PIERCING THE DOCTRINE OF STRICT COMPLIANCE IN DOCUMENTARY CREDITS: HOW STRICT IS STRICT COMPLIANCE?

BY

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DECLARATION

I, KNOWLEDGE MABHARANI CHIRENJE, do hereby declare that the work on which this thesis is based is my original work (except where acknowledgements indicate otherwise) and that neither the whole work nor any part of it has been, is being or is to be submitted for another degree in this or any other University. I authorize the University to produce for the purpose of research either in whole or any portion of the contents in any manner whatsoever.

Signature Signed by candidate

Date 1 MARCH 2006

DEDICATION

I dedicate this work to my mother Luwisa Kitikiti. You left me barely two months before I completed my LLM. I wanted to make you proud. Thank you for your love and I remain guided by your visionary and principled motherhood.

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ABSTRACT:

Letters of credit have since time immemorial been the bedrock of international trade financing. Arguably, letters of credit have survived the test of time by the observance of the doctrine of strict compliance; that the documents presented by the vendor or provider of services must strictly comply with the terms and conditions of the credit.
Lord Sumner put it thus, "It is both common ground and common sense that in such a transaction, the accepting bank can only claim indemnity if the conditions upon which it is authorised to accept are in the matter of the accompanying documents strictly observed. There is no room for documents which are almost the same, or which will do just as well. Business could not proceed securely on any other lines. The bank's branch abroad which knows nothing officially of the details of the transaction thus financed, cannot take upon itself to decide what will do well enough and what will not. If it does as it is told, it is safe; if it declines to do anything else, it is safe; if it departs from the conditions laid down, it acts at its own risk."[1]

[1] *Equitable Trust Co. of New York vs. Dawson Partners* (1926) 27 Ll. L. Rep 49 (HL)

The aim of this research is to investigate the extent of this strict compliance in letters of credit operation and the desirability or otherwise of relaxing the rigours of strict compliance. In doing so, it will put into context the general form and content of documentary credits, the current construction of the doctrine and critically investigate how strict is the strict compliance doctrine. Final thoughts will be given as to the possibilities of relaxation of the doctrine and a possible desirable interpretational position for Zimbabwe.

1. Introduction:

The documentary credit[2] was developed by the mercantile world in order to reduce the conflicting interests between the parties to a contract of sale.[3] The seller ideally does not want to give up control of the goods before he has received the purchase price. On the other hand, the buyer does not want to pay the purchase price for the goods until the goods are no longer at the disposal of the seller.[4] Such conflict is most acute in the case of international sales where the buyer and the seller are dealing with each other at a distance.

Thus documentary credits represent the most secure method by which the seller may obtain the price of the goods he has contracted to sell. In essence the credit is established under the terms of the sale contract, the buyer instructs his bank (the issuing bank) to open a credit in the seller's name, normally through a bank in the seller's country (the correspondent bank). This bank notifies the seller of the opening of the credit on which the seller may draw only on presentation of specified conforming documents to the bank.[5] The value of this system lies in the security that it affords to all the parties concerned. The seller has the payment of his price assured, provided he presents the *correct documents*[6], by a reputable bank, usually one in his own country. The

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[2] The terms "documentary credit", "documentary letters of credit", "letter of credit", and "commercial letters of credit" have the same meaning. "Documentary credit" or simply "credits" are terms used in the Uniform Customs and Practice- The UCP.

[3] Michael Brindle and Raymond Cox, "Law of Bank Payments", Sweet & Maxwell, London -2004

[4] Ibid

[5] D.M.Day and B. Griffin, " The Law of International Trade", 2nd Edition- Butterworths, 1993

[6] The emphasis is mine. This underlines the need for the documents presented by the seller to comply with the terms of the credit as a precondition for payment. The documents must be as requested or

correspondent bank will receive the documents before it allows the seller to draw for the price and will thus be able to hold them as security pending payment by the issuing bank. The issuing bank in turn will have the documents as security for payment by its own customer, the buyer.[7]

The buyer will send to the issuing bank instructions as to the documents, which the seller is to present to the bank (or to the correspondent bank) in order to be allowed to draw on the credit. It is a term of the contract between the buyer and his bank that the bank will allow the seller to draw on the credit *only*[8] if the documents are in strict accordance with these instructions.[9] A bank, which accepts documents, which do not comply, will be liable to the buyer. The concept of strict compliance is what has come to be known as the doctrine of strict compliance. This doctrine has governed the law of letters of credit since the beginning of the twentieth century.[10] It was echoed in *Basse and Selve vs. Bank of Australia,* [11] which concerned a certificate of quality and was explained by Bailhache J. in *English Scottish and Australian Bank vs. Bank of South Africa* [12] in what has become one of the classical statements in point: "It is elementary to say that a person who ships in reliance on a letter of credit must do so in exact compliance with the terms. It is elementary to say that a bank is not bound or indeed entitled to honour drafts presented to it under a letter of credit unless those drafts with the accompanying documents are in strict accord with the credit as opened."

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comply with the credit and thus they are deemed to be correct documents. To what extent the documents must strictly comply with the terms of the credit is what forms the basis for the discussion herein.

[7] *Supra* note 4

[8] Supra note 5

[9] Supra note 4

[10] Peter Ellinger, "The doctrine of Strict Compliance", Its Development and Current Construction *et al* Lex Mercatoria- Essay on International Commercial Law In Honour of Francis Reynolds- LLP, 2000

[11] (1904) 90 LT 618, following *Re an Arbitration between Reinhold & co and Hansloh* (1896) 12 TLR 422

[12] (1922) 12 LILR 21 at 24; see also *Belgian Grain and Produce Co. Ltd vs. Cox & Co (France) Ltd* (1919) 1 LI.LR.256 at 257

In *Equitable Trust Co. of New York vs. Dawson Partners Ltd*[13] Lord Sumner had this to say;

> "it is both common ground and common sense that in such a transaction the accepting bank can only claim indemnity (from the buyer) if the conditions on which it is authorized to accept are in the matter of the accompanying documents *strictly observed*. There is no room for documents which are almost the same, or which will do just as well. Business could not proceed securely on any other lines. The bank's branch abroad, which knows nothing officially of the details of the transaction thus financed, cannot take upon itself to decide what will do well enough and what will not. If it does as it is told, it is safe; if it declines to do anything else, it is safe; if it departs from the conditions laid down, it acts at its own risk."

This is the construction of the doctrine of strict compliance. The objective of this study is to evaluate how strict is strict compliance. In doing this the study will discuss the general form of the documentary credits, evaluate the doctrine of strict compliance and consequently discuss whether or not it is desirable to retain the doctrine in its current construction. If not, the study will investigate whether or not there is room for the relaxation of the doctrine without necessarily undermining the rationale thereof.

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[13] (1927) 27 LI L.Rep 49 at 52

2. Form and Operation of Documentary Credits:

A banker's commercial credit is an undertaking by a banker to pay a sum of money to the person to whom the credit is addressed or more usually to accept or purchase a bill of exchange drawn or held by that person. The undertaking is either absolute or more usually is given on condition that that person fulfils the requirements set out in the credit.[14]

2.1 The Documentary Credit:

The definition of documentary credit which is currently accepted by the banking world is that of Article 2 of the Uniform Customs and Practice (UCP) for Documentary Credits.[15] This article states that a documentary credit is,

> "any arrangement, however named or described, whereby a bank (the issuing bank) acting at the request and on the instructions of a customer (the Applicant) or its own behalf,
>
> i. Is to make a payment to or to the order of a third party (the Beneficiary), or is to accept and pay bills of exchange (Drafts) drawn by the beneficiary.
>
> ii. Authorises another bank to effect such payment or to accept and pay such bills of exchange (Draft(s), or

[14] RR Rennington & Alt Hudson & J E Mann, 'Commercial Banking Law.' Macdonald and Evans- 1978
[15] UCP 500 (the 1993 Revision)

iii. Authorises another bank to negotiate against stipulated document(s) provided that the terms and conditions of the credit are complied with."

To comply with the terms of the credit constitutes a condition precedent to the bank's duty to pay both in cases falling within ii and iii.[16] In esesence, at the request of the buyer, the issuing banker promises to pay the price of the goods to the seller against the tender of the relevant documents. The nature of the banker's undertaking may vary: it may be an irrevocable promise or one subject to revocation.[17] The method of payment promised by the banker may assume different forms. Firstly, he may agree to pay cash when the documents are presented or at a deferred date, such as 90 days after presentation. Secondly, he may undertake to accept the bill of exchange for the price drawn on him by the seller. Thirdly, he may agree to negotiate without recourse a bill of exchange drawn by the seller's bill. In the last two cases, the documents must be attached to the seller's bill.

