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CHAPTER 1

INTRODUCTION TO BILLS OF LADING AND BANKERS' DOCUMENTARY CREDITS

INTRODUCTION

1.1 The aim of this book is primarily to describe the law applicable to, and workings of bankers' documentary credits, as they are used in international sales and carriage of goods carried by sea. Particular emphasis will be placed on the role of the bill of lading, and other shipping documents, in the documentary credit.

1.2 It will become clear as this chapter progresses that without the traditional shipped bill of lading, neither international sales contracts nor the bankers' documentary credit could ever have developed into anything like their present form. Even today, the bill of lading retains a central role in both international sales and documentary credits. However, it is no longer entirely suited to many modern trading conditions, and there has been a retreat from traditional shipping documentation over the last 30 or 40 years. This retreat, the extent to which banks and trading parties have provided for replacement, and the problems of replacement documentation, are important themes in this book. It will become apparent that the present situation is not wholly satisfactory, but also that there are measures the parties can take to improve it.

1.3 This chapter will trace the development of international sales over the last two centuries or so, and explain the pivotal role played by the bill of lading. It will account the development of documentary credits, which might be seen as the logical culmination of this process. The fundamental principles of the documentary credit will be examined. The chapter will end with an account of the diminishing role of the traditional bill of lading, the problems this poses, and the challenges for the future.

DEVELOPMENT OF MODERN INTERNATIONAL SALES OF GOODS AND PROTECTION OF THE PARTIES

1.4 Two hundred years ago, international trade was utterly different from what we know today, but by the latter half of the nineteenth century it had evolved into something at least remotely like its modern form. The driving force was undoubtedly the convenience of the trading parties, but the evolution was probably slower than trading parties would have ideally liked; it required not only technological advances, and new forms of contract, but also legal changes. It also required the bill of lading to take on the pivotal role as a document of title that it retains today.

1.5 The new forms of trading brought with them increased risks to the trading parties, which were, to some extent, alleviated by the use of the bill of lading and the new contracts. But the logical development of this process, probably early in the twentieth century, was the documentary credit that we know today. The legal framework that these provided spawned the development of more complex forms of trade, probably unforeseen when the framework was originally developed. These, as well as new technological developments, have placed great strain on the framework, and in particular on the use of the traditional bill of lading. The last 20 or 30 years have seen the development of new contracts and documentation, and changes in the legal framework. These have alleviated some, but by no means all of the problems posed.

Birth of the c.i.f. contract

1.6 At the beginning of the nineteenth century, international trade would typically have required the buyer actually to call at foreign ports, either in person or via an agent, probably chartering a vessel for the purpose.[1] Sellers would have brought their goods alongside or on board the buyer's ship and trading would have thereupon been concluded, with the buyer paying the price.[2] By contrast, at the end of the century, the c.i.f. contract was well-established. Contracts would have been made in advance, by post or telegraph. The c.i.f. seller would have arranged shipment, and paid freight and insurance, quoting a fixed price, inclusive of both.[3] He would have placed the goods on board a vessel, bound for the buyer's country of business, and there was no need for the buyer to venture from his home port.

1.7 It is obvious that the second type of trade is far more convenient, particularly for buyers, than the first. Even for sellers, the ability to contract ahead, and to take control of the shipment process, was probably an advantage; after all, it would have been the seller who would have had the local knowledge required to do this. The trading system up to the start of the nineteenth century was no doubt forced on the parties by the primitive trading conditions of the time, before the establishment of regular shipping lines, efficient telegraph and postal services, and reliable marine insurance facilities.[4] By the end of the nineteenth century, these technological and infrastructural issues had been largely resolved. Probably safer and more reliable shipping, with the gradual predominance of steam against sail, also helped.

1.8 It is also obvious, however, that the second type of trade is a very different creature from the first, posing problems which are more than simply technological and infrastructural. In the early transaction, delivery by the seller (to the buyer's ship), inspection of the goods by the buyer or his agent, and payment to the seller, would all have occurred in the seller's country of business, before the buyer's ship sailed. It was not really an international sale at all, rather a sale in the seller's country of business to

1. David M. Sassoon, *The Origin of f.o.b. and c.i.f. Terms and the Factors Influencing their Choice* [1967] J.B.L. 32; see also Sassoon, *C.i.f. and f.o.b. Contracts*, 4th ed., Sweet & Maxwell (1995), paras 431–433.
2. It is probable that free alongside ship (f.a.s.) and free on board (f.o.b.) contracts would have had their origin in this way and some facets of this early transaction remain in the modern f.o.b. contract. For example, the buyer would have been considered shipper (originally on board his own ship) and the bill of lading (receipt of the carrier) would have been issued to him, not to the seller: *Cowas-Jee* v. *Thompson* (1845) 3 Moore Ind. App. 422, 430; 18 E.R. 560, 563.
3. This is probably the defining characteristic of the c.i.f. contract, compared with a variety of the f.o.b.: *The Parchim* [1918] A.C. 157.
4. Sassoon, *The Origin of f.o.b. and c.i.f. Terms and the Factors Influencing their Choice* [1967] J.B.L. 32. Even quite early in the nineteenth century, traders were attempting to move towards the more modern type of transaction if they could, for example in *Dunlop* v. *Lambert* below, para. 1.17ff., where the voyage was short, and communication problems presumably easier.

the buyer's premises, albeit that these premises were a "floating warehouse".[5] No doubt the seller should be very careful to secure payment prior to the ship's sailing,[6] but in general, this type of sale posed no particular legal or security issues. The buyer would have been entirely responsible for the sea transit, would have arranged his own insurance, and if the vessel were chartered, would have had recourse against the shipowner in the event of loss caused by any breaches of the charterparty. Again, no particular legal problems would have been posed.

