2 SA 498.

⁶² DiMatteo (n 43) 111.

the remitting bank may nevertheless discount and or purchase the bill.⁶³ In such instances the bank will finance the exporter at the bank's own risk, with or without recourse, before despatch to the presenting or collecting bank.⁶⁴ The decision of the bank to discount the bill will be based on whether the customer and the drawee are commercially sound, and also on the sale transaction in question.⁶⁵ Where the commercial or financial standing of the drawee is indisputably secure some banks may be prepared to discount the bill without recourse but probably at a higher discounting fee.⁶⁶ Where the discounting was not without recourse, the third party (bank) will have recourse against both the seller (as the indorser and drawer of the bill) and the buyer (as the acceptor of the bill) should the buyer dishonour the bill on maturity.⁶⁷

Forfaiting

To avoid recourse by an endorsee, the bill may be negotiated without recourse to the seller,⁶⁸ a practice known as forfaiting. Forfaiting is accordingly a transaction whereby the seller draws a bill on the buyer and negotiates it to someone else (the forfaiter) without recourse to himself. The forfaiter⁶⁹ basically gives up his right to claim from the seller (drawer and indorser) should the buyer (the drawee and acceptor of the bill) dishonour the bill.⁷⁰ However, should the forfaiter renegotiate the bill, the 'buyer' in the second transaction can proceed against the original seller should the bill be subsequently dishonoured unless there is a specific exclusion clause.⁷¹ Like letters of credit, a forfaiting transaction is independent of the underlying contract of sale.⁷² In a forfaiting transaction, the creditworthiness of the importer is an important factor.⁷³ One of the advantages of forfaiting is that there is no exchange risk. The bill may be drawn in a foreign currency and

⁶³ Gocheva *Trade Finance Infrastructure Development Handbook for Economies in Transition* (2005 UN publications) www.unescap.org/sites.../tipub2374 (19/02/2015) 17-18 and Bridge (n 35) 255.

⁶⁴ Gocheva (n 63) 18.

⁶⁵ Chuah (n 41) 568 par 11-034.

⁶⁶ See Chuah (n 41) 568-569.

⁶⁷ Bills of Exchange Act 34 of 1964, ss 2, 53(1) read with s 55.

⁶⁸ Bridge (n 35) 256.

⁶⁹ The forfaiter is normally the bank, finance house or discount company.

⁷⁰ Schmitthoff (n 48) 262 and Wolff (n 39) 159.

⁷¹ Schmitthoff (n 48) 264.

⁷² Wolff (n 39) 159.

⁷³ Chatterjee (n 10) 85.

therefore the proceeds may be converted at spot rate. However, due to the complex nature of the forfaiting documentation, the administrative costs may be high.⁷⁴

Some remarks on bills of exchange or drafts

A draft⁷⁵ is a written order by one party instructing another party to pay the party giving the order or a third party. Drafts, as negotiable instruments, facilitate international payments through banks. However, it is important to note that the banks as intermediaries do not guarantee performance.⁷⁶ Such drafts are said to offer more flexibility than documentary credits and are transferable.⁷⁷ There are two basic types of drafts: sight drafts and time drafts.

A sight draft, as indicated by its name, is payable on sight. It is normally sent by the seller to the buyer after making a shipment. This process is also facilitated through the parties' banks. The seller's bank will send it to the buyer's bank together with any other documentation that may have been agreed upon such as, for example, the original bill of lading, invoice, certificate of origin, and/or phytosanitary certificate.⁷⁸ The buyer will receive the documents of title to the goods upon honouring the sight draft. There are, however, normally no guarantees regarding the condition of the goods. The only information relates to the quantities, date of shipment and the like, which appears from the documentation.⁷⁹ In the same respect, there is no guarantee that the buyer will pay the draft on presentation. The buyer can refuse to pay the draft. Although this may expose the buyer to a contractual claim by the seller for breach of the contract of sale, such refusal may cause major problems for the seller. The seller would then have to make an alternative arrangement for the shipped goods. He could find a new buyer, dispose of the goods, or arrange that they be shipped back. There is no recourse against the banks since their responsibility ends with the exchange of money for documents.⁸⁰

⁷⁴ Chatterjee (n 10) 86.

⁷⁵ Also known as the bill of exchange.

⁷⁶ <http://go.worldbank.org/R79F6RWVV0> (10/05/2014) 1 page only; see also DiMatteo (n 43) 110.

⁷⁷ Benjamin (n 32) 1998.

⁷⁸ Adodo (n 13) 6- 7 and Worldbank.org (n 76).

⁷⁹ Worldbank.org (n 76).

⁸⁰ Adodo (n 13) 6 - 7.

A time draft, or date draft, is similar to a sight draft except that payment is not immediate but after a specified time or on a certain date after the buyer accepts the draft and receives the goods.⁸¹ Upon accepting the draft, the buyer has a contractual obligation to pay as directed on the draft. In the same way, the bank does not guarantee payment and the buyer can put off payment by not accepting the draft on time. In most countries an accepted time draft is easier to enforce than an unpaid invoice.⁸² This type of draft is most frequently used in international sales due to the fact that it allows buyers to purchase goods and defer payment until the maturity date (hence allowing credit) while at the same time ensuring that the exporter ships the goods to the agreed destination and is paid on maturity of the draft (or earlier if he discounts the draft before maturity).⁸³

2.2.3 Acceptance with documents against payment

This third type of collection is the most uncommon. It is more theoretical than practical.⁸⁴ The exporter gives instructions that the importer, on presentation of the documents, shall accept a bill of exchange drawn at, say, 60 or 90 days after sight. The documents may not, however, be released to the importer until the bill has been paid. Until then the goods must be kept in a warehouse.⁸⁵ This method of payment is also provided for by the URC under article 2(a) (3).⁸⁶

2.2.4 Concluding remarks

In an environment where there is constant conflict between the economic interests of the exporter and importer documentary collections, like documentary credits, are important payment methods. They provide some level of security of payment for the seller. This is because the seller's bank controls the documents of title during collection. At the same time the importer is offered some security in that he can inspect the documents before making payment or accepting the bill of exchange.⁸⁷ If the importer is satisfied, his objectives of

⁸¹ Adodo (n 13) 7.

⁸² Worldbank.org (n 76).

⁸³ Adodo (n 13) 6.

⁸⁴ Credit Suisse (n 56) 85.

⁸⁵ Worldbank.org (n 76).

⁸⁶ A 2(a) (3).