Commercial credits are most commonly used in connection with the import and export transaction where an exporter who contracts to sell goods to a foreign purchaser is unwilling to dispatch them in reliance on the purchaser's personal credit, either because the purchaser is unknown to him or because his credit is uncertain. The purchaser, on the other hand may equally be uncertain about the exporter's reliability, and, therefore unwilling to part with his money before the goods are registered.[18] A transaction under a commercial letter of credit therefore presupposes the case of a seller or buyer whose reputation is sound in his own country but who is not sufficiently known in foreign markets to

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[16] "Benjamin's Sale of Goods", Sweet & Maxwell, London-2002
[17] Ibid
[18] G.A. Penn, AM Shea & A Arora, "The Law and Practice of International Banking- Banking Law Volume 2", Sweet & Maxwell- London 1987

enable him to rely on his reputation when selling or purchasing goods abroad.[19]

A compromise therefore has to be reached whereby the purchaser agrees in a contract of sale to procure the opening of commercial credit by a reliable bank in his own country in favour of the exporter, and when the bank notifies the exporter of the opening of the credit the exporter has an assurance that when he dispatches the goods and tenders the shipping documents to the bank, he will be paid the purchase price by the bank.

Thus documentary credits represent the most secure method by which a seller may obtain the price of goods he has contracted to sell. In essence the credit is established under the terms of the sale contract.[20]

The machinery and the reason for its use were described, in what has become a classic statement, by Scrutton L J in *Guaranty Trust Co. of New York vs. Hannay & Co.*[21]

> "The enormous volume of sales of produce by a vendor in one country to a purchaser in another country has led to the creation of an equally great financial system intervening between vendor and purchaser, and designed to enable commercial transactions to be carried out with the greatest money convenience to both parties. The vendor to help the finance of his business, desires to get his purchase price as soon as possible after he has dispatched the goods to his purchaser; with this object he draws a bill of exchange for the price, attaches to the draft the document of carriage and insurance of the goods sold and sometimes an invoice for the price, and discounts the bill- that is, sets the bill with the documents attached to an exchange house.

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[19] Ibid

[20] D.M. Day & Bernadette Griffin; ' The Law of International Trade'- second edition, Butterworths 1993

[21] (1918) 2 KB 623 at 659

> The vendor thus gets his money before the purchaser would, in ordinary course, pay; the exchange house duly presents the bill for acceptance, and has, until the bill is accepted, the security of a pledge of the documents attached and the goods they represent. The buyer on the other hand may not desire to part with the price until he has resold the goods. If the draft is drawn on him, the vendor or the exchange house may not wish to part with the documents of title until the acceptance given by the purchaser is met at maturity. But if the purchaser can arrange that a bank of high standing shall accept the draft, the exchange house may be willing to part with the documents on receiving the acceptance of the bank. The exchange house then have the promise of the bank to pay, which, if in the form of a bill of exchange is negotiable and can be discounted at once. The bank will have the documents of title as security for its liability on the acceptance, and its purchaser can make arrangements to sell and deliver the goods."

The value of this system therefore lies in the security that it affords to all parties concerned. The seller has the payment of this price assured, provided he tenders the correct documents, by a reputable bank, usually in his own country. The correspondent bank will receive the documents before it allows the seller to draw for the price and will thus be able to hold them as security pending payment by the issuing bank. The issuing bank in turn will have the documents as security for payment by its own customer, the buyer.[22]

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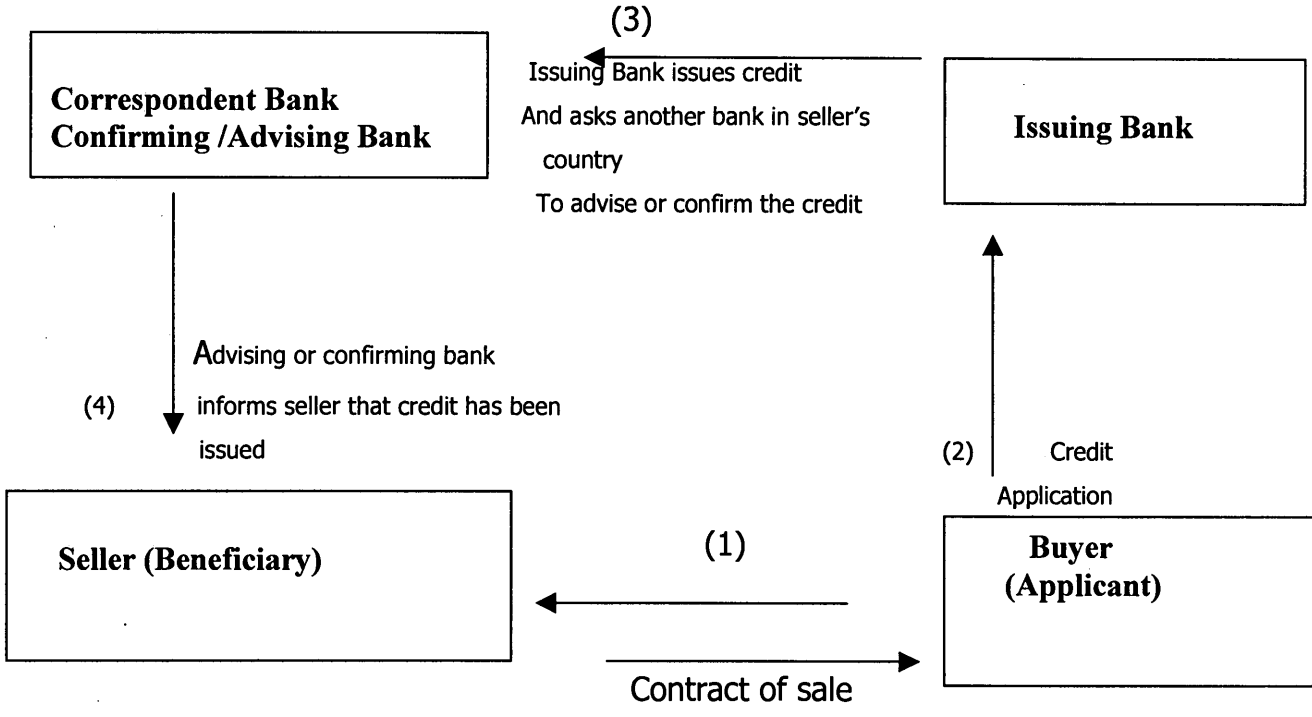
[22] *Supra* note 16

2.2 The Documentary Credit Operation:

An agreement that payment should be by letter of credit involves several stages. These stages are traced below.[23]



The applicant for the credit is the buyer under the contract of sale, by whom the contractual price is owed. There is however, no apparent objection to the applicant being someone other than the buyer, perhaps a third party who is himself indebted to the buyer and will be discharging that debt by making payment under a credit opened in favour of the seller. The contract of sale will often make express provision for the time for opening the credit and failure to open the credit by the stipulated time can be treated by the seller as breach of a condition precedent to his

[23] *Supra* note 14

performance and a repudiation of the contract by the buyer.[24] Where there is no express stipulation as to opening the credit, the credit must be opened at the very latest, before the first date of shipment of the goods.[25] The instructions given by the buyer to his bank will reflect the sale contract between himself and the seller. These instructions comprise the buyer's mandate. They must be strictly complied with by the bank, exercising reasonable skill and care to determine their compliance.[26]

When the bank of the buyer is in receipt of the buyer's instructions, it will issue notice to the seller that the credit has been opened and the conditions with which the seller must comply in order to obtain payment under that credit. It is thus referred to as the issuing bank. The issuing bank gives an undertaking, as principal to pay against correct documents in accordance with the mandate of the buyer. The issuing bank may communicate the opening of the credit to the seller direct or through another bank, which is situated in the seller's country of residence. This is referred to as the correspondent or advising bank.[27] Although it is easier to effect communication through a correspondent bank, it clearly increases the cost of the credit mechanism, and transmission of instructions invariably carries inherent risk of inaccuracies.[28] However both the cost and the risk are borne by the applicant.