1.9 By contrast, the later transaction poses problems both of security and legal infrastructure, which had (in addition to the technical problems) to be resolved before the c.i.f. contract could enjoy general use. Most obviously, the seller can no longer ensure payment before the ship and goods sail. If the buyer does not pay, the seller cannot easily get the goods back, and is faced (at best) with the uncertain prospect of suing in a foreign jurisdiction (not something to be relished, even today). Moreover, though the seller is assumed to have taken care to choose an honest buyer,[7] he may know nothing of his solvency, especially given that the parties are trading in different jurisdictions. From the buyer's viewpoint, he is no longer present, either personally or through an agent, at the point of delivery of the goods, and cannot inspect the goods before they sail. Essentially similar difficulties, the prospect of suing a seller of uncertain solvency in a foreign jurisdiction, would make buyers most reluctant to pay for the goods prior to shipment,[8] quite apart from the liquidity issues of so doing.

Role of the bill of lading

1.10 Even well before the nineteenth century, ships' masters issued bills of lading for goods loaded on board. They constituted a receipt for the goods, and contained statements as to their description and apparent order and condition. Later they were made negotiable, for example by being issued to seller's order, or to bearer,[9] and it came to be recognised, by custom of merchants, that transfer of a negotiable bill of lading could operate as a symbolic transfer of the goods themselves (i.e. that it is a document of title). In *Lickbarrow* v. *Mason* the courts recognised that transfer of the shipped bill of lading could transfer the property in the goods.[10] If the goods were sold, the current holder of the bill of lading could, by producing it, prove his title to the goods, and the shipowner who delivered only against production of an original bill could be assured that he was delivering to the right person. Conversely, the shipowner

5. See, e.g., comments in *Ruck* v. *Hatfield* (1822) 5 B. & Ald. 632, 106 E.R. 1321.
6. This clearly was a problem. In *Cowas-Jee* v. *Thompson*, note 2 above, mate's receipts were issued to, and retained by the sellers, and in *Ruck* v. *Hatfield* (1822) 5 B. & Ald. 632, 106 E.R. 1321 and *Craven* v. *Ryder* (1816) Taunt. 433, 128 E.R. 1103, transferred to the buyers against payment, the idea being that the buyers could only obtain bills of lading by exchanging the mate's receipts for them. *Cowas-Jee* showed that the device did not generally work, since the shipowner was normally entitled, and indeed obliged, to issue bills of lading to the buyer as shipper, to whom property had passed on shipment. On mate's receipts generally see para. 3.65ff.
7. *Sanders* v. *Maclean* (1883) 11 Q.B.D. 327.
8. Interesting, the manner in which Internet sales are usually conducted, which pose similar problems of security, and additionally a significant fraud risk. Consumer protection legislation often places the ultimate risks in Internet sales on credit card providers.
9. See further para. 3.17ff.
10. See para. 6.3ff., at any rate if (as was almost always the case at that time) the bill of lading was made negotiable.

who delivered without production had no such assurance, and risked an action in conversion from the true owner.[11]

1.11 As we shall see in chapter 6, property in the goods does not always pass on transfer of the bill of lading. By the end of the nineteenth century, however, the courts had recognised that a shipowner who delivered against its production would normally be protected from an action, even if property were actually vested elsewhere.[12] Though the courts came to accept that the bill of lading could be treated as the symbol of the goods,[13] it was never clearly established, at common law, that a shipowner who delivered without production would be liable, without more, to the holder of a bill of lading who did not also have property in the goods.[14] However, it was (and remains) an implied term of the carriage contract that the shipowner will deliver only against production of an original bill,[15] and bill of lading holders usually could (and can) sue shipowners in contract.[16] As a result of these legal developments, whereas a shipowner who delivered against production of an original bill of lading would usually be protected from action, to deliver without production would be to risk action from the holder of the bill of lading, for the full value of the goods. That remains the position today.

1.12 It follows, therefore, that a seller who, even after delivering the goods to the vessel, retained the bill of lading, transferring it only against payment, could protect himself to some extent against non-payment, since the buyer would need to obtain the bill of lading to obtain the goods from the vessel. Today, the mechanics of this transfer might be carried out by a collection arrangement arranged through the seller's bank, either via its overseas branch or through a correspondent bank in the buyer's country of business. The buyer will be able to obtain the bill of lading only against payment, or acceptance of a bill of exchange.[17] It may be that in the nineteenth century the exchange of documents against payment might have been more risky, since unless the seller or his agent can accompany the bill of lading, he as surely loses control of the bill of lading by indorsing it and posting it to the overseas buyer, as he loses control of the goods themselves by shipping them. What is to prevent the buyer from taking the bill of lading without paying for the goods? We will see in chapter 6 that dealings with the bill of lading can, even in this situation, protect the seller against the bankruptcy of a buyer who is honest,[18] but that mercantile practices revolving around the use of bills of lading do not protect the parties against the fraud of those with whom they deal. The parties are expected to look to their own expertise to guard against dealing with fraudsters.