⁸⁷ Maduegbuna (n 34) 656.

assurance of quality and quantity are partially satisfied.⁸⁸ Therefore, documentary collections serve to provide the parties with a compromise between payment on open account and payment in advance for the settlement of their transactions.⁸⁹

3. The legal framework of documentary collections

The International Chamber of Commerce's Uniform Rules for Collection (URC 522) form the basis for the processing of documentary collections. The rules regulate the essential rights and responsibilities of the parties to the agreement.⁹⁰

3.1 Parties to a collection

There are generally five parties to a collection in terms of the URC 522.

- *The principal*: This is the party giving the collection instruction to the bank (also referred to as the seller or exporter).
- *Remitting bank*: This is the bank that the principal mandates to carry out the collection on its behalf.⁹¹
- *Collecting bank*: This is any bank other than the remitting bank (located in the importer's country) involved in obtaining payment or acceptance from the buyer.
- *Presenting bank*: This is usually the buyer's bank. It is the collecting bank making presentation to the drawee/importer.⁹²
- *The drawee*: This is the party presented with documents for either acceptance or payment in accordance with the collection instruction. This will be the buyer.⁹³

According to Moorcroft however, the drawee is not a party to the collection; this is despite it being listed under 'parties to a collection' in article 3(b) of the URC 522.⁹⁴ Although the drawee eventually becomes involved in the collection process, he is not one of the initial parties.⁹⁵ According to Maduegbuna "[t]he importer is not a party to the contract of

⁸⁸ Maduegbuna (n 34) 656-657.

⁸⁹ Maduegbuna (n 34) 650.

⁹⁰ Maduegbuna (n 34) 651.

⁹¹ Van Niekerk and Schulze (n 8) 251.

⁹² URC a 3(a).

⁹³ URC a 3(b); See also Chatterjee (n 10) 149 and Maduegbuna (n 34) 653.

⁹⁴ Moorcroft (n 28) par 32.2.

⁹⁵ ICC Uniform Rules for Collection –A Commentary (n 30) 11.

collection between the exporter and its bank, and the remedies of the holder (such as the exporter) remain on the bill and not on the collection transaction.”⁹⁶

3.2 Stages of documentary collections

The whole process, extending from the first contact between the importer and exporter, ie the conclusion of the contract of sale, to the completion of the transaction, can involve many separate steps. Documentary collection generally has three stages:

- *Establishing the terms of collection*: This is actually at the conclusion or negotiation of the sale terms. The exporter stipulates the terms of payment in his offer or agrees on them with the buyer in the contract of sale.⁹⁷
- *Collection order and transmission of documents*: Once the sale contract has been concluded and the payment method agreed upon, the exporter dispatches the goods directly to the address of the buyer or to the presenting bank. The latter is subject to article 10 of the URC 522.⁹⁸ At the same time, the principal prepares all the necessary documents (invoice, bill of lading, insurance certificate, certificate of origin, etc) and sends them to his own bank (the remitting bank) together with the collection order. The remitting bank then sends the documents, together with the necessary instructions, to the collecting or presenting bank.⁹⁹
- *Presentation of documents to drawee and settlement*: The presenting and or collecting bank informs the buyer of the arrival of the documents and terms of their release. Depending on whether the documents are to be released D/P or D/A,¹⁰⁰ the buyer makes payment, or accepts the bill of exchange, and in return receives the documents. The presenting bank then has to transfer the collected amount to the remitting bank, which credits it to the exporter’s account.¹⁰¹

⁹⁶ Maduegbuna (n 34) 653.

⁹⁷ Credit Suisse (n 56) 84.

⁹⁸ “Goods should not be despatched directly to the address of a bank or consigned to or to the order of a bank without prior agreement on the part of that bank. Nevertheless, in the event that goods are despatched directly to the address of a bank or consigned to or to the order of a bank for release to a drawee against payment or acceptance or upon other terms and conditions without prior agreement on the part of that bank, such bank shall have no obligation to take delivery of the goods, which remain at the risk and responsibility of the party despatching the goods.”

⁹⁹ Van Niekerk and Schulze (n 8) 251 and Adodo (n 13) 7 par 1.05.

¹⁰⁰ Discussed in par 2 above.

¹⁰¹ DiMatteo (n 43) 111 par 4.01.

The process of documentary collection is relatively straightforward. However, it depends heavily on all the parties, especially the banks, performing their function properly. As stated by Davies and Snyder, “international uniformity is very important in this context as all the banks in all the countries must understand and perform their obligations in the same way.”¹⁰²

Below is a diagram by Davies and Snyder¹⁰³ showing the typical movement of documents and money in a documentary collection.

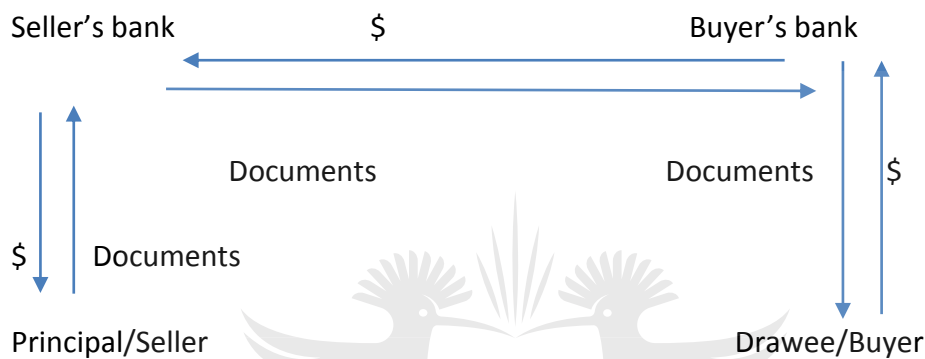


Figure 1 Movement of documents and money under documentary collection

3.3 Uniform Rules for Collection

The URC were first published in 1956 to standardize the collection practice, and have since been revised three times.¹⁰⁴ The current URC 522 have been in force since 1 January 1996 and are established very well internationally.¹⁰⁵ Like the ICC's Incoterms, the application of URC depend on the clear consensus of the parties. Banks can differentiate between a collection made up of the actual documents and the instruction from the party who originates the collection.¹⁰⁶ Therefore, every collection has to be accompanied by such a collection instruction and the URC must be incorporated in those instructions given by the

¹⁰² Davies and Snyder *International Transactions in Goods Global Sales in Comparative Context* (2014) 273.

¹⁰³ Davies and Snyder (n 102) 273.

¹⁰⁴ In 1967, 1978 and 1995; see Wolff (n 39) 175.

¹⁰⁵ Moorcroft (n 28) par 32.2.