There are however two roles that a correspondent bank may assume; that of an adviser in which case the bank is used as an adviser and does not assume any undertaking to make payment to the beneficiary on its own behalf. Its purpose is merely to advise the beneficiary of the terms of the credit with which he must comply if he is to receive payment

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[24] *See Etablissements Chainbaux SARL vs. Harbormaster* (1955) 1 Lloyd's Rep 303

[25] P.Sellman, 'Law of International Trade'4th Edition, Old Bailey Press, 2003. *See also Pavia &Co. SPA vs. Thurman-Neilsen* (1952) 2 QB 84; *Ian Stach Ltd vs. Baker Bosley Ltd* (1958) 2 QB 130

[26] Ibid; Article 13(a) of the UCP

[27] Ibid at 34

[28] See *Equitable Trust Co. of New York vs. Dawson Partners Ltd* (1927) 27 Ll .LR 49

from the issuing bank.[29] The second role that a correspondent bank may assume is one of a confirmer. Where the correspondent bank confirms the credit, not only does it communicate to the seller that the credit has been opened in his favour, but it gives him a complete, separate and additional undertaking to make payment if correct documents are tendered to it. Whilst it is acting as an agent of the issuing bank to the extent that if it correctly makes payment, it has a right to reimbursement by the bank instructing it [30] while in giving the undertaking to make payment it acts as principal vis-à-vis the seller.[31] To that end the confirming bank cannot refuse to pay the seller if the documents are correct even though it has already been intimated that the issuing bank would not be prepared to reimburse it.[32] The rationale behind this is that each of the four contracts in the documentary credit are separate and autonomous but interconnected.[33]

2.3 Types of Credits:

A fundamental classification of documentary credits is their division into revocable and irrevocable credits. This classification is recognized in Article 6 of the UCP, which also requires that all credits should clearly indicate whether they are revocable or irrevocable.[34] In the absence of such an indication, it is deemed to be irrevocable.[35] Whether a documentary credit is revocable or irrevocable depends on the terms of the promise given by the issuing banker to the seller.[36]

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[29] Ibid
[30] Article 14(a) of the UCP
[31] Article 9(b) of the UCP
[32] *Supra* note 24
[33] Ibid
[34] Benjamin's Sale of Goods, Sweet & Maxwell, London - 2002
[35] *See* Article 6(c) of the UCP
[36] *West Virginia Housing Development Fund vs. Sroka* 415F. Supp 1107 (1976)

2.3.1 Revocable Credits:

A revocable credit is one, which the buyer has established, but which he may later cancel or modify in so far as the seller has not already drawn on it.[37] Under Article 8(a) of the UCP, a revocable credit does not constitute a legally binding undertaking between the issuing banker and the seller and when the buyer decides to cancel or modify it, he may do so at any time without notice to the seller.[38]

However, if the issuing bank cause a correspondent advising bank or some other bank to be involved in the payment, acceptance or negotiation of the credit prior to its cancellation or amendment, that other bank would be entitled to reimbursement for the expenses incurred and payments made from the issuing bank, who would be entitled in turn to reimbursement from the applicant, the buyer.[39] Revocable credits are little more than a statement by a bank to the seller, the beneficiary, that the buyer will do that which he was already bound to do by entering the contract of sale. They are of little value to a seller who requires security and are closely linked to parent and subsidiary company and merely require the bank's services for the transmission of funds.[40]

2.3.2 Irrevocable Credits:

An irrevocable credit is one, which is expressly stated to be irrevocable. Thus it cannot be cancelled or modified provided that the seller presents the correct documents to the bank in the contract period.[41] In essence the

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[37] *Supra* note 19
[38] *Supra* note 33. *See* also, *Cape Asbestos Co. Ltd vs. Lloyds Bank Ltd* (1921) WN 274
[39] Article 8(b) of the UCP
[40] *Supra* note 24 at 157
[41] *Supra* note 19

issuing bank gives a binding undertaking to the beneficiary that he will pay against documents, or that all bills in compliance with the terms of the credit will be honoured, whether by acceptance, payment or negotiation.[42] This undertaking along with that of the confirming bank, if any, is contractual in nature. In *Stein vs. Hambros Bank*[43] Rowlatt J said that "... the obligation of the bank (under an irrevocable credit) is absolute, and is meant to be absolute, that when the correct documents are presented, they have to accept the bill. That is the commercial meaning of it."

The promise for payment may assume one of four forms. The first under clause (a)(i) may assume the form of a promise to pay in cash when the documents are tendered. Secondly under clause (a)(ii) may assume the form of a promise to make payment in cash at some deferred date, determinable in accordance with the provisions of the credit. A third type of undertaking defined in clause (a)(iii) is given by the bank where the beneficiary is asked to draw a bill of exchange covering the amount of the credit. If the draft is to be drawn on the issuing bank, that bank undertakes to accept and pay the draft on maturity. If the draft is to be drawn not on the issuing bank but "another drawee bank", the issuing bank's duty is to accept and pay on maturity draft(s) drawn by the beneficiary in the event the drawee bank stipulated in the credit does not accept draft(s) drawn on it, or to pay draft(s) accepted but not paid by such drawee bank at maturity.[44]

The fourth type of undertaking is used in credits available by negotiation. In such a credit, the issuing bank undertakes to negotiate a bill of exchange drawn by the beneficiary. According to clause (a)(iv) the issuing bank is then deemed to have undertaken to "pay without recourse

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[42] Article 9(a) of the UCP
[43] (1921) 9 Ll LR 433
[44] Benjamin's Sale of Goods, *supra* at 1643, (23-051)

to drawer's and or bona fide holders, draft(s) drawn by the beneficiary and /or documents presented under the credit".[45]

Under Article 9(d)(i) of the UCP, an irrevocable credit can neither be amended nor cancelled without the agreement of the issuing bank,[46] the confirming bank, if any, and the beneficiary. This arrangement gives considerable security to the seller but may have disadvantages for the buyer since he is committed to the credit.[47] In *Discount Records Ltd vs. Barclays Bank Ltd*,[48] an irrevocable credit was opened in favour of the sellers. The goods shipped were not in accordance with the terms of the contract of sale and the buyer sought to prevent the banks from paying under it on the grounds that the sellers had been fraudulent and that the buyer was thus entitled to release from his legal obligations.[49] The court refused to grant the injunction on the grounds that fraud was merely alleged and not proved and in these circumstances it would not be proper to allow an irrevocable credit to be effectively revoked. Thus Megarry J.[50] said that, "I would be very slow to interfere with bankers' irrevocable credits, and not least in the sphere of international banking, unless a sufficiently good cause is shown, for interventions by the court that are too ready or too frequent might gravely impair the reliance which quite properly is placed on such credits."

However there remains the possibility that a court might, in sufficiently serious case, allow a buyer to avoid payment on an irrevocable credit. In the American case (distinguished in the *Discount Records* case) of *Sztejn vs. J Henry Schroeder Banking Corp*,[51] it was stated that, where the seller's fraud has been called to the bank's attention before the drafts

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[45] Ibid
[46] *AMF Head Sports Wear Inc. vs. Ray Scott's All- American Sports Club Inc.* 4487.Supp 222 (1978)
[47] *Supra* note 19
[48] (1975) 1 All ER 1071; (1975) 1 Lloyd's Rep 444
[49] Ibid
[50] Ibid at 1075
[51] 31NYS 2d 631 (1941)

and documents have been presented for payment, the principle of the independence of the bank's obligation under the letter of credit should not be extended to protect the unscrupulous seller.

The issue here is clearly one of policy, the balancing of the undesirability of assisting fraud against the necessity for maintaining the stability of established commercial transactions. The issue of fraud will be discussed in a little greater detail below.

2.4 Confirmed and Unconfirmed Credits:

Whether a documentary credit is confirmed or unconfirmed depends on the role assumed by the correspondent banker.[52] A credit is confirmed when the correspondent in addition to notifying the seller of the opening of the credit in his favour, adds its own confirmation of the credit.[53] Under Article 9(b) of the UCP, such a confirmation constitutes a definite undertaking by the confirming banker, given to the beneficiary in addition to that of the issuing banker's: he may promise to pay cash on presentation or at a deferred date; he may undertake to accept and pay a documentary bill drawn on himself or to accept and pay such a bill drawn if a nominated third bank dishonours a bill drawn under the credit, or he may promise to negotiate or purchase without recourse to a documentary bill drawn on a third party other than the applicant.[54]

It is essential that the confirming banker's undertaking be definite and unconditional. Thus, if the confirming banker reserves to himself a right of recourse against the seller, his undertaking does not constitute a confirmation.[55]

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[52] *Supra*, Benjamin's Sale of Goods
[53] *Supra* note 19
[54] *Supra* note 42 at 23-054
[55] *Wahbe Tamari & Sons Ltd vs. 'Colprogeca' Sociedade Geral de Fibras Cates e Produtos Coloniais Lda* (1969) 2 Llyod's Rep 18

A seller will whenever possible stipulate for a confirmed credit in the contract of sale.[56] Typically, the commercial purpose of a confirmed credit is to give the beneficiary a cause of action against a bank which is within the confirming bank's jurisdiction should the credit not be honoured.