1.13 The bill of lading also contains a description of the goods, statements by the ship's master that they have been loaded on board the vessel, and as to their apparent

11. The basis of liability is considered further in chapter 7.
12. *Glyn Mills Currie & Co.* v. *East and West India Dock Co.* (1882) 7 App. Cas. 591, discussed in para. 7.26ff.
13. *Sanders* v. *Maclean*, note 7 above.
14. This somewhat academic issue is further considered in paras 7.43 and 7.72ff.
15. *Kuwait Petroleum Corp.* v. *I & D Oil Carriers Ltd. (The Houda)* [1994] 2 Lloyd's Rep. 541. See further para. 7.26ff.
16. See next section; also para. 7.14ff.
17. Details of collection arrangements are beyond the scope of this book, by see, e.g., *Schmitthoff's Export Trade*, 10th ed., Stevens, 2000, ch. 10. See also *Uniform Rules for Collections* (1995 Revision), ICC Publication No. 522. On bills of exchange, see further para. 2.4ff.
18. Para. 6.86ff.

order and condition.[19] These statements are disinterested, but in any case the law developed principles of liability in the event that they were incorrect, and relied upon by a buyer to his detriment, by taking up the bill and paying for the goods.[20] It followed that a buyer, who paid against tender by the seller of a bill of lading, obtained some assurance that the seller had shipped goods conforming to the contractual description.

1.14 The c.i.f. contract, and some other forms of modern international sales contract, combine physical delivery of goods to the vessel with constructive delivery, by tender of documents, against which payment is to be made. Obviously, this assumes that the documents can be sent faster than the goods themselves. Though this was usually true in the later part of the nineteenth century, once efficient postal systems had developed, it is sadly no longer always true today. This is the main reason why, in some trades, the bill of lading no longer retains the role that it enjoyed a century or so ago.[21]

Contractual issues

1.15 Under the early type of transaction, the buyer would have been entirely responsible for carriage of the goods (either on board his own ship, or a vessel chartered by him). The buyer would have been the shipper of the goods, and if a bill of lading were issued, it would have been issued to him, not to the seller; in the early case of *Cowas-Jee* v. *Thompson*, Lord Brougham observed that[22]:

> "It is proved beyond all doubt, indeed it is not denied, that when goods are sold in London, 'free on board,' the cost of shipping then falls on the seller, but the buyer is considered as shipper."

1.16 Delivery was to the ship, and risk and property would typically pass on shipment.[23]

1.17 The later type of transaction is very different, especially if, as with a c.i.f. contract, the seller makes the contract of carriage in his own name. The delivery point remains the ship, however, and risk of loss or damage to the goods passes to the buyer on shipment. The issue, then, which had to be resolved before the c.i.f. contract could come into common usage, is to the carrier's liability if loss occurs due to a breach by him of the carriage contract. The seller, as shipper, could sue, but at least until the House of Lords decision in *Dunlop* v. *Lambert*,[24] it was by no means clear that he would have been able to recover only nominal damages, property and risk having passed to

19. The master cannot state that the goods were loaded in *actual* good order and condition, since he cannot know what is hidden from him, and he is not assumed to have any expertise in the quality of the merchandise: *Cox* v. *Bruce* (1886) 18 Q.B.D. 147. The best assurance he can give is that they were shipped in apparent good order and condition. In modern sales, a quality certificate on loading is also often required, providing additional assurance.
20. See, further, para. 5.69ff. The shipowner should ideally be liable for false statements made in the bill, relied upon by the buyer who takes it up. This aspect of the law is not entirely satisfactory, but liability will attach in most situations.
21. See para. 1.109ff., and further consideration in chapters 3 and 8.
22. Above, note 2.
23. Comments in *Ruck* v. *Hatfield*, note 5 above, suggest that in f.o.b. sales the ship was considered to be the warehouse of the buyer, the contract providing for delivery thereto.
24. (1839) 6 Cl. & Fin. 600, (1839) 7 E.R. 824. This was not truly an international sale, the voyage being from Leith (Scotland) to Newcastle (England); presumably, communication between these ports was good enough for it to be practicable to entrust shipping arrangements, including making the carriage contract, to the seller.

provided for as long ago as UCP 400 in 1983,[99] and is now provided for by Art. 11 of UCP 600.

99. UCP 400, Art. 12, replaced by UCP 500, Art. 11, and now UCP 600, Art. 11. On the 1993 alterations, see *UCP 500 & 400 Compared*, ICC Publication No. 511 (1993), pp. 31–33. The 2006 changes are not changes of substance: see Byrne, *The Comparison of UCP 600 and UCP 500*, Institute of Banking Law and Practice (2007), at 110–113.

CHAPTER 4

THE CONTRACT OF SALE

4.1 The sale contract is often referred to as the underlying transaction, because for documentary credits at least, it is from sale contract obligations that everything else is derived. It determines the nature of the buyer's payment obligations. It also determines the seller's documentary obligations, and the obligation of one or both parties to make appropriate provision for carriage and insurance.

4.2 Performance bonds also guarantee the performance of an underlying transaction, though it need not be a sale contract. The obligation to provide the bond will be derived from the underlying transaction.

4.3 There is a sense in which the documentary credit or performance bond sits on top of the sale contract, or (in the case of a performance bond) other underlying transaction. A documentary credit provides a swift and reliable payment mechanism, independent of the underlying transaction in the sense that payment under the credit is assured, whatever disputes there may be under the sale contract. But payment, or refusal to pay, under the documentary credit is not necessarily the end of the matter. If the credit fails to pay the seller may have an action on the sale contract. Conversely, if it provides payment, the buyer can still pursue the seller for sale contract breaches, or indeed reject the goods and claim repayment of the price, should the breach warrant it. These actions may not be ideal, because the buyer will be suing the seller, or *vice versa*, in a foreign jurisdiction, and the liquidity of the other party may be in doubt. Nonetheless, the actions are there in principle, and with performance bonds in particular, there are a number of cases involving a final adjustment, an action on the underlying contract, long after the performance bond has been paid.[1]

4.4 In this chapter we consider the sale contract, as the underlying transaction for a documentary credit. Though autonomous, it is closely connected with the other contracts constituting the documentary credit.[2] In para. 4.5ff. we consider the nature of the buyer's obligation to provide a credit, an obligation derived from the sale contract. Para. 4.44ff. looks at the consequences for the sale contract, if the credit does not actually provide payment. Para. 4.68ff. looks at documentary requirements, since it is clearly desirable, indeed essential, that those under the sale contract match those under the credit.