¹⁰⁶ URC 522 Commentary (n 30) 8.

principal, and communicated to all the parties in the documentary chain.¹⁰⁷ Once the URC are incorporated into the text of the instruction, they create a privity of contract between the seller, the remitting bank and the collecting bank and/or presenting bank unless that would be contrary to local law or expressly excluded by the parties.¹⁰⁸ Without express incorporation of the rules into the instruction, they will not be applied to that particular collection unless it can be established that there are rules of trade usage that parties to the collection ought to have known.¹⁰⁹ In the case of *Harlow and Jones Ltd and American Express Bank Ltd*¹¹⁰ the court held that “the URC applied to the presentation of discrepant documents under a letter of credit even though not expressly incorporated in the collection instrument because of the invariable practice of the banks”.¹¹¹ This was a case in which the discrepant documents under a letter of credit were sent on ‘collection terms’. The defendant released the documents to the sub-purchaser and the bill of exchange was subsequently dishonoured. The defendant-issuer argued that ‘on a collection’ basis meant that the documents were to be sent to the issuing bank outside of the letter of credit; that is, the issuing bank was being authorized to act simply as a collecting agent without any further responsibility for payment, and was therefore not liable for releasing the documents against acceptance of the bills. A further argument, however, was that the URC¹¹² did not apply to the collection since they were not specifically incorporated in the collection instruction. The court held, *obiter*, that the URC did not have to be specifically incorporated in this collection because all the banks in England subscribed to the rules. It was therefore beyond argument that the defendant did too, and for this reason the URC would apply.¹¹³

It is important to note that the mere fact that a collection and collection instruction have been sent and received by the remitting bank does not *per se* create obligations on the party receiving the collection and/or instruction. Article 1(b)¹¹⁴ clearly states that “Banks shall have no obligation to handle either a collection or any collection instruction or

¹⁰⁷ URC 522-A commentary (n 30) and Moorcroft (n 28) par 32.2.

¹⁰⁸ *Motani Lounge v Standard Bank of SA Ltd* (n 65) 498; see also a 1 (a) of the URC.

¹⁰⁹ Mckendrick *Goode on Commercial Law* (2010) 1054 note 10.

¹¹⁰ 1990 2 Lloyd’s Rep 343.

¹¹¹ Brindle and Cox *The Law of Bank Payments* (2010) 746.

¹¹² 1978 version.

¹¹³ See <http://www.docstoc.com/docs/8632000/Harlow-and-jones-v-American-Express-Bank-and-Creditanstalt-Bankverein.doc> (21/05/2015).

¹¹⁴ URC.

subsequent related instructions”. Even though the instructed bank has an option to take or refuse the instruction, it is obligated to advise the sender if it is unable to handle the entire collection or any part of the instruction.¹¹⁵ Failure to advise in that regard may have dire consequences on the bank at a later stage.¹¹⁶ This is because consent to carry out the instruction will be implied.¹¹⁷

The URC 522 have 26 articles. It is structured under the following headings:

- A. General provisions and definitions (Art1-3);
- B. Form and structure of collections (art 4);
- C. Form of presentation (Art 5-8);
- D. Liabilities and responsibilities (Art 9-15);
- E. Payment (Art 16-19);
- F. Interest charges and expenses (Art 20-21); and
- G. Other provisions (Art 22-26).¹¹⁸

3.3.1 *The collection order/instruction*

The collection instruction is the material term of the collection. This means that everything must take place according to the collection instruction. The instruction has to include and provide for every stage of the collection, from the details of the bank giving the instruction to the currency and instruction in the event of the non-payment. The bank is expected to act only within the ambit of the collection instruction and nothing beyond that.¹¹⁹ If, for example, the collecting bank releases the documents to the buyer contrary to instructions by either not insisting on payment or the acceptance of a time bill, the bank could be liable in damages to the principal for breach of contract¹²⁰ (and in accordance with English law potentially also for “conversion of the documents”).¹²¹

¹¹⁵ URC a 1 (c); see also ICC’s Opinion R382 - 1998/99 discussed below.

¹¹⁶ Chatterjee (n 10) 148; see also *DOCDEX Decision No.283* discussed below.

¹¹⁷ Benjamin (2014) (n 32) 1999.

¹¹⁸ Chatterjee (n 10) 148.

¹¹⁹ URC a 4; see also *DOCDEX decision 283* discussed below.

¹²⁰ See the *Motani Lounge* case (n 61) discussed in par 2.2.1 above.

¹²¹ Schmitthoff (n 48) 182; see also the *Calico Printers* case (n 59) 197 and *Midland Bank v Eastcheap Dried Fruit Co* 1962 1 Lloyd’s Rep 359.

It is important to note that even though the presenting bank is normally the buyer's bank, it acts as an agent for the principal (under English law) in a documentary process.¹²² The position in South African law is such that the presenting bank "acts as mandatary of the remitting bank (or of the collecting bank, if a collecting bank is involved) and therefore as a sub-mandatary of the principal".¹²³

In an Official Opinion¹²⁴ the ICC had to make a determination regarding: (a) remedies for apparent failures by the presenting bank to act within its mandate as per the collection instruction; and (b) the release of goods against a bill of lading not properly endorsed, and the enforceability of the accepted draft.

The facts were that the original shipping documents were delivered to Bank A (the remitting bank) in Country I with instructions that they be forwarded to Bank U (the collecting bank) in Country S. They were to be delivered to the drawee against acceptance of the relevant bills of exchange payable at 90 days after the date of the release of the bill of lading. The schedule of the remitting bank requested: D/A collection; acceptance of receipt (by airmail); and use of telex to advise of acceptance. The collecting bank was specifically requested to advise immediately if they could not handle the collection instruction.

The collecting bank did not comply with these instructions and based on the drawee's instructions transferred the documents to a third bank, Bank B, under a simple covering letter that did not even list the documents.¹²⁵ The remitting bank did not authorise the use or choice of the presenting bank. Furthermore, the collecting bank took an unreasonably long time to advise the fate of the documents to the remitting bank. The advice was only received from Bank U nine months later, after a number of tracers and reminders, contrary to the collection instructions. Bank B (the presenting bank) claimed that it did not receive the first bill of exchange and one original bill of lading. The drawee did not collect the shipping documents nor did it accept the bill of exchange.

¹²² Davies and Snyder (n 102) 274.

¹²³ Van Niekerk and Schulze (n 8) 251.

¹²⁴ ICC Official Opinion R383 - 1998/99.

¹²⁵ Official Opinion R383 - 1998/99.