An unconfirmed credit is one under which the correspondent bank merely advises the seller of the opening of the credit but does not itself undertake any obligation under it. A correspondent bank will naturally not confirm a revocable credit.[57] The beneficiary under an unconfirmed credit has an enforceable right only against the issuing bank. The notification of the credit from the advising bank will carry words such as, "This credit does not have our confirmation." [58]

2.5 Contractual Relationships in a Documentary Credit:

A transaction, which involves a documentay credit, brings into play a web of contracts;

- The contract of sale between the buyer and the seller;
- The contract between the buyer (the applicant) and the issuing bank;
- The contract between the issuing bank and, if there is one, the correspondent bank (who may advise and/or confirm the credit or pay as nominated bank on behalf of the issuing bank);
- The contract between the seller and the advising /confirming bank.[59]

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[56] *Supra* note 19 at 158
[57] Ibid
[58] Ibid
[59] *Supra* note 19

The four contracts relating to a confirmed irrevocable credit were clearly set out on the case of *United City Merchants (Investments) Ltd vs. Royal Bank of Canada, The American Accord.* [60] Lord Diplock stated that,

> "It is trite law that there are four autonomous though interconnected contractual relationships involved: (1) The underlying contract for the sale of goods, to which the only parties are the buyer and the seller; (2) The contract between the buyer and the issuing bank under which the latter agrees to issue the credit and either itself or through a confirming bank to notify the credit to the seller and to make payments to or to the order of the seller (or to pay, accept or negotiate the bills of exchange drawn by the seller) against presentation of stipulated documents; the buyer agrees to reimburse the issuing bank for the payments made under the credit.
>
> For such reimbursement, the stipulated documents, if they include a document of title such as a bill of lading, constitutes a security available to the issuing bank; (3) if payment is to be made through a confirming bank, the contract between the issuing bank and the confirming bank authorizing and requiring the latter to make such payments and to remit the stipulated documents to the issuing bank when they are received, the issuing bank in turn agreeing to reimburse the confirming bank for payments made under the credit; (4) the contract between the confirming bank and the seller under which the confirming bank undertakes to pay to the seller(or to accept and negotiate without recourse to the drawer bills of exchange drawn by him) up to the amount of the credit against presentation of the stipulated documents. Again, it is trite law that contract (4) with which alone the instant appeal is

[60] (1982) 2 WLR 1041; (1983) AC 168

directly concerned, the parties to it, the seller and the confirming bank, deal in documents as article 8 of the Uniform Customs and Practice puts it.

If on their face the documents presented to the confirming bank by the seller conform with the requirements of the credit as notified to him by the confirming bank, that bank is under contractual obligation to the seller to honour the credit not withstanding that the bank has knowledge that the seller at the time of the presentation of the confirming documents is alleged by the buyer to have and in fact has committed a breach of his contract with the buyer for the sale of goods to which the documents appear on their face to relate that would have entitled the buyer to treat the contract of sale as rescinded and to reject the goods and refuse to pay the seller the purchase price"

This passage sets out and describes the four contracts that form the basis of a confirmed irrevocable credit i.e. the contract between the buyer and the seller, the contract between the buyer and the issuing bank, the contract between the issuing bank and the correspondent or confirming bank and the contract between the correspondent bank and the seller.

Paul Todd[61] asserts that the first three contracts are ordinary bilateral contracts between the parties. The fourth contract is more problematic, because neither bank is agent of the seller and no solution that is wholly satisfactory has yet been found to the relationship between the seller and the confirming bank. Crucially from the words of Lord Diplock is the fact that, banks deal in documents rather than goods and that the whole purpose of an irrevocable credit is to give the seller an assured right to be paid before he parts with the control of the goods that does not permit of any dispute with the buyer as to the performance of

[61] Paul Todd, '*Cases and Materials on International Trade*', Thompson; Sweet & Maxwell, 2003

the contract of sale being used as a ground for non- payment or reduction or deferment of payment.[62]

2.6 The Principle of Autonomy:

The contracts mentioned above are autonomous in that their terms are independent of each other.[63] Thus nothing in the sale contract can affect the terms of the credit.[64] Furthermore the letter of credit is separate from and independent of the underlying contract of sale. The bank is not concerned with the underlying contract of sale but only with the documents tendered by the beneficiary.[65]

Consequently if the bank makes payment against conforming documents, then it is entitled to be reimbursed by the applicant.[66] Article 14(a) provides that, "when the issuing bank authorises another bank to pay.... against documents which appear on their face to be in compliance with the terms and conditions of the credit, the issuing bank and the confirming bank, if any, are bound: (i) to reimburse nominated bank which has paid." This therefore forms the contractual basis for the autonomy of the irrevocable credit with the effect that the applicant cannot prevent the bank from making payment notwithstanding that it is aware of defects in the goods not manifest on the face of the documents.[67] However, in *Hong Kong and Shanghai Banking Corporation vs. Kloeckner &Co. AG,* [68] Heirst J. held that this rule does not prohibit a bank from raising by way of set-off a liquidated claim of its own against a

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[62] Ibid
[63] Ibid at 398
[64] *Urguhart Lindsay & Co. vs. Eastern Bank* (1922) 1 KB 318; *Semex Corporation vs. UBAF Arab American Bank* (1995) 2 Bank L.R 73
[65] Articles 3 and 4 of the UCP
[66] Pamela Sellman, 'Law of International Trade', 4th Edition, Old Bailey Press- 2003
[67] *Power Curber International Ltd vs. National Bank of Kuwait SAK* (1981) 2 Lloyd's Rep 394
[68] (1990) 2 QB 514

beneficiary of a standby letter of credit.[69] Nevertheless, it has been argued that even where the bank has a direct claim of its own, the principle that letters of credit (like bills of exchange) should be treated as autonomous, or as "cash" means that any right of set-off should be more strictly circumscribed and limited to cross- claims connected with the transaction which provides for the credit itself and which are liquidated.[70]

2.7 The Fraud Exception Rule:

Under a letter of credit transaction, a bank need not pay under a credit when it knows that a tender contains statements known by the beneficiary to be false or contains a forged signature or alteration. If it pays it is doing so against the duty it owes to the applicant.[71] Thus fraud will justify a bank in not paying a beneficiary under a letter of credit. The exception for fraud on the part of the beneficiary seeking to avail himself of the credit is a clear application of the maxim *ex turpi causa non oritur actio* or if plain English is to be preferred, "fraud unveils it all'. The courts will not allow its processes to be used by a dishonest person to carry out a fraud.[72]

However, in the United *City Merchants vs. Royal Bank of Canada*[73] Lord Diplock held that fraud as to entitle a banker to refuse to pay under a letter of credit notwithstanding the strict general rule requiring payment when the documents are in order on their face, did not extend to fraud to which the seller or beneficiary was not party. This

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[69] See *Safa vs. Banque du Caire* (2000) Lloyd's Rep. 600
[70] *Solo Industries UK limited vs. Canara Bank* (2001) 1 WLR 1800; *See* generally Michael Brindle & Raymond Cox, 'Law of Bank Payments', Third Edition, Sweet & Maxwell, London 2004
[71] Bailey JK Xu, 'The Issuing Bank's Duty under Letter of Credit Transaction', Accessed at www.hllawyers.com/law-en-publications. Accessed on 06. 08. 2005
[72] Andreas Karl, 'Letters of Credit: The Doctrine of Strict Compliance'- Thesis – University of Uppsala, Accessed at www.juridicum.su.se/ transport/ . Accessed on 06.08.2005
[73] (1982) 2 W.L.R 1041

therefore means that where the beneficiary was not party to the fraud, he is entitled to payment if he presents conforming documents.