GENERAL REQUIREMENTS OF PROVISION OF CREDIT

4.5 Documentary credits, as seen in chapter 2, are of various types, and the type of credit which the buyer must provide is determined by the sale contract.

1. Para. 9.91ff.
2. See para. 1.57ff.

4.6 It is important to appreciate, however, that because the contract of sale is autonomous,[3] it has no direct effect on the obligations of the banks under the credit. The contracts constituting the credit are independent of the underlying contract. If the required form of credit is not provided by the buyer the seller may thereby have an action against the buyer under the sale contract, but his relationship with issuing or confirming bank will be determined by the terms of the credit actually provided, in other words, by the contract between himself and the relevant bank. Therefore, if the credit does not conform to the sale contract requirements the seller may sue the buyer on the contract of sale, but can take no steps to remedy the situation against either bank directly.

Implied requirement for irrevocable credit

4.7 Where the sale contract provides for sale by documentary credit, the courts presume a requirement for an irrevocable credit unless the contrary is expressly stated.[4] An authority for this proposition is *Giddens* v. *Anglo-African Produce Ltd.*,[5] an action by c.i.f. purchasers (under two contracts) of South African yellow maize against the sellers for damages for non-fulfilment of the contracts. The defendant sellers contended that the credit required by the sale contract had not been opened, so that the condition precedent for their performance had not arisen, and Bailhache J. accepted this proposition. In giving judgment for the defendants he said[6]:

> "I think this case is quite hopeless. Here is a contract which calls for an established credit and in purported satisfaction of what this contract calls for what they get is this: 'Negotiations of drafts under these credits are subject to the bank's convenience. All drafts hereunder are negotiated with recourse against yourselves.' How that can be called an established credit in any sense of the word absolutely passes my comprehension."

4.8 This was not an irrevocable credit because under an irrevocable negotiation credit the drafts must be negotiated without recourse against the drawer.[7] It appears from the (very short and not very clear) report of the case that the sale contract did not call expressly for an irrevocable credit, but it is usually assumed that a requirement for an irrevocable credit was implied.

4.9 There is no presumption, by contrast, that a credit is required to be confirmed, unless the sale contract expressly so states.

Credit more than simply means of paying the price

4.10 The courts recognise that the credit is more than simply a means of paying the price, because the seller may be relying on it to finance the transaction. Two consequences follow from this principle, that the seller is under no obligation to perform at all until the credit is opened, and that it must be opened within a reasonable time.[8]

3. *Ibid.*
4. Until 1993 the UCP adopted the opposite position, but with the 1993 revisions, the UCP position was brought into line with that of the common law. The latest (2006) revisions allow only for irrevocable credits.
5. (1923) 14 Ll. L. Rep. 230.
6. *Ibid.*, at 230 (col. 2).
7. See paras 2.27ff. and 2.37ff. Although the report is rather inadequate, the credit appears to be an old-fashioned negotiation credit, where drafts are drawn on the applicant (buyer), not the issuing bank, the bank undertaking merely to negotiate the drafts. This form of credit is obsolete except in some parts of Asia, and is disallowed under UCP 600. See para. 2.14ff.
8. A further consequence, affecting measure of damages, is considered below, at para. 4.38ff.

Opening of credit condition precedent of seller's performance under sale contract

4.11 In *Trans Trust SPRL* v. *Danubian Trading Co. Ltd.*,[9] the buyers failed to procure the opening of a credit in accordance with the requirements of sale contract (for the purchase of steel). The sellers were unable to obtain the steel in the absence of the credit, and Denning L.J. categorically stated that they were under no obligation to perform at all, in its absence.[10] Provision of the credit was a condition precedent to the seller's performance, and the buyers were also in breach in failing to provide. The buyers were accordingly liable for damages for breach, on principles discussed below.[11]

Time of opening of credit

4.12 Ideally, the sale contract should stipulate the period within which the credit should be opened.[12] If it does not, or if the term is too vague to be treated as an express stipulation as to time,[13] then the courts have again had regard to the fact that the seller may be relying on the provision of the credit in order to finance the transaction, and require the credit to be opened as soon as the buyer reasonably can.

4.13 The starting point is *Garcia* v. *Page & Co. Ltd.*, where Porter J. said that the credit must be opened immediately, his test being "that the buyer must have such time as is needed by a person of reasonable diligence to get the credit established".[14] There was no express stipulation in the contract itself, and he took the view that three months was an unreasonably long time to establish the credit. What is a reasonable time will depend on all the circumstances, but the courts have adopted Lord Watson's test from *Hick* v. *Raymond & Reid*,[15] that " . . . the party upon whom it is incumbent duly fulfils his obligation, so long as such delay is attributable to causes beyond his control, and he has neither acted negligently nor unreasonably".