However, the shipping company had released the cargo against the missing bill of lading which had not been properly discharged by either the collecting bank or the presenting bank (the bill of lading was made out in favour of Bank A and endorsed to Bank U). Furthermore the relevant bills of lading against which delivery was made contained on the first merely a seal of Bank U and on the second neither the seal nor the signature of Bank U.

The collecting bank stated that after obtaining the acceptance of the drawee on the bill of exchange, the documents were transferred to Bank B (presenting bank). Bank B indicated that it had retained a photocopy of this bill of exchange. It was alleged that the drawee was a fraudster and had most likely stolen the original bill of lading, and Bank U was merely trying to justify its stand. Bank U insisted that it complied with the provisions of the URC.

The issues for determination by the ICC were inter alia:

- a) Whether Bank U (the collecting bank) was liable for the loss suffered; and
- b) What, if any, remedies were available through the ICC mechanism that would provide adequate relief in this matter.

In reaching its decision the ICC referred to several articles of the URC: sub-article 1(c) provides that if a bank elects for any reason not to handle a collection it must advise the party from which it received the collection or instructions without delay. Sub-article (f) allows the collecting bank (Bank U) to utilize the services of a presenting bank of its choice. Sub-article 11(b) states: "Banks assume no liability or responsibility should the instructions they transmit not be carried out, even if they themselves had taken the initiative in the choice of such other bank(s)". Sub-article 12(a) provides: "Banks must determine that the documents received appear to be as listed in the collection instruction and must advise by telecommunication or, if that is not possible, by other expeditious means, without delay, the party from whom the collection instruction was received of any documents missing, or found to be other than listed. Banks have no further obligation in this respect."

The ICC concluded that the collecting bank was within the scope of the URC in electing Bank B as the "presenting bank". There was no requirement in the URC for this to be conveyed to

Bank A (the remitting bank). Furthermore it was the responsibility of Bank U to forward (and list) the documents as received from Bank A. Bank B should have insisted on a list of documents that it should have received, or should have advised Bank U of the documents actually received.

On the issue of the shipping company having released the cargo against one original bill of lading (instead of two), it was alleged that one of the original bills of lading was not properly endorsed by Bank U, and therefore the ICC was of the opinion that the release of goods should not have occurred. It was also not clear why the documents were still sent to Bank B if the draft had been properly accepted at the counters of Bank U.

The ICC's opinion on this issue was that the remitting bank, the collecting bank and the shipping company failed to act within their mandates in accordance with the collection order. It held, however, that the appropriate remedies would have to be determined by local law.

According to Schmitthoff, it is not always easy for the collecting bank to follow the collection instruction to the letter.¹²⁶ There are times when the collecting bank finds itself in a dilemma. It is aware that releasing the documents without insisting on the performance as set out in the collection order, especially the bill of lading, would be a major risk. On the other hand, the buyer may be the customer of the bank. Even if the buyer indemnifies the bank, the bank would not be protected if the buyer were to become insolvent.

Where the bank is tempted to release the documents prematurely under a trust receipt (which evidences the bank's ownership), a genuine trust is a prerequisite.¹²⁷ The trustee is the buyer and the beneficiary is the collecting or presenting bank. The bill of lading or the goods (or proceeds from the sale) become the trust property. The buyer hereby undertakes to pay the bank from the proceeds of the sale. Where the buyer is not allowed to sell the goods, he may warehouse the goods in the name of the bank. The warehouse receipt is kept

¹²⁶ Schmitthoff (n 48) 182.

¹²⁷ Schmitthoff (n 48) 182.

by the bank to be released upon payment.¹²⁸ The benefit to the buyer is that he gets to examine the goods and the documents before payment or acceptance. However, should anything go wrong in this arrangement the bank is liable unless the seller had consented to this arrangement.¹²⁹ It is normal practice in such cases that the collecting bank concludes a contract with its customer that will afford it a remedy against its customer should the customer abuse that privilege and breach their agreement.¹³⁰ In the case of *Motani v Standard Bank Ltd*¹³¹ the applicant and respondents signed a standard contract upon which the bank would assist the applicants in importing goods from foreign suppliers on, *inter alia*, a D/P collection basis. In terms of that agreement the bank agreed to release documents to the applicant without payment or acceptance on condition that the applicant would return them within 48 hours or make payment in full, failing which the bank was authorized to debit the applicant's account with the amount owing. *In casu* the applicant failed to return the documents within the agreed time and/or to make the required payment. The bank ultimately debited the customer's account with the amount owing and that action was upheld by the court.

It is important to note also that if the bank cannot carry out the instruction or take the collection it is under an obligation to advise the sender in that regard. Furthermore it has the discretion to return the documents to the sender without any further action.¹³² In a *DOCDEX Decision*¹³³ the ICC was requested to make a decision and interpretation in terms of articles 1(c), 1(a), and 4(a)(i) of the URC. The principal through the remitting bank (initiator) sent documents for collection under the URC. The collection instruction stated that the documents were to be released against payment. The initiator claimed that the respondent (collecting bank) failed to follow the collection instruction in that the collecting bank failed to remit the payment to the remitting bank. Furthermore the collecting bank released the collection documents to the drawee without payment and failed to return the collection documents to the remitting bank (which it was supposed to if it could not carry out the instruction). The respondent argued that payment relating to the goods covered by the

¹²⁸ Schmitthoff (n 48) 182; *Calico Printers association Ltd v Barclays Bank* (1930)36 Com case 197.

¹²⁹ Schmitthoff (n 48) 182.

¹³⁰ *Motani v Standard Bank* (n 61) 510 par c.

¹³¹ 1995 2 SA 498 discussed in par 2.2.1 above.

¹³² A commentary URC 522 (n 30) 9.

¹³³ No 283.

collection was already made to the principal in advance due to the accepted usage between the contracting parties.

The issues for determination were, inter alia, whether the collecting bank was liable to pay the amount of the presented documents, and, furthermore, whether the collecting bank, by accepting the collection received, had agreed to perform the collection in accordance with the URC.

The ICC applied the provisions of articles 1(c), 1(a), and 4(a)(i) and concluded that by accepting the collection instruction received,¹³⁴ the collecting bank agreed to perform the collection in accordance with the URC and was only permitted to act upon the instructions given in the collection instruction. Therefore, by not returning the documents or by releasing the documents without payment, the respondent acted contrary to the collection instructions and contrary to the international banking practice. The respondent was held to be liable for the payment plus interest and costs.