3. The Doctrine of Strict Compliance

3.1 Form and Content of the Doctrine of Strict Compliance:

The doctrine of strict compliance is fundamental to the operation of letters of credit. The documents presented under the letter of credit must strictly comply with the terms of the credit. If the documents do not comply with the terms of the credit but the bank nevertheless pays, it will not be entitled to reimbursement by the applicant, as it will have exceeded its mandate.[74] If the documents do comply with the terms of the credit, then payment must be made. The buyer will send to the issuing bank instructions as to the documents which the seller is to present to the bank or to the correspondent bank in order to be allowed to draw on the credit.

It is a term of the contract between the buyer and his bank that the bank will allow the seller to draw only if the documents are in strict accord with these instructions and a bank, which accepts documents which do not comply, will be liable to the buyer.[75] Furthermore it will be a term of the contract between the bank and the seller that the seller presents the correct documents.

In the *Moralice*,[76] McNair J. held that, " When a CIF contract provides that payment shall be by means of presentation of documents against an irrevocable credit, that necessarily involves not only in the contract between the confirming bank and the seller but in the contract between the buyer and the seller, that the documents must be such as will strictly comply with the terms of the credit." This case involved the

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[74] P. Sellman, ' Law of International Trade', 4th Edition, Old Bailey Press-2003
[75] D.M Day and B. Griffin, ' The Law of International Trade', 2nd Edition Butterworths London- 1993
[76] *Moralice (London) Ltd vs. ED & F.Mann* (1954) 2 Lloyd's Rep 526 at 533

sale of 5000 bags but the bill of lading tendered to the bank indicated that there were three short. The bank was held to be entitled to reject the documents. The *de minimis* rule is not applicable to documentary credits.

The first reason for this rule is the position in which a bank would find itself if it allowed the seller to draw on the tender of documents which the buyer would not accept. Lord t Sumner in *Equitable Trust Company of New York vs. Dawson Partners Ltd*[77] indicated that; it is both common ground and common sense that in such a transaction the accepting bank can only claim indemnity (from the buyer) if the conditions on which it is authorised to accept are in the matter of the accompanying documents strictly observed. There is no room for documents which are almost the same or which will do just as well. Business could not proceed securely on any other lines. The bank's branch abroad, which knows nothing officially of the details of the transaction thus financed cannot take upon itself to decide what will do well, enough and what will not. If it does as it is told, it is safe; if it departs from the condition laid down, it acts at its own risk. The documents tendered were not exactly the documents which the (bank) had promised to take up and prima facie they were right in refusing to take them.

The second reason for the bank's insistence on the strict compliance of the tender with its instructions lies in the bank's position in relation to the sale contract. The bank is not a dealer in goods; it cannot be expected to know trade terms and practises or to know why the buyer has stipulated for a particular item and what importance he might attach to that item.[78] The point arose in *J.H. Rayner &Company Ltd vs. Hambro's Bank*[79] where the sale was of "Coromandel groundnuts". The buyer's application for the opening of the credit required documents indicating

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[77] (1927) 27 Ll. LR 49
[78] *Supra* note 87
[79] (1943) KB 37; (1943) 74 Ll. Rep10

these goods. The documents presented by the seller to the bank included an invoice for " Coromandel groundnuts" but a bill of lading indicating the shipment of "machine shelled groundnuts kernels". At first instance Atkinson J. admitted evidence to show that trade practice regarded the terms as identical in meaning and concluded that the bank should have accepted the documents.[80]

The court of Appeal reversed this ruling. McKinnon L J. stated that, "it is quite impossible to suggest that a banker is to be affected with knowledge of the customs and customary terms of everyone of the thousands of traders to whose dealings he may issue letters of credit. It would be quite impossible for business to be carried on and for bankers to be in any way protected in such matters, if it were said that they must be affected by a knowledge of all he details of the way in which particular trades carry on business."[81]

The case of *Soprana SpA vs. Marine and Animal By- Products Corp* [82] illustrates well the various ways in which a seller might fall short of the conforming documents requirements.[83] This case was one of a contract for 500 tons of 'CHILEAN FISH FULL MEAL', to be shipped C & F Savona. The banker's letter of credit called for a commercial invoice, a weight list, a health certificate showing the goods to be free from salmonella, origin analysis and quality certificates, and a full set of on board bills of lading marked " freight prepaid." The covering letter described the goods as "500 Chilean Fish Full-meal 70% Protein, 10 % Max fat, 2% Max Salt, 2% Max Sand, 10% Max Moisture". The court held that the documents tendered were non - conforming and for the following reasons.

First the bill of lading described the goods as "Chilean Fishmeal",

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[80] *Supra* note 87
[81] Supra note 91 at 41 and 13 respectively
[82] 1951 (2) Lloyds Rep 367
[83] Michael Bridge, 'The International Sale of Goods- Law and Practice', Oxford University Press, 1999

the protein content was stated as 69.7 % in the analysis certificate and as 67% minimum in the quality certificate and the health certificate referred to "Fishmeal" but made no reference to salmonella. Therefore the health certificate was non-conforming. So too the quality and analysis certificates because of the lower protein count.[84] But the bill of lading description was acceptable since it was not inconsistent with the full accurate description of the goods in the commercial invoice.[85]

Secondly the bill of lading tendered was marked "freight collect." This was unacceptable though the court had some difficulty in dealing with the arbitration tribunal's finding that it was common practice for freight collect bills to be accepted under a C & F contract if the seller deducted freight from the price, which the seller in this case had not done.[86] MacNair J. also took the view that the bank was entitled to reject the first tender, because the documents did not conform and reliance was placed upon *Midland Bank Ltd vs. Seymour*[87] for the statement that the documents must naturally be consistent and upon *J. H Rayner and Co. Ltd vs. Hambros Bank Ltd*[88] for the proposition that the description of the goods in the shipping documents and in the bills of lading must conform with the description of the goods in the letter of credit. In the present case the letters of credit as stated above incorporated the UCP, which by Article 33 provides that "the description of the goods in the commercial invoice must correspond with the description in the credit. Whenever the goods are described in the remaining documents, description in general terms will be acceptable." Article 37 (c) of the UCP 500 provides that, the description of the goods in the commercial invoice must correspond with the description in the Credit. *In all other documents, the goods may be*

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[84] Ibid
[85] See UCP 500 Article 37(C)
[86] Supra note 95
[87] (1955) 2 Lloyd's Rep 149 at 153
[88] (1943) 1 KB 37

described in general terms not inconsistent with the description of the goods in the Credit.[89]

Paul Todd [90] pointed out that the decision is an application of the doctrine of strict compliance.

The insistence upon the doctrine of strict compliance is continually reiterated. In *English, Scottish and Australian Bank vs. Bank of South Africa* [91], Bailhache J. remarked that, "it is elementary to say that a person who ships in reliance on a letter of credit must do so in exact compliance with its terms. It is also elementary to say that a bank is not bound or indeed entitled to honour drafts presented to it under a letter of credit unless those drafts with the accompanying documents are in strict accord with the credit opened."[92] Thus if a certificate signed by *experts* is required a certificate signed by a single expert is a bad tender. Similarly a set is non-conforming if the bill of exchange is drawn on the issuing bank instead of the buyer.[93] The duty of strict compliance prevails in the contracts, which occur in a documentary credit transaction, that is the contract between the buyer and the correspondent banker, the contract of the banker and the seller and in the relationship of issuing and

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[89] The emphasis is mine

[90] *Supra* note 60

[91] (1922) 1 Ll L R 21 at 24; See also *Belgian Grain and Produce Co.Ltd vs. Cox (France) Ltd* (1999) 1 Ll L R 256 at 257; *Donald H. Scott & Co. Ltd vs. Barclays Bank Ltd* (1923) 2 KB 1 at 11; *Bank Melli Iran vs. Barclays Bank D. Co.* (1951) 2 Lloyd's Rep 367 at 374; *Midland Bank Ltd vs. Seymour* (1955 2 Lloyd's Rep. 147 at 154; *Kydon Compania Naviera SA vs. National Westminster Bank Ltd (The Lena)* (1981) 1 Lloyd's Rep 68 at 74- 75; *Glencore International AG vs.. Bank of China* (1996) 1 Lloyd's Rep. 135; In the US see: *Venizelos SA vs. Chase Manhattan Bank,* 425 F2d 461 (1970); *Oriental Pacific (USA) Inc. vs. Toronto Dominion Bank,* 357 NYS 2D 957 (1974); *Flagship Cruises Ltd vs. New England Merchants National Bank of Boston,* 569 F 2d 699(1974); *Re Coral Petroleum, 878 F2d 830* (5th Cir. 1989) *Trifinery vs. Banque Paribas 762F. Supp* (SD NY, 1991); *Ocean Rig ASA vs. Safra National Bank of New York* 72 F. Supp 2d 193 Cf; *Banco Espanol de Credito vs. State Street Bank and Trust Co,* 385 F 2d 230 (1967) (which suggest that the standard of strict compliance may be relaxed when a discrepancy does not relate to the description of the goods: In Canada *see;* Davis O'Brien Lumber Co Ltd *vs.* Bank of Montreal (1951) 3 DLR 536 at 550