4.14 In *Etablissements Chainbaux SARL* v. *Harbormaster Ltd.*,[16] the contract of sale required the credit to be "opened in London within a few weeks". Devlin J. treated this as too vague a term to be treated as an express provision as to time,[17] and therefore thought that a reasonable time should be allowed. Applying the test from *Hick* v. *Raymond & Reid*, he thought that one month was about the outside limit. This is far longer than in the normal case, but the test is flexible; here, French buyers had to provide a sterling letter of credit, and there was an inevitable delay in obtaining exchange control permission from the French Government. In *Baltimex Ltd.* v. *Metallo Chemical Refining Ltd.*,[18] Sellers J. took into account the fact that the sellers' knowledge

9. [1952] 2 Q.B. 297, [1952] 1 Lloyd's Rep. 348.
10. [1952] 2 Q.B. 297, 304.
11. Para. 3.14ff.
12. E.g., *Transpetrol Ltd.* v. *Transol Olieprodukten Nederland BV* [1989] 1 Lloyd's Rep. 309, where the buyer's failure to open a credit by the stipulated time was treated as a breach of condition, justifying the sellers in repudiating the contract.
13. E.g., "within a few weeks", as in *Etablissements Chainbaux SARL* v. *Harbormaster Ltd.* [1955] 1 Lloyd's Rep. 303, below.
14. (1936) 55 Ll. L. Rep. 391, 392 (col. 1).
15. [1893] A.C. 22, 32–33. This is not a banking case, but concerns the obligations of a consignee under a carriage contract. However, the test is of general application.
16. [1955] 1 Lloyd's Rep. 303.
17. *Ibid.*, at 306 (col. 1).
18. [1955] 2 Lloyd's Rep. 438.

at the time of the contract that delay was likely, since they were to be paid out of the proceeds of a sub-sale by their buyers to Russian sub-buyers, and they knew that there was likely to be a delay in the establishment of the credit by the Russian sub-buyers.

4.15 Because the seller may be relying on the credit to finance the transaction, the requirement to provide a credit within a reasonable time prevails even where under the contract, delivery is postponed until a considerable time into the future. As Devlin J. observed in *Etablissements Chainbaux SARL* v. *Harbormaster Ltd.*, where delivery was not to take place for eight months[19]:

> "Sometimes a letter of credit is wanted merely because the seller is unwilling to make arrangements for shipment, which may involve him in expense, unless he knows he is going to be paid. . . . [The] seller had to manufacture the goods, and what he desires is to have the letter of credit for it is plainly so that he will have the assurance, within a few weeks and before he begins manufacture, that he is certain to be paid and that the labour of manufacture will not therefore be done in vain."

4.16 In *Etablissements* the sellers had to manufacture the marine engines they had agreed to sell, but even where the seller already has the goods, there will still be expenses involved in shipping them, and the *Etablissements* principle is not limited to cases where the seller must manufacture or otherwise obtain the goods. Indeed, the courts do not seem to enquire into the seller's position, the test of reasonableness being addressed solely to the reasons for the buyer's delay.

4.17 In addition to the reasonable time requirement, the courts have consistently held that if the contract provides for shipment by the seller at any time over a stated period, then in the absence of an express stipulation, the buyer must open the credit and make it available by the beginning of the shipment period. The authority for a c.i.f. contract is the Court of Appeal decision in *Pavia & Co. SpA* v. *Thurmann-Nielsen*.[20] The buyers claimed that since the credit was simply a means of paying the price, there was no reason why the credit should be provided before the price became payable (i.e., in a c.i.f. sale, on tender of shipping documents). The Court of Appeal took the view that this was the wrong approach. The credit was not simply a means of paying the price, but was also intended to provide the seller with security. Denning L.J., echoing the principles already set out, said[21]:

> "The question in this case is this: In a contract which provides for payment by confirmed credit, when must the buyer open the credit? In the absence of an express stipulation, I think the credit must be made available to the seller at the beginning of the shipment period. The reason is because the seller is entitled, before he ships the goods, to be assured that, on shipment, he will get paid. The seller is not bound to tell the buyer the precise date when he is going to ship; and whenever he does ship the goods, he must be able to draw on the credit. He may ship on the very first day of the shipment period. If, therefore, the buyer is to fulfil his obligations he must make the credit available at the very first date when the goods may be lawfully shipped in compliance with the contract."

4.18 The argument that the provision of the credit is merely another way of paying the price was also rejected in a different context, considered below.[22]

19. [1955] 1 Lloyd's Rep. 303, 305 (col. 2).
20. [1952] 2 Q.B. 84; [1952] 1 Lloyd's Rep. 153.
21. [1952] 2 Q.B. 84, 88.
22. Para. 4.38ff.

4.19 Similar reasoning was applied to an f.o.b. contract by Diplock J. in *Ian Stach Ltd.* v. *Baker Bosley Ltd.*[23] The buyers argued that unlike *Pavia*, it was they rather than the sellers who were entitled to choose the time of shipment, within the stipulated period.[24] Diplock J.'s view was that this made no difference to the principle in *Pavia*, relying again on the principle that the seller needs the assurance given by the credit from as early as possible. The view was stated yet again that a commercial credit is not simply a means of paying the price.[25]

4.20 The requirement that the credit must be available by the beginning of the shipment period is additional to the reasonable time requirement, and does not allow the buyer to delay where the shipment period does not begin until after more than a reasonable time has elapsed.

Terms of credit

4.21 The terms of the credit must comply with any express provisions of the sale contract. If it does not, the seller will be bound by its terms, *vis-à-vis* the bank, but will be entitled to treat the buyer under the sale contract, as not having put in place a proper documentary credit. He will therefore be under no obligation to perform, on the principles discussed above, and will also be entitled to damages.[26]

4.22 The sale contract could, in principle, prescribe precise requirements for the credit. Otherwise the requirements must not be inconsistent, but in determining consistency we must bear in mind that it is the sale contract which is being enforced; there is no justification, therefore, for a doctrine of strict compliance, as described in para. 9.166ff. In *Siporex Trade SA* v. *Banque Indosuez*[27] there were two underlying sale contracts, one for tallow and one for cotton seed oil. The tallow contract required "any origin edible fancy tallow", whereas the letter of credit required a certificate of US origin, and omitted the word "edible". The cotton contract required cotton seed oil "any origin", but the letter of credit prescribed "any origin except Spain and South Africa". On an assumption (for the purposes of argument) that a demand under a performance bond was conditional on proper letters of credit being provided, Hirst J. took the view that the credit terms did not comply.[28] But the action was not on the sale contract; the issue was whether a bank should pay on a performance bond demand, and a bank faced with such a demand should not be required to make investigations, beyond the documents themselves. There was, however, testimony from an expert witness that:

> "that tallow of [the kind required] could not be acquired otherwise than in the United States; at all events in such quantities at competitive prices. He also testified that it was common knowledge that Arab states such as Egypt would not allow imports from either South Africa or Spain,

23. [1958] 2 Q.B. 130; [1958] 1 Lloyd's Rep. 127.
24. The contract was described as "classic" f.o.b., where the ship is nominated by the buyer, who is entitled to call for shipment at any time within the stipulated shipment period: *J. & J. Cunningham Ltd.* v. *Robert A. Munro & Co. Ltd.* (1922) 28 Com. Cas. 42. The buyers argued unsuccessfully that this was a ground for distinguishing *Pavia*, where the sale contract was on c.i.f. terms: [1958] 2 Q.B. 130, 142.
25. [1958] 2 Q.B. 130, 139. He also cited the remarks of Jenkins L.J. in *Hamzeh Malas & Sons* v. *British Imex Industries Ltd.* [1958] 2 Q.B. 127; [1957] 2 Lloyd's Rep. 549, set out in their context in para. 9.57ff.
26. See respectively para. 4.11ff. above and para. 4.38ff., below.
27. [1986] 2 Lloyd's Rep. 146.
28. *Ibid.*, at 161. In fact, he decided that the performance bond was unconditional, and applied *Edward Owen Engineering Ltd.* v. *Barclays Bank International Ltd.*, in para. 9.77ff.

CHAPTER 9

BANKS' DUTIES TO ACCEPT OR REJECT PRESENTATION

GENERAL CONSIDERATIONS

9.1 This chapter is concerned with the banks' duty to determine whether a presentation is a complying presentation (to use the wording of UCP 600, Art. 14(a)).

Contracts autonomous but interconnected

9.2 It was explained in Chapter 1 that in principle the four contractual relationships in a confirmed documentary credit, as identified by Lord Diplock in *United City Merchants (Investments) Ltd.* v. *Royal Bank of Canada (The American Accord)*, are autonomous.[1] It follows therefore that in principle, the obligations of the confirming bank towards the beneficiary may differ from those between the two banks, and those between the issuing bank and its customer. If, for example, the terms of the credit differed from the customer's instructions, the confirming bank's relations with the beneficiary would be governed by the terms of the credit, whereas the relationship between issuing bank and customer would be governed by the customer's instructions. The relationship between the two banks would also not govern that between confirming bank and beneficiary. The second paragraph of Art. 4(a) of UCP 600 states, in effect, that the beneficiary cannot avail himself of the provisions of either of the other contracts involving the banks: "A beneficiary can in no case avail himself of the contractual relationship existing between the banks or between the applicant and the issuing bank."

9.3 However, there ought to be no difference between these contracts, since the terms of the credit should conform precisely to the customer's instructions. Only if one or other bank exceeds its mandate will the documentary requirements under these contracts differ. On the assumption that the same documents are stipulated in each of these contracts, it would be very inconvenient if the courts held that the obligations owed under each contract differed. It is essential for practical workability, for example, that a confirming bank is required to pay the beneficiary only if he can be assured of reclaiming the money paid from the issuing bank, and the issuing bank from the customer.[2]

1. [1983] 1 A.C. 168. See para. 1.57ff.
2. See, for example, the statements made by Lord Diplock in *United City Merchants (Investments) Ltd.* v. *Royal Bank of Canada (The American Accord)*, discussed below, para. 9.69ff. Sir John Megaw observed in *Bankers Trust Co.* v. *State Bank of India* [1991] 2 Lloyd's Rep. 443 that: "The metaphor 'autonomous' means only that one does not read into any one of the four contracts the terms of any of the other three contracts. But the 'genesis and the aim of the transaction' (Lord Wilberforce's words in another authority) are not to be ignored where they may be relevant to assist in the interpretation of the terms of the contract."

9.4 The courts recognise this, and in reality, therefore, obligations under these contracts may be regarded as the same (unless of course the bank exceeds its instructions in the issue of the credit). This is probably what is meant by the notion that the four contracts, although autonomous, are interconnected.[3]

9.5 It is also recognised, on the other hand, that the contracts constituting the credit are independent of the underlying transaction (the contract of sale). In performing their duties under the credit, banks are unconcerned with whether their actions might thereby put either seller or buyer in breach of the sale contract, of whose terms they may in any case be unaware. If, for example, the terms of the credit require a bank to reject documents which the buyer would be required to accept under the sale contract, then the seller's remedy is to sue on the contract of sale.[4] The bank's obligations are defined by the terms of the credit alone, and the sale contract is irrelevant. Indeed, it may even be governed by the law of a different jurisdiction to that governing the credit.[5] UCP 600 adopts the same principle, Art. 4(a) beginning[6]:

> "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. . . . "

Banks' expertise in documents not goods

9.6 A theme underlying the discussion in this chapter is that the law assumes that whereas banks hold themselves out as experts in handling documents, they hold out no expertise in the handling of goods. If the documents do not conform, the banks do not know whether or not the non-conformity is material. Hence, Art. 5 of UCP 600 provides: "Banks deal with documents and not with goods, services or performance to which the documents may relate."[7] In UCP 600, Art. 14(a), concerned with the standard for examination of documents, the bank must "determine, on the basis of the documents alone, whether or not the documents appear on their face to constitute a complying presentation". It is not required to, and indeed must not look behind the face of the documents, because it is not in a position to form a relevant judgment. This also justifies the disclaimer on effectiveness of documents in UCP 600, Art. 34. The point that emerges from these provisions is that neither issuing nor correspondent bank is interested in anything apart from whether the documents conform on their face to the credit requirements. Neither bank is interested in the condition of the goods, nor on whether either seller or buyer is in breach of the sale contract.