In terms of the URC the collection instruction should also state the full address of the drawee or the domicile at which the presentation is to be made. In the event the incorrect address is provided, the collecting bank is not responsible for any consequential delay caused by the incomplete or incorrect address having been provided.¹³⁵

3.3.2 Form and presentation

In terms of article 5 of the URC, presentation refers to the process in terms of which the presenting bank makes the listed documents available to the party named in the collection instruction.¹³⁶ The collection instruction must also state the time within which presentation must be made, and the presenting bank is under an obligation to make presentation as instructed. However the use of the words “first, prompt, immediate” or any similar terms is

¹³⁴ Since they did not advise the sender that they were unable to handle the collection.

¹³⁵ A 4 and 14 URC; see also DOCDEX decision R61/7A546.

¹³⁶ Wolff (n 39) 173.

prohibited where they were meant to indicate the urgency of the presentation. Where such terms are used, the banks will disregard them.¹³⁷

The documents should be presented to the drawee in the form received from the remitting bank. Banks cannot add or remove anything with the exception of affixing stamps, making such endorsements as may be necessary or placing rubber stamps and/or any identifying marks customarily required for the collection process.¹³⁸ Unlike with documentary credits, the bank is not obligated to check the conformity of the documents. The banks just have to act in good faith and exercise reasonable care.¹³⁹

The URC provide that the remitting bank must use the bank nominated by the seller as the collecting bank, but where the principal did not nominate the collecting bank, the remitting bank may nominate the bank of its choice in the country of presentation and or payment.¹⁴⁰ Furthermore where the remitting bank did not nominate the presenting bank, the collecting bank may use the bank of its choice. In such cases, the collecting bank is under no obligation to inform the remitting bank of its choice of presenting bank.¹⁴¹ It cannot, however, be made liable for any errors on the part of the bank selected. It is merely obliged to make its choice with reasonable care and to pass on the correct instructions.¹⁴²

3.4. Settlement/ dispute resolution

The distribution of risk in documentary collections, as already stated, is such that the seller will part with the commodity without knowing whether payment will be effected. On the other hand, the buyer is faced with the risks of advance payment. This is because he is obligated to make payment or acceptance when he takes up the documents even if he has not received the goods or checked whether they comply with the terms of their contract.¹⁴³

In the event the buyer fails to pay due to insolvency or any other reason, the seller will be faced with imminent loss and may be forced to attempt enforcing the contract in a foreign

¹³⁷ URC a 5(b). See also Chatterjee (n 10) 151; Van Niekerk and Schulze (n 8) 253; and Moorcroft (n 28) par 32.3 note 27.

¹³⁸ URC a 5(c).

¹³⁹ Chuah (n 41) 571.

¹⁴⁰ Moorcroft (n 28) par 32.2 and Benjamin (n 32) 2000.

¹⁴¹ URC a 5(f). See also the ICC Official Opinion R383 - 1998/99 discussed par 3.3.1 above (n 124).

¹⁴² URC a 11.

¹⁴³ Credit Suisse (n 56) 81.

jurisdiction subject to foreign law. Even if the seller succeeds in its claim for damages, the amount is rarely enough. In the case of *British Columbia Saw-mill Co v Nettleship*¹⁴⁴ the court held that a failure to pay an acceptance at maturity may cause the destruction of the creditor's trade. The debtor may know that inevitable ruin will be the result of non-acceptance or non-payment. However, the measure of damages is never the actual damage sustained.¹⁴⁵ Also, the buyer after acceptance and/or payment may still claim damages for breach of contract if the goods are not up to standard.¹⁴⁶ Since the collection of documents is independent of the underlying sale transaction, this matter is left to the national court with jurisdiction to decide using the applicable law of the contract.¹⁴⁷

3.4.1 Dispute resolution under the International Chamber of Commerce

The ICC has set up a number of ways for settlement of disputes where there is a disagreement between the parties regarding interpretation of definitions or guidelines set up by the ICC. This is with respect to either documentary credits (UCP), documentary collections (URC) or demand guarantees (URDG).¹⁴⁸ The most convenient and cheapest method is negotiation between the parties to reach an amicable solution.

If the parties fail to reach a compromise litigation or arbitration may follow. However such cases take a long time to settle and can be expensive. Against this background the ICC has set up an instrument and rules to solve disputes in a relatively amicable manner in a similar way to that in a court of arbitration.¹⁴⁹ The initiator can apply to the ICC for a DOCDEX decision.¹⁵⁰ The counterparty receives a copy of the application and may state its position in reply (but it is not a rule that it has to reply).¹⁵¹ For example, in one such decision discussed in detail above,¹⁵² the initiator claimed that the respondent was in breach of the collection instruction to release the documents against payment. The respondent replied that the

¹⁴⁴ (1868) LR 3 CP 499 506.

¹⁴⁵ See Adodo (n 13) 6 note 1.

¹⁴⁶ Van Niekerk and Schulze (n 8) 252.

¹⁴⁷ McKendrick (n 109) 517. See also Chuah (n 41) 571.

¹⁴⁸ Credit Suisse (n 56) 11.

¹⁴⁹ The ICC Rules for Documentary Instruments Dispute Resolution Expertise (ICC DOCDEX RULES) (1997).

¹⁵⁰ See for example *DOCDEX Decision R614/7A546* discussed above.

¹⁵¹ See a 3 DOCDEX Rules.

¹⁵² *DOCDEX Decision 283*.

principal was paid in advance as a result of trade usage between the principal and the drawee.

The panel of judges is made up of three people selected from a list of experts in the International Chamber of Commerce's Banking Commission.¹⁵³ The experts have to make a declaration of impartiality before sitting as judges. The process normally takes about three months from the arrival of the application at the International Chamber of Commerce to the issue of a DOCDEX decision reached collectively by the experts.¹⁵⁴

In one such decision¹⁵⁵ the initiator approached the ICC where the principal (initiator) had entrusted the remitting bank to handle various documentary collections. The remitting bank presented the documents and the collection instruction to the presenting bank. The collection instruction stated that documents should be released against payment; however, there was mention of partial payment being acceptable by the remitting bank (this was not included in the collection instruction). The collection was accepted by the presenting bank. However, the documents were released without full payment contrary to the collection instruction. The unanimous decision of the appointed experts was that the presenting bank was only entitled to release the documents against full payment and was therefore liable. In applying article 19 (b) of the URC, it was stated that partial payments would only be accepted if specifically authorised in the collection instruction.¹⁵⁶

It is important to note that a DOCDEX decision is not binding on the parties unless they agree to be bound.¹⁵⁷ However, as stated by Thomas Song, "the decision represents a reasoned analysis and conclusion by experts in the field, and therefore is regarded by the courts as persuasive authority on the issues based on reasonableness and international standard practice."¹⁵⁸ DOCDEX is considered by the ICC as the "speedy and reliable dispute

¹⁵³ ICC DOCDEX Rules a 1.3.