[92] Benjamin's Sale of Goods, 6th edition, Sweet and Maxwell (2002)

[93] *Kydon Compania Naviera SA vs. National Westminster Bank Ltd (The Lena)* (1981) 1 Ll. Rep. 68

correspondent banker.[94] The rule is best illustrated by the fact that the rule *de minimis non curat lex* does not apply in documentary credits transactions.[95]

However some mitigation of the harshness of the doctrine is to be found in the principle that the credit should be interpreted as a whole.[96] Thus an isolated technical phrase may occasionally be construed in the light of other terms is provided for by the UCP Article 13(a) which emphasizes the importance of banking practice and other matters have been subject to judicial decision.[97]

Meaning of discrepancy: While the doctrine of strict compliance is in itself, well entrenched and understood, there is little authority to explain the exact nature of a "discrepancy" or "irregularity". Undoubtedly, the exclusion of the principle that *de minimis non curat lex* suggests that any meaningful deviation in the documents set out in the letter of credit constitutes a discrepancy and vitiates the tender. But would it mean that a minor typographical error or a patent omission or slip constitutes a discrepancy?[98]

The problem was considered in two modern American cases. In the first case, *Beyene vs. Irvin Trust Co.*[99], a documentary credit called for a bill of lading including a notation stating, "notify Mohammed Sofan". The bill of lading tendered by the beneficiary referred instead to Mohammed

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[94] Thus *Equitable Trust Co. of NY vs. Dawson Partners Ltd supra (*which was an action between a banker and a buyer) has been cited in *Reyner (JH) and Co. Ltd vs. Hambros Bank Ltd* (1943) 1KB37(an action by seller against a banker)

[95] *Moralice (London) Ltd vs. ED and F. Man* (1954) 2 Lloyd Rep Corp (1966) Lloyd's Rep 367 at 390; *Astro Exito Navigacion SA vs. Chase Manhattan Bank (The Messianiaki Tolmi)* (1986). Lloyd's Rep 455; *Seaconsa Far East Ltd vs. Bank Markzi Bonhouri Islam Iran* (1993) Lloyd's Rep 236.

[96] *Elder Dempster Lines Ltd vs. Ionic Shipping Agency Inc* (1968) 1 Lloyd's Rep. 529 at 535-536. Some American cases construe the credit so as to uphold the transaction: *Venizolos SA vs. Chase Manhattan Bank* 425F 2d 461 (1970); *CNA Mortgage Investors Ltd vs. Hamilton National Bank* 540 SW 2d 238 (Teny 1975); *West Virginia Housing Dept Fund vs. Sroka* 415 F. Supp 1107(1976) which also emphasised that the credit needs to be construed *contra proferentem*; *Bank Of North Carolina vs. Rock Island Bank* 570 F 2d 2002 (1978)

[97] 762F 2d 4 (1985)

[98] *See* Benjamin's Sale of Goods above

[99] 726F 2d 4 (1985)

Soran. The Second Circuit Court of Appeals concluded that the issuing bank could not be certain that Mohammed Sofan and Mohammed Soran were one and the same person or that the difference in the name was a pure misnomer or a typographical error. The documents were therefore considered discrepant.[100]

In the second case, *Bank of Montreal vs. Federal National Bank*,[101] a group of companies known as "Blow Out Companies" needed an advance from the Plaintiff bank. To secure this loan, the group instructed the defendant bank to open a standby credit in favour of the plaintiff bank. Payment under the facility so issued was due against the plaintiff bank's bill of exchange accompanied by a default certificate that had *inter alia* to attest that the amount of the bill would be set off against the liabilities of one of the members of the group described as, "Low Out Prevention Ltd." In fact the group did not encompass a company by this name, the correct style of the member involved being, "Blow Out Products Ltd." Upon the group's default, the plaintiff bank drew a bill of exchange in which it described the relevant company under its correct style, attaching a memorandum explaining that the style as set out in the letter of credit involved a misnomer. Russell J, in the US District Court, rested his decision for the plaintiff bank on the finding that the substitution of the names was occasioned by a draftsman's error. A construction of the letter of credit, which treated the error as such was in his opinion, fair and gave effect to the intention of the parties as it was of course, clear that the company to whose affairs the standby letter of credit related was Blow Out Products Ltd." Treating the documents as discrepant would have frustrated the object of the transaction.[102]

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[100] *Supra* note 77
[101] 622F Supp. 6 (1986)
[102] Ibid

Peter Ellinger believes that Russell J's judgment was correct. Where it can be shown that the supposed discrepancy results from a patent error, it is unrealistic to treat the entire tender as invalid by reason only of a technical slip or mistake.[103] Undoubtedly where it is not clear that the departure from the details set out in the letter of credit constitutes a mistake, even a minor mistake justifies the rejection of the documents. But to treat any typographical error or patent mistake as a discrepancy would convert the commercial transaction covered by the letter of credit into a proof reading exercise.

A wish to preclude the transaction from being so treated is actually evident in the decision respecting one of the discrepancies pleaded in the classic case of, *Equitable Trust Co. of New York vs. Dawson & Partners*[104] The respective objection was that a certificate of quality had been countersigned by the "Hendelsvereeniging te Batavia" and not as stipulated by the "Chamber of Commerce" of Batavia. Relying on the evidence, Bateson J. held that the two bodies were known to be the same. His decision that the departure was therefore not a discrepancy was affirmed by the court of appeal[105] and although the House of Lords reversed that judgment on other grounds, it left this specific finding undisturbed.[106] To hold that the certificate was defective as it described the certifying body in its Dutch rather than in English style would have frustrated the transaction on the ground of a meaningless technicality.

The UCP relaxed the inflexible common law position. As seen above, Article 37 of the present version allows for a description in general terms apart from in the invoice. Thus if the only fault had been the description in the bill of lading as "Fishmeal", the tender would have been valid. Even then it would not have been valid at common law. As it was,

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[103] *Supra.* Benjamin's Sale of Goods at 1713
[104] (1927) 27 Ll. LR 49
[105] (1925) 25 Ll. LR 90; (1924) 24 Ll. LR 261
[106] (1927) 27 Ll. LR at 51 and at 54 (Viscount Sumner)

the UCP article will not cure the other faults. The last revision of the UCP provides in Article 13(a) that "compliance of the stipulated documents on their face with the terms and conditions of the credit shall be determined by international standard banking practice as reflected in these Articles."[107] Arguably this allows for more flexibility to be introduced into the doctrine of strict compliance.

The courts in the United States appear to apply a rule to the effect that banks should be charged with knowledge of banking practices but relieved from any charge to know commercial practises, i.e. the industry practices of the commercial parties to the underlying transaction.[108] This bears some similarities with the principle that banks do not deal in goods but can only be workable if there are clearly defined banking practices which are the same throughout the world, for otherwise how would you work a claim of sale with banks in different countries? Flexibility might tend to promote justice at the expense of certainty

3.2 Trial Defects:

In *Bankers Trust Company vs. State Bank of India*[109], Lloyd LJ accepted evidence "that discrepancies are found in nearly half of all credits." It was well reinforced by Sir Thomas Bingham MR. who observed that "discrepancies are found in nearly half of all credits," and it may well be true that as Sir Thomas Bingham MR, observed in *Glencore International AG vs. Bank of China*,[110] the discrepancies are rarely litigated, matters usually being settled well before that stage; "There are a number of reasons for this. The parties to these transactions (buyers, sellers, issuing

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[107] *Ibid*
[108] *Ibid,* See (1999) Journal of Business Law 521 at 523-524
[109] *Supra* note 112
[110] (1996) 1 Lloyd's Rep 135

and advising banks) are seasoned professionals not inexperienced consumers...Banks rightly jealous of their reputation in the international market place are generally careful not to refuse payment on the grounds of non conformity unless the non conformity is clear."