9.7 Under UCP 500, Art. 13(a), banks were required to examine documents with reasonable care. This phrase has been omitted from UCP 600, Art. 14(a), apparently

3. *United City Merchants*, *per* Lord Diplock at 182H–183C. This passage is also set out in para. 1.52ff.
4. As he attempted, unsuccessfully, for example, in *Soproma SpA* v. *Marine & Animal By-Products Corp.*, para. 4.21ff.
5. See para. 2.119ff.
6. UCP 600, Art. 4(a). The reference to "other contract" is probably intended to cover stand-by letters of credit, where the underlying transaction may be a construction, rather than sale contract (see para. 2.69ff.). The clause, "even if any reference whatsoever to such contract(s) is included in the credit," was added in 1983. It was not intended to have any effect on the practical handling of credits, but was a reaction to the practice of making reference in the credit itself either directly to the commercial contract, or to the invoice which will often include a reference to the commercial contract. Direct reference to the commercial contract is a practice which again is more likely with standby credits: *UCP 1974/1983 Revisions Compared and Explained*, ICC Publication No. 411 (1984), 13.
7. This provision was unchanged in 1993 from the 1983 revision, and changed only in detail in 2006.

in line with a policy of "the removal of vague phrases".[8] While one can appreciate the desire to strive for certainty, it may not always be capable of achievement. Once examination is required at all, the courts must necessarily determine a standard of care, and would almost certainly apply a reasonable standard in any case.[9] It seems unlikely that the removal of this phrase will have any effect.[10]

9.8 Article 13(a) of UCP 500 also required banks to adopt international standard banking practice in determining compliance. This continues under UCP 600, Art. 14(d), though only in relation to data in the document. The ICC has codified its approach to international standard banking practice, the present provision being ISBP 2007.[11]

Banks' expertise in documents not factual situations

9.9 A related point is that banks should not be concerned with the existence or otherwise of any other fact situation, apart from that indicated on the face of the documents themselves. Otherwise, extensive inquiries may be required, in an area where again the bank may not necessarily be assumed to have any relevant expertise.

9.10 In *Banque de l'Indochine et de Suez SA* v. *JH Rayner (Mincing Lane) Ltd.*,[12] the credit called for: "shipment to be effected on vessel belonging to Shipping Company that is a member of an International Shipping Conference." Sir John Donaldson M.R. noted that[13]:

> "This is an unfortunate condition to include in a documentary credit, because it breaks the first rule of such a transaction, namely that the parties are dealing in documents, not facts. This condition required a state of facts to exist. What the letter of credit should have done was to call for a specific document which was to be acceptable to the buyer and his bank evidencing the fact that the vessel was owned by a member of a conference."

9.11 For the same reason, vague terminology should also be avoided. UCP 500, Art. 20(a) actively discouraged it, listing a number of terms which should not be used.[14] UCP 600, Art. 3 defines some vague time terms, and allows banks effectively to disregard other terms, such as "first class", "well known", "independent", "official", "competent", "prompt" or "as soon as possible", to take a few examples from the provision. The problem with such terms is not simply that they are vague, but that they require the bank to consider a factual situation (e.g., whether a certificate is "independent" or "official"), whereas their only concern should be with the documents themselves.

8. Ulph, *The UCP 600: Documentary Credits in the 21st Century* [2007] J.B.L. 355, 362.
9. E.g., the assertion by Debattista, *The New UCP 600—Changes to the tender of the Sellers's Shipping Documents under Letters of Credit* [2007] J.B.L. 329, 337. In any case, in *Gian Singh & Co. Ltd.* v. *Banque de l'Indochine*, in para. 9.23ff., Lord Diplock thought that the requirement "to examine the documents with reasonable care to ascertain that they appear on their face to be in accordance with the terms and conditions of the credit", as required by what was then Art. 7 of UCP 290, "does no more than restate the duty of the bank at common law": [1974] 1 W.L.R. 1234, 1238–1239. The removal of the requirement should therefore make no difference.
10. Ulph, *op cit.*
11. ICC Publication No. 681.
12. [1983] Q.B. 711. See further below, para. 9.190ff.
13. *Ibid.*, at 728.
14. Similar to Art. 22(b) of the 1983 revision.

9.12 We will see in para. 9.183ff. that any ambiguity in the applicant's instructions is resolved in the bank's favour, if the issue is whether the bank has exceeded its mandate in accepting documents.

Quick decision required

9.13 If a bank were to take too long to examine the documents this would have an obvious adverse effect on the negotiability of the shipping documents, particularly where multiple re-sales are envisaged.[15] A quick decision is also of importance from the point of view of the beneficiary under the credit, since if the documents are rejected he will wish to have them at his disposal as quickly as possible, in order to effect alternative transactions.