¹⁵⁴ Credit Suisse (n 56) 11.

¹⁵⁵ *DOCDEX Decision No.306*.

¹⁵⁶ *Decision No.306* (n 155).

¹⁵⁷ DOCDEX RULES a 1.4; Jimenez *Guide to Export-Import Basics ICC publication 641* (2003) 61(hereinafter ICC publication 641) and Song "Sectoral dispute resolution in international banking (documentary credit dispute expertise: DOCDEX)" 2013-2014 *Arizona Journal of International and Comparative Law* 529 533.

¹⁵⁸ Song (n 157) 533.

settlement mechanism providing for a document-based expert decision... scrutinized by the technical adviser of the ICC Banking Commission and issued by the Centre for Expertise.”¹⁵⁹ The general content and interpretation of the ICC uniform rules is based on the fact that their function is to serve as rules of banking practice not rules of law.¹⁶⁰ Although it has no official legal status, the purpose of the URC is to ensure the required international uniformity of the governing rules and that the documentary collection is operated according to an identifiable and generally accepted system.¹⁶¹

In another opinion¹⁶² the documents (three bills of lading) were sent to a bank in Country I for collection on D/P basis. The collecting bank did not advise of the fate of the documents despite repeated reminders to the party and the bank. The delivery orders against all the three bill of lading were taken by manipulated discharged bills of lading. The matter was brought to the notice of the bank's head office in Country I. The collecting bank responded that documents were stolen from its branch and were used in the delivery of the goods, without its permission, by false signatures and stamps. It denied any liability or responsibility. The principal was only informed about the theft of the documents six months later.

The ICC had to address a query regarding the responsibilities of the collecting bank to inform the remitting bank promptly when documents are stolen from one of its branches. The issue was whether the collecting bank is absolved of its responsibilities under a collection instruction if the documents are stolen and used in taking delivery of the goods.

The ICC in reaching its decision referred to article 1 of the URC which provides that "[i]f a bank elects, for any reason, not to handle a collection or any related instructions received by it, it must advise the party from whom it received the collection or the instructions by telecommunication or, if that is not possible, by other expeditious means, without delay". Other articles that featured were article 9 which states that banks are to act in good faith

¹⁵⁹ Guide to Export-Import Basics (n 157) 61.

¹⁶⁰ Goode "Abstract payment undertakings and the rules of the International Chamber of Commerce" 39 *Saint Louis University Law Journal* 725, 727.

¹⁶¹ Chatterjee (n10) 159. See also Davies and Snyder (n 102) 273.

¹⁶² ICC's Official Opinion R382 - 1998/99.

and exercise reasonable care, and article 26 which requires of the collecting bank to inform the remitting bank of payment, acceptance or non-payment/acceptance without delay.

The ICC concluded that the collecting bank failed to comply with its responsibilities in terms of the above-mentioned articles. It failed to keep the documents under strict control and at the disposal of the remitting bank. It was held, however, that even though the collecting bank had not complied with the requirements of the URC, this issue as to remedies was one to be resolved by local law.¹⁶³

4. The duties of banks in documentary collections under the URC

The specific duties of the bank(s) in documentary collections are covered in part D of the URC 522 titled “Liabilities and Responsibilities” (Articles 9-15). Article 4 of URC also lists the role of the bank(s) in the documentary collection process. As already stated the role of banks in documentary collection is merely that of a ‘collecting agent’. The bank or banks party to the collection are indemnified from doing anything outside of the collection instruction. Unlike in the case of letters of credit, they do not have any duty to ensure any conformity of documents, nor do they guarantee performance. All that is expected from the banks is good faith and reasonable care.¹⁶⁴ The issue of good faith and reasonable care is for the national court which has jurisdiction to decide by applying the relevant law of contract.¹⁶⁵ As in the case of documentary credits, banks bear no responsibility regarding presentation of fraudulent documents as long as there is no fraud on the part of the bank. They have no responsibility to ensure genuineness of the documents or the correctness of the description, weight, quality etc of the goods, or whether the goods represented by the documents in fact exist.¹⁶⁶ Considering that the nature of the collection is such that the parties cannot lift the veil of the documents and suspend payment because of disputes concerning the quality of goods or other alleged breaches of contract by either party,¹⁶⁷ the question arises whether the bank can be interdicted from making payments to the principal where it is clear that there is fraud on the documents presented. The case of *ZZ Enterprises*

¹⁶³ Opinion R 382 (n 162).

¹⁶⁴ URC a 9. See also Benjamin (n 32) 1999.

¹⁶⁵ Chuah (n 41) 571.

¹⁶⁶ See URC a 13. See also Bridge (n 35) 258.

¹⁶⁷ *Fieties Letters of Credit - the Fraud Exception: a Time for Conformity* (2013 dissertation UWC) 40.

*v Standard Bank of South Africa Ltd*¹⁶⁸ involved a dispute in connection with an earlier (the 1978) version of the URC. ZZ Enterprises lodged an application in court for an interdict prohibiting Standard Bank from paying the remitting bank under a documentary collection. The ground of the application was fraud on the part of the beneficiary.

The court held that in appropriate circumstances there is no reason why the fraud exception (as applied in documentary credits) would not be applicable in South African law. The court was of the opinion that to invoke the fraud exception, there must be at least a *prima facie* case of fraud. The court found in the present case the alleged facts before it indicated a breach of contract and not fraud.¹⁶⁹ The application for an interdict failed, *inter alia*, because ZZ Enterprises could not make out a *prima facie* case of fraud.¹⁷⁰ Therefore, in appropriate cases, it would seem fraud can be a ground for stopping payment under a collection.

However, failure to act in accordance with the mandate (collection instructions) attracts liability on the part of the bank(s).¹⁷¹ According to Moorcroft,¹⁷² the only responsibility that banks have regarding the documents is to determine whether the documents are *prima facie* as listed in the collection instruction. Where there is a discrepancy they are obligated to inform the party who sent the documents immediately. However, where the remitting bank did not list the documents, they cannot dispute the type or number of documents received by the collecting bank.¹⁷³ Since banks deal only with documents and not in goods, merchandise should never be sent to the address of the bank without the prior consent of the bank. Where there is no agreement, the bank will have no obligation to insure or store the goods, nor will it be responsible for the condition or fate of the goods.¹⁷⁴ Furthermore, the banks bear no such responsibility even where they take action for the protection of the goods. The collecting bank will be expected to advise the instructing bank as soon as possible of any steps taken. The only time the seller should absolutely send goods to the

¹⁶⁸ 1995 CLD 769 (W).