Nevertheless the high rate of discrepancies or alleged discrepancies is disturbing because it weakens the security of the seller.[111] One of the main advantages to the seller of an irrevocable documentary credit is said to be that the "vendor of goods selling against a confirmed letter of credit is selling under the assurance that nothing will prevent him from receiving the price."[112] If potential problems and hence the potential for non-payment exists in half of all credits, the value of such assurance is surely severely compromised.

Paul Todd[113] suggests two possible reasons for the degree to which discrepancies or alleged discrepancies arise under letters of credit. The first is that the credit requirements are insufficiently precise, rendering it unclear whether a credit has been complied with or not. In *Bankers Trust Co vs. State Bank of India* [114] for example, 967 pages of free text had to be checked. In *Glencore International AG vs. Bank of China* [115], the credit for the sale of ingots required "Origin: Any Western Brand", the issue being whether this covered goods which were shipped from Indonesia. Probably a degree of vagueness is inevitable in commerce especially where a variety of goods will satisfy the buyer's requirements, but it is certain to increase the potential for disputes about discrepancies.

The second possible reason is that the credit requirements are too onerous given that the beneficiary might have little control over the precise form of the shipping documents and that minor technical mistakes

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[111] *Supra* note 60
[112] *Hamzeh Malas & Son vs. British Imex Industries Ltd* (1958) 2 QB 127 at 129
[113] *Supra* note 60, pg 473 at 10-030
[114] (1991) 2 Lloyd's Rep 443
[115] (1996) 1 Lloyd's Rep 135

can often creep into any document.[116]

A bank is neither obliged nor entitled to accept non- conforming documents. To take the simplest case of an issuing bank under an unconfirmed credit, the bank will not be obliged to accept under its contract with the beneficiary and will not be entitled to accept under a contract with the applicant. But the non-compliance may be extremely trivial consisting for example of obvious typing errors, where a refusal by the buyer to accept could hardly be justified, but may be used as a device to get out of a bad bargain or a falling market,[117] the reason incidentally, for the rejection in *Glencore International AG vs. Bank of China.*[118] Alternatively, on a rising market, the buyer may be only too happy to accept the documents. Therefore, two issues arise, first, whether the strict compliance doctrine allows of any exception where the non-compliance is really trivial, and secondly, as to what extent is it permissible for the bank to leave the decision whether or not to accept to the buyer or applicant for the credit.

3.3 Very Trivial Defects:

The original common law position was that the triviality of defect was irrelevant; a bank could not be expected to know whether a defect was trivial and therefore the documents had to comply strictly with the terms of the credit. It was no answer that the document presented was just as good.[119] In *Equitable Trust Co. of New York vs. Dawson and Partners,*[120] Lord Sumner observed that there "is no room for documents which are almost the same or which will do just as well." In *J.H Rayner and Co Ltd*

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[116] *Supra* note 60
[117] Ibid at 474
[118] *Supra* note 124
[119] *Supra* note 60
[120] (1926) 27 Ll. L. Rep 49

vs. Hambros Bank Ltd[121] an irrevocable credit required sight drafts to be accompanied by bills of lading for "Coromandel groundnuts." The sellers tendered bills of lading for " machine-shelled groundnuts kernels," which were universally understood in the trade to be identical to "Coromandel groundnuts." The bank refused payment, the seller sued and failed. McKinnon L J. observed that it is no good that the words in the bill of lading were "almost the same or they will do just as well." They were not the same and as against the seller, the bank was entitled to refuse payment.[122]

As it was noted earlier the position was relaxed by the UCP except for the commercial invoice, whether the full rigour of the common law continues to apply. While its rationale has obvious benefits for the banks who need to do no more than examine the documents themselves, in a complex credit, a very strict position can allow buyers to easily escape bad bargain, for example on falling markets.[123] Moreover there are some errors which must obviously be trivial even on examination of the documents alone, and there is good argument for relaxing the position, at any rate for such defects.In *Banque de L'Indochine et de Suez SA vs. J.H Rayner (Mincinglane) Ltd*,[124] Parker J. thought that Lord Sumner's statement cannot be taken as requiring rigid meticulous fulfilment of precise wording in all cases. "Some margin must and can be allowed, but it is slight and banks will be at risk in most cases where there is less than strict compliance." In that case the tender was held in fact to be bad, both by Parker J and later by the Court of Appeal, but at least the possibility was alluded to that some defects are so trivial as to not entitle a bank to reject.[125]

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[121] (1943) 1 KB 37
[122] *Supra* note 60
[123] Ibid
[124] (1983) QB 711
[125] *Supra* note 60

In *Bankers Trust Co vs. State Bank of India*, Lloyd LJ described as trivial that the telex number of the buyers'...office was given as 931310 instead of 981310. As with the earlier case nothing actually turned on triviality of this defect, but the view earlier advanced by Parker J was to some extent entrenched by this judgement. In the case of Krediet Bank Antwerp vs. Midland Bank plc,[126] Evans LJ gave as an example of obvious typographical error such as the possible misspelling of "Smith", as "Smithh", and regarded that as trivial.

The courts have since *Bankers Trust* been reluctant to extend this category of defect and indeed it would surely be undesirable if it applied other than to the sort of defect which is obviously trivial, on examination of the documents alone. In *Seaconsar Far East Ltd vs. Bank Markazi Jomhouri Islami Iran,*[127] the credit required each of the documents presented to contain the letter of credit number and the name of the buyer. The court of appeal refused to enquire as to the reason for this requirement and held that the bank could not ignore it. However trivial an omission, the absence of the letter of credit number and the name of the buyer from the *proces verbal* called for explanation and the bank were entitled to reject documents. Lloyd LJ. Stated, "I cannot regard as trivial something which whatever may be the reason, the credit specifically requires. It would not I think, help to define the sort of discrepancy which can properly be regarded as trivial. But one might take, by way of example *Bankers Trust Co vs. State Bank of India* [128] where one of the documents gave the buyer's telex number as 931310 instead of 981310." The discrepancy in the present case is not of that order.

To this end the recognition of a special category of trivial defects if accepted into the law at all, was restricted to a very narrow scope.[129] In

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[126] (1999) 1 Lloyd's Rep Bank 219
[127] (1993) 1 Lloyd's Rep 326
[128] *Supra* note 123
[129] See, *United Bank Ltd vs. Banque National de Paris (1992) SLR 64*

particular any defect, which puts the bank on enquiry, is not trivial for these purposes. In *Glencore International AG vs. Bank of China,*[130] however, the letter of credit (relating to the sale of aluminium ingots) stated "origin; Any Western Brand," The commercial invoices described the goods as "Any Western Brand Indonesia (Inalum Brand)." the certificate of origin also certified that the material is of Indonesian origin (Inalum Brand)." The certificate of origin also certified that the material "is of Indonesian origin (Inalum Brand)". Both differed in other words from the credit requirements. The Court of Appeal (reversing Rix J. on this point) took the view that had these been the only defects, the tender would have been good.

On the commercial invoice, to which alone of course, the common law doctrine of strict compliance still applied, Sir Thomas Bingham MR observed, "it is, we think, plain that the original specified in the credit ('Any Western Brand') is expressed in very broad generic way. A banker would require no knowledge of the aluminium trade to appreciate that there could be more than one brand falling within the genus...we cannot for our part accept the additional words Indonesia (Inalum brand) were such as ...to...call for further inquiry or are such as to invite litigation. It seems to us quite plain on the face of the document that the additional words were to indicate the precise brand of the goods, it being implicit that the brand fell within the broad generic description, which was all that was required. The additional words could not on any possible reading of the documents have been intended to indicate that the goods did not or might not fall within the description " 'Any Western Brand.' " [131]

This aspect of the decision is to be welcomed to the extent that the real reason for the rejection in that case was that the market was falling and it would be regrettable if any defect however trivial could allow

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[130] Ibid
[131] *Supra* note 60 at 476

a buyer to escape a bargain that had turned bad for that reason. The defect is clearly very different from that instanced by Lloyd LJ in *Bankers Trust Co vs. State Bank of India*, and the case establishes a significant exception to the doctrine of strict compliance.[132] However it is clear from the above passage that Sir Thomas Bingham MR regards the meaning as clear from the face of the documents so that if this is true, the principle is not infringed upon that the bank should be able to determine from the documents alone whether or not to accept them.

3.4 Notification of the discrepancy:

If the bank decides to reject the documents,[133] it is required to inform the beneficiary directly and to state all the discrepancies.[134] Even though the UCP 500 Rules state that notification has to be by telecommunication and only if telecommunication is not possible may it be effected by other expeditious means, it was held by the court of Appeal in *Seaconsor Far East Ltd*[135] case that the notification of rejection could be oral pursuant to an implied term of the letter of credit contract.