9.14 In spite of the importance of a quick decision, prior to UCP 500, the UCP did not stipulate a maximum time for the examination of the documents, UCP 400 stipulating only that the bank should have a reasonable time in which to examine them.[16] Placing an upper limit was thought to raise difficulties. Transactions were not all the same, and it was arguable that a longer period may be appropriate where the credit is for a very substantial sum, or the documents are either numerous or unusually complex, or in a foreign language.[17] Also of importance for a document that was intended to be used worldwide was that there was little uniformity as between jurisdictions as to what is a reasonable time.[18] By 1993, the view had changed. UCP 500 fixed an upper limit, Art. 13(b) providing that:

"The Issuing Bank, the Confirming Bank, if any, or a Nominated Bank acting on their behalf, shall each have a reasonable time, not to exceed seven banking days following the receipt of the documents, to examine the documents and determine whether to take up or to refuse the documents and inform the party from which it received the documents accordingly."

9.15 Thus, for the first time, an upper limit was placed on "reasonable time", albeit an upper limit that was sufficiently high to be unlikely to have significant, if any, practical effect, at any rate in London.[19]

9.16 Closely related to these provisions were requirements to communicate refusal, beginning with Art. 16(c) of the 1983 revision:

"If the issuing bank decides to refuse the documents, it must give notice to that effect without delay by telecommunication or, if that is not possible, by other expeditious means, to the bank from which it received the documents (the remitting bank), or to the beneficiary, if it received the documents directly from him. . . . "

15. We have observed elsewhere in the book that speed of document handling and transmission is one of the main reasons for the move, in recent decades, away from the shipped bill of lading towards less traditional forms of documentation: para. 1.109ff.
16. UCP 400, Art. 16(c).
17. E.g., Ellinger: *Reasonable time for examination of documents* [1985] J.B.L. 406, 407–408.
18. On why an upper limit was not adopted at that time, see also *UCP 1974/1983 Revisions Compared and Explained*, ICC publication No. 411 (1984), 33.
19. In *Bankers Trust Co.* v. *State Bank of India* [1991] 2 Lloyd's Rep. 443, the Court of Appeal (interpreting UCP 400) thought that eight days was too long, at any rate in London, while accepting that what was reasonable will depend, not only on the number and complexity of the documents, but also on the level of sophistication in dealing with documents in the particular country. What is reasonable will not be the same everywhere, and the figure of seven was arrived at as a compromise: *UCP 500 & 400 Compared*, ICC Publication No. 511 (1993), 40. However, the high maximum limit implied that in London at least, the issue would continue to be determined by the definition of a reasonable time.

9.17 This was transformed into UCP 500, Art. 14(d), in substantially similar terms, but with a seven-day maximum limit, thus paralleling the provision for expeditious examination of the documents.

9.18 In *Seaconsar Far East Ltd.* v. *Bank Markazi Jomhouri Islami Iran*,[20] the Court of Appeal, interpreting the 1983 provision, held that the bank must first decide whether telecommunication was possible and if not must choose some other expeditious means, and in either case the bank must act without delay. In other words, whether telecommunication or other expeditious means was used, it must be used without delay. The court also held that the obligation to communicate without delay was additional to that of deciding within a reasonable time whether to take up or refuse the documents. Sir Christopher Staughton justified this by observing that examination and communication were very different kinds of obligation[21]:

"The time needed for checking documents must necessarily be somewhat vague; it depends how any documents are required by the credit, what detail they must contain, and how clearly or (as the case may be) obscurely that is spelt out. But once that is done and the decision taken, it will ordinarily be a fairly simple task to give notice to the beneficiary."

9.19 He did not further elaborate on the meaning of "without delay". In *Bayerische Vereinsbank* v. *Bank of Pakistan* Mance J., interpreting UCP 500, appeared to regard the words "without delay" as meaning something similar to "reasonable time" under UCP 500, Art. 13(b),[22] but this must now be considered in the light of the Court of Appeal decision in *Seaconsar*.

9.20 UCP 600 differs from its predecessors by stipulating, for the first time, a maximum period *in place of* a reasonable time, "to determine if a presentation is complying". In order to determine this, it must examine the presentation, under UCP 600, Art. 14(a).[23] The maximum time under Art. 14(b) is five banking days. Removal of the "reasonable time" requirement conforms with the policy of removing uncertain phrases, but while the change will no doubt resolve issues of uncertainty in interpreting the previous provisions,[24] it is not ideal where a reasonable time might be less than five days. On its terms Art. 14(b) allows the bank five days, whether or not it is reasonable to take that time. Arguably a reasonableness term would be implied. Against that, it is more difficult to justify implying a term, where a fixed time has been expressly stipulated.[25] It is also true that a reasonable time term has been deliberately excluded from UCP 600, but in principle, the views of the ICC Banking Commission should not be relevant in interpreting what is, after all, a private contract.[26] Though arguments can be advanced each way it is at least likely, I suggest, that the courts would continue to require determination within a reasonable time.[27]

20. [1999] 1 Lloyd's Rep. 36.
21. *Ibid.*, at 41. The Court of Appeal differed on this issue from Tuckey J., who had amalgamated the obligations: [1997] 2 Lloyd's Rep. 89.
22. [1997] 1 Lloyd's Rep. 59, citing (at 69 (col. 1)) *Bankers Trust Co.* v. *State Bank of India* [1991] 2 Lloyd's Rep. 443, in para. 9.34ff.
23. There is no longer a requirement explicitly to examine the documents.
24. Certainty seems to have been a major motivation for the change: e.g., Debattista [2007] J.B.L. 329, 338. As we will see below, what is encompassed within a reasonable time split the Court of Appeal in *Bankers Trust Co.* v. *State Bank of India*: para. 9.34ff.
25. See, e.g., the express stipulation in para. 9.34ff.
26. See the arguments in para. 1.89ff.
27. Implied terms must, however, give way to express contrary terms. As we will see in para. 9.34ff., Art. 16(b) allows approaches, for limited purposes, to be made to the applicant within the five-day period. This express provision would probably override any reasonable time term, even if such a term were implied.