¹⁶⁹ *ZZ Enterprises v Standard Bank* 1995 CLD 769 (W) 783.

¹⁷⁰ For a discussion of the case see Oelofse "Developments in the law of documentary letters of credit" 1996 *SA Merc LJ* 289 310.

¹⁷¹ See cases discussed in par 3.

¹⁷² (n28) par 32.4.

¹⁷³ ICC's opinion R382 - 1998/99 (n 162).

¹⁷⁴ URC a 10.

bank is if a shipment is by air freight.¹⁷⁵ An air waybill (AWB) is a straight consignment and cannot be negotiated. The buyer does not need the AWB to collect the goods. The importer can obtain the goods without paying for them.¹⁷⁶ Therefore, the best way to avoid this is to dispatch the AWB to the presenting or collecting bank. This is because the goods will only be released after the buyer's bank issues an air release to the carrier and that can only happen after the buyer has made payment or accepted the draft. Because the bill of lading for ocean freight is a title document for the goods and can be a negotiable document, whereas the comparable airway bill is neither negotiable nor a document of title, it has been argued that documentary collections are only viable for ocean shipments.¹⁷⁷

The rules provide for exclusion of liability on the part of the banks. A bank (the remitting bank) instructing another (the collecting or presenting bank) to perform services would not be liable if its instruction cannot be properly executed or at all. The principal bears that risk.¹⁷⁸ The case of *Grosvenor Casinos Ltd v National Bank of Abu Dhabi*¹⁷⁹ involves a clean collection. It is relevant for purposes of dealing with the interpretation of the URC regarding documentary collections. Its importance is to be found in the comments made by the court regarding documentary collections and the URC, particularly article 11. The dispute arose as a result of gambling by one Mr Al-Reyaysa. Cheques covering most of the losses were honoured, but two cheques, were dishonoured. These cheques were passed by the casino for collection to the National Westminster Bank as remitting bank, which remitted them to NBAD as collecting bank under the terms of a collection instruction incorporating the URC. Judgment in default against Mr. AlReyaysa was unsatisfied. The casino sought to engage the liability of NBAD (collecting bank), alleging both deceit and breach of contract. It was stated in an *obiter dictum* that no claim could be brought against National Westminster Bank (remitting bank) since the URC provide that the involvement of any collecting bank, even one selected by the remitting bank, is at the risk of the principal.¹⁸⁰

¹⁷⁵ Anonymous <http://www.creditmanagementworld.com/index.html> (10/05/2014) one page only.

¹⁷⁶ DiMatteo (n 43) 121.

¹⁷⁷ DiMatteo (n 43)110; Worldbank.org (n 76) unnumbered.

¹⁷⁸ Brindle *and* Cox (n 111) 746; URC a11.

¹⁷⁹ 2008 EWHC 511 (Comm); 2008 2 Lloyd's Rep 1.

¹⁸⁰ Bennett "Bank collections, privity of contract, and third party losses" 2008 *The Law Quarterly Review (LQR)* 532 533.

Also of interest in this decision is that the court held that the URC do not create privity of contract between a customer of the remitting bank and the collecting bank. On this point, the defendant bank had argued that the collecting bank in this case was not party to the collection because it was the drawee and couldn't have been the collecting bank under article 3(a) (iii). The court dismissed this on the ground that there is nothing in the URC that made the "concept of drawee and collecting bank mutually exclusive". Being a drawee does not automatically disqualify it from being a collecting bank under article 3(a) (iii). The court concluded, however, that the URC do not alter the common law position by creating privity of contract between all the parties of the collection.¹⁸¹ The court's reasons for the decision have been succinctly summarised as follows:

- The collection of cheques and other documents was conducted between banks, specifically between the remitting bank and the collecting bank, in a highly structured and formalised manner, and the URC was intended to reflect and support that approach and so far as possible achieve uniformity of collection practice across international boundaries. The URC was intended to govern existing contractual relationships and not to create such relationships where they did not otherwise exist.
- There was nothing in the articles of the URC which led to a contrary conclusion. In fact, Article 4 militated strongly against the claimant's contentions. Except for some specific provision in the collection instruction entitling a collecting bank to take instructions from a principal (which might well be an example of the specific creation in a particular case of a contract between them), completely absent from the collection instruction in the present case which did not even identify or mention the principal, the collecting bank had to disregard any instructions other than from the remitting bank from which it received the collection. The judge thought it would be a strange contract indeed if the collecting bank could not act upon instructions from the other party to the contract. This was fatal to the claimant's case. For present purposes, Article 4 simply emphasised that the relationship in a collection process was between the two banks.
- Article 21(c) contemplated that a principal would only be liable to the collecting bank for its charges and expenses where the collection instruction expressly so provided. This was wholly inconsistent with the URC having created privity of contract between them independently of the specific terms of the collection instruction. This was a critical difference between the provisions of URC 522 and the earlier version of URC ...The claimant's strongest point related to Article 9 (it was meaningless to make the principal a party to the collection unless he had direct rights against a collecting bank that breached its obligations under Article 9). However, the judge did not consider that the article was intended to create contractual (or for that matter tortious) duties where none exist under the local law.

¹⁸¹ Anonymous 2008 *Law and Financial Markets Review (Law & Fin Mkt Rev)* 362.

The ICC Commentary on Article 9 contemplated banks acting in accordance with local practice and local law, which suggested that Article 9 was not imposing some overarching where there was not one before.”¹⁸²

While the court’s reasons as quoted above are not without merit, I am inclined to agree with the scholars holding the view that incorporating the URC creates privity of contract between all the parties in a collection.¹⁸³ To hold otherwise would create a liability gap as the rules indemnify the remitting bank. While I would be persuaded (with some reservation) by the court’s reasons in this particular collection, the blanket application of the *Calico* case seems to go against the clear intentions of the URC. As stated by Bridge “[A] presenting bank, notwithstanding difficulty posed by the privity of contract, ought in principle to incur liability to the principal on the basis of a constructive contract incorporating URC 522”.¹⁸⁴ He argued that even though this could not be reconciled with the decision in the *Calico* case,¹⁸⁵ the direct liability of the presenting or collecting bank to the principal fills the liability gap. The decision in the *Calico* case was that there was no privity of contract between the collecting or presenting bank and the principal. This decision was, however, before the existence of the URC which clearly established privity of contract between the seller, the collecting and/or presenting bank and the remitting bank where the URC are incorporated in a collection.¹⁸⁶ This interpretation was confirmed in the *Motani Lounge* case.¹⁸⁷ The court in this case departed from the common law position that was applied in the *Calico* case. However, despite the privity of contact between the collecting bank and the principal, the remitting bank is still liable to indemnify the presenting bank against all duties and responsibility imposed by the foreign law and usage.¹⁸⁸

¹⁸² *Law & Fin Mkt Rev* (n 181) 368.

¹⁸³ *Motani Lounge (Pty) Ltd v Standard Bank of SA Ltd* (n 61); Schmitthoff (n 48) 182 and Van Niekerk and Schulze (n 8) 253.

¹⁸⁴ (n 32) 257.

¹⁸⁵ 1931 36 Com Cas 197.

¹⁸⁶ See also the ‘decision’ of the ICC in the DOCDEX decision 283 (n 133) where the ICC held that the collecting bank acted contrary to the collection instructions and contrary to the international banking practice and was therefore held to be liable for the payment plus interest and costs.

¹⁸⁷ 1995 2 SA 498 (n 61).

¹⁸⁸ URC a 11(c).

Article 14 of the URC indemnifies the bank(s) involved with the collection from any liability that may occur as result of delay and/or loss in transit of messages, letters or documents, or for delays or other mistakes resulting from translation or interpretation of technical terms. The Uniform Customs and Practice for Documentary Credits provide similar protection for banks in documentary credits.¹⁸⁹ Furthermore, in terms of the URC, the banks are not responsible for loss resulting from force majeure, riots, wars or any other causes beyond their control.¹⁹⁰ However, the parties may agree to insure the goods in transit in their sale contract against some or all of the situations listed under article 15.

As already stated, the collection instruction must give instructions as to interest or charges and expenses involved in a collection, if any.¹⁹¹ If the instruction is that the presenting or collecting bank must collect the interest charges and/or the expenses from the buyer, the bank is obligated to proceed with the collection¹⁹² even if the drawee refuses to pay. But the converse is true where the instruction specifically states that the interest and/or the charges cannot be waived.¹⁹³ The presenting bank has to advise the party who gave the instruction if the drawee refuses to pay any of the charges. However, the bank will not face any legal liability where documents were not presented because the drawee refused to pay the charges in question. Where the expenses and/or collection charges or disbursement are for the principal's account, the collecting bank(s) are entitled to recover these charges from the bank that gave the instruction (the remitting bank). This is independent of the fate of the collection. The remitting bank will claim from the principal.¹⁹⁴

5. Advantages and disadvantages of documentary collections

The advantages of documentary collections for the seller are that the process is relatively easy and inexpensive. Furthermore, the exporter retains control of the transport documents until he receives some guarantee of payment.¹⁹⁵ The advantage for the buyer is that he has an opportunity to inspect the documents and sometimes the goods before he must pay for

¹⁸⁹ UCP 600 (2007) a 35.

¹⁹⁰ URC a 15. See also UCP 600 a 36 for a similar provision.

¹⁹¹ URC a 4.

¹⁹² D/P or D/A.

¹⁹³ URC a 20 and 21.

¹⁹⁴ URC a 21 (c).

¹⁹⁵ ICC publication 641 179.

the merchandise.¹⁹⁶ In the case of D/A collections, where payment is deferred, the buyer receives a line of credit.¹⁹⁷

Disadvantages on the part of the seller include the risk that the buyer will not accept the bill of exchange or make payment against documents.¹⁹⁸ At this stage the exporter would already have shipped the goods and may suffer loss due to the breach on the part of the buyer. The seller has to come up with an alternative plan for the goods, either find another buyer or keep them at a warehouse pending the claim for breach of contract in a foreign jurisdiction.¹⁹⁹ There is also the credit risk of the importer, the risk of the importing country and possible customs issues.²⁰⁰ The collection process can also be very slow. However, sometimes the exporter's bank may discount the bill or advance finance while waiting for the collected funds to clear.²⁰¹ Where there was no discounting, the seller does not receive the proceeds until the remitting bank receives the payment. This process takes longer in countries with strict exchange control rules. In the long run the documentary collection can be expensive as a result of the interest that may accrue.²⁰²

As already mentioned, the importer's risk with a D/P method of collection is that the goods may not be as indicated in the documents. The banks in a documentary collection process assume no risk besides that of their own negligence in carrying out their instructions.²⁰³

¹⁹⁶ See the *Motani Lounge* case (n 61) 509 I-J and Schmitthoff (n 48) 182.

¹⁹⁷ See Benjamin (n 32) 1983 and Maduegbuna (n 34) 675.

¹⁹⁸ Discussed in (par 2.2.1).

¹⁹⁹ Adodo (n 13) 6 and 10.

²⁰⁰ ICC publication 641(n 157) 180; Adodo (n 13) 6; DiMatteo (n 43) 111.

²⁰¹ ICC publication 641 (n 157).

²⁰² Maduegbuna (n 34) 674.

²⁰³ ICC publication 641(n 157) 180; DiMatteo (n 43) 110.

6. Conclusion

Documentary collections as a method of payment and financing international trade are meant to provide security of payment to the seller and security of conforming goods in good quality to the seller and to the buyer. However, as already demonstrated, this arrangement does not always achieve this purpose. It does however provide a compromise for both the buyer and seller as compared to other methods of payment (open account and letters of credit). As stated by Maduegbuna “...despite its real and apparent shortcomings, this payment and financing arrangement, remains relevant to the needs of the exporter and importer, particularly the small and medium size international trader, who would find the arrangement a veritable source of soft, short and even medium term financing, in this era of st[r]ingent financial facilities.”²⁰⁴ Further, it would seem that there is a balance of risks between both parties. There is no one party that bears more risk than the other.

The URC where incorporated govern the duties and responsibilities of the parties to a collection. While these rules are subject to the national law of the country, their main purpose is to achieve international uniformity. The rules are a result of international trade usage by banks. Despite the decisions by the ICC experts (DOCDEX decisions)²⁰⁵ regarding the privity of contract between the collecting bank and the principal, the courts and some scholars are still divided on the issue. The English law position seems to hold the view in the *Calico case*, i.e no privity of contract exists²⁰⁶. The South African law position since the *Motani* case is that where the parties incorporated the URC to their collection, a tripartite contract is created between the principal, the remitting bank and the collecting bank.

It is submitted therefore that with the next URC revision, the ICC must address the issue of privity of contract between the seller and the collecting bank.

²⁰⁴ Maduegbuna (n 34) 677.

²⁰⁵ eg DOCDEX decision 283 discussed above

²⁰⁶ See Benjamin (n 32) and cases cited therein. See also *Grosvenor Casinos Ltd v National Bank of Abu Dhabi* discussed in par 4.1 above.

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