In *Glencore International AG vs. Bank of China*[136] it was pointed out that the statement of discrepancies is binding on the bank, which may not thereafter raise new grounds. Bridge[137] argues that this position represents a departure from the earlier and controversial case of *Kyden Cia Naviera SA vs. National Westminster Bank Ltd (The Lena)*[138] where the documents were presented on a number of occasions, the bank not acting consistently as to the grounds of rejection. The court held that the bank

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[132] Ibid
[133] *Seaconsar Far East Ltd vs. Bank Markazi Jomhouri Islami Iran* (1993) 1 Lloyd's Rep 236 at 241
[134] Article 14 (d0 of the UCP 500; *See* also *Rafsanjan Pistachio Producers Cooperative vs. Bank Leumi plc* (1992) 1 Lloyd's Rep 513 at 531
[135] Ibid
[136] (1996) 1 Lloyd's Rep 135
[137] *Supra* note 95
[138] (1963) 1 Lloyd's Rep 68

had made no representations for the purpose of a binding estoppel.[139] Further, any duty owed by the bank when paying against a letter of credit was owed to the applicant and not the beneficiary. Bridge further submits that *The Lena* is no longer a reliable authority on the raising of fresh objections. If documents are rejected by the bank, it seems that the beneficiary is permitted to make a fresh, conforming tender[140] though this would have to be done before the expiry of the letter of credit and should also not entail altering the documents so that they become unclean.

3.5 Time for raising Objections, Waiver:

Peter Ellinger[141] notes that some American authorities take the view that the person to whom the documents are tendered must raise all his objections to the documents at the time of their rejection and that he is usually precluded from raising further defences at a later stage.[142] Traditionally English courts took to the opposite view, allowing pursuit of all available defences involving those raised for the first time at the trial.[143]

The position was clarified by Article 16 (d) of the 1983 revision which adopted the American doctrine. Under this position, currently reproduced in Article 14 (d) (ii) of the UCP 1993, the banker to whom the documents are tendered has to state the discrepancies in respect of which

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[139] *Supra* note 95

[140] *Bayerische Vereins Bank AG vs. National Bank of Pakistan* (1996) CLC 1443

[141] *Supra*, Benjamin's Sale of Goods

[142] *Bank of Taiwan Ltd vs. Union National Bank*, IF. 2d 65 at 66 (1924); *Second National Bank of Allegheny vs. Lash Corporation*, 299 F 371 at 373- 374 (1924); *North Valley Bank vs. National Bank of Austin* 437 Supp 70 (1977); *Pringle -Associated Mortgage Corp vs. Southern National Bank* 571F 2d 871 (1978). The rule applies only to objections that are known at the time of rejection.

[143] *Skandinaviska Kreditaktiebolaget vs. Barclays Bank* (1925) 22 L1 LR 523 at 525; *Westminster Bank vs. Banco Nazion Di Credito* (1928) 31 LILR 306 at 311; *Soprona SpA vs. Marine and Animal By-Products Corporation Ltd* (1966) 1 Lloyds 367 at 387; *Kydon Campainia Naviera SA vs. National Westminster Bank Ltd (The Lena)* (1981) 1 Lloyds Rep 68 at 78- 8(which suggest that Article 8 (e) of the 1974 Revision had not changed the position. The wording of the Article 14 (d) thoug clearer.It would be too late to raise a point for the first time at the stage of an appeal. *Gian Singh & Co. Ltd vs. Bank De Indochine* (1974) 2 Lloyd's Rep 1 at 12.

the documents are rejected. If that banker fails to do so, he is precluded under Article 14 (e) from disputing the regularity of the documents.[144] In *Bankers Trust Co vs. State Bank of India,*[145] the Court of Appeal gave effect to this provision and distinguished the earlier cases. Moreover their Lordships emphasised that under Article 16 (d) the notice had to be dispatched as soon as the bank in question had reached its decision to reject. Conceptually the bank's failure to refer to given discrepancies maybe considered to be a waiver.[146] This indeed was the view taken by Kaplan J. in *Hing Yip Fat Co Ltd vs. Daiwa Bank Ltd.*[147]

In certain cases waiver may also be inferred from the banks' conduct.[148] One of the objects of requiring the person to whom the documents are tendered to raise all objections at the same time he rejects the tender, is to enable the tenderer to cure all the defects and to re-tender the documents before the expiration of the documentary credit.[149] The right to re-tender is recognised in the United States.[150] In the United Kingdom it derives support from *Basse and Selve vs. Bank of Australasia* [151] in which the documents were originally rejected by the banker due to a defect in a certificate of analysis but were held to comply with the requirements of the credit when retendered by the seller after the

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[144] *Supra,* Benjamin's Sale of Goods.

[145] (1991) 1 Lloyd's Rep. 587; (1991) 2 Lloyd's Rep 443; *Bayerische Vereisbank AG vs. National Bank of Pakistan* (1997) 1 Lloyd's Rep 59

[146] Wing *On Bank Ltd vs. American National Bank and Trust Co.* 457 F 2d 328 (1972) which suggests however that a failu raise an objection might not result in an estoppel if the tender was beyond correction; *see* also *Flagship Cruises Ltd vs. Nev England Merchants National Bank of Bostom* 569 F 2d 699 (1978)

[147] *Kerr - McGee Chemical Corp vs. Federal Deposit Insurance Corp.* 872 F. 2d 971 (11th Cir. 1989); *Paramount Export C vs. Asia Trust Bank* 238 Cal. Ref 920 (App 1987)

[148] *Floating Dock Ltd vs. Hong Kong and Shanghai Banking Corporation* (1986) 1 Lloyd's Rep 65. *Kerr - McGee Chemic Corp vs. Federal Deposit Insurance Corp.* 872 F. 2d 971 (11th Cir. 1989); *Paramount Export Co vs. Asia Trust Bank* 238 C Ref 920 (App 1987)

[149] *Kingdom of Sweden vs. New York Trust Co* 96 N.Y.S. 2d 779 at 790- 791 (1949)

[150] *Supra,* Benjamin's Sale of Goods

[151] (1904) 90 LT 618; See also *United City Merchants (Investments) Ltd vs. Royal Bank of Canada* (1979) 1 Lloyd's Rep 267 at 275, unaffected at this point by the decision of the House of Lords, (1983) AC 168

correction of the certificate.[152]

3.6 Consultation With Applicant:

It has been observed that in spite of the number of discrepancies in documentary credits few get to the litigation stage; one reason being that the parties negotiate and particularly that applicants for credits are prepared to accept documents that strictly speaking they would be entitled to reject[153]

The doctrine of strict compliance even as applied in *Glencore*, coupled with the increasing complexity of modern credits surely make it likely that rejection on technical grounds will be possible in a high proportion of credits. Todd[154] observes that any bank has to look to at least two contracts to determine where its duties lie. In the simplest case of an unconfirmed irrevocable credit, if the documents tendered do not conform, the issuing bank is entitled to as against the beneficiary to reject them. The bank can also be required to reject them by the applicant, but if the non-conformity is of no consequence the applicant may not rush to reject them. One possibility is for the bank to accept under reserve, as occurred in the *Banque de L' Indochina* case, but that is not entirely desirable because it delays the time until which the applicant can be certain of final payment.

Arguably it is sensible therefore to allow a bank before finally deciding to reject, to consult with the applicant. On the other hand it would be undesirable by so doing to prolong the decision- making process too much. Moreover the seller's security would be significantly weakened if too much control over the decision -making process were left with the

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[152] *Donald H Scott & Co. Ltd vs. Barclays Bank Ltd* (1923) 1 KB 1
[153] *United Bank Ltd vs. Banque National de Paris* (1992) SLR 64 (Singapore Law Reports)
[154] *Supra* note 60

buyer. The courts appear to have reached a position, which while allowing banks to consult, compromises unduly neither speed nor the security of the seller.[155]

In the *Royan*[156] case Gatehouse J suggested that the bank should be allowed time to consult with the applicant before deciding whether or not to accept or reject the documents. In *Bankers Trust vs. State Bank Of India*,[157] however the unanimous view of the Court of Appeal was that on no time should a bank be allowed time to enable the buyers to examine the documents for the purpose of discovering further discrepancies. The majority view however, with Lloyd LJ dissenting on this point was that a bank which had decided to reject the documents was allowed time to send them to the buyers to enable them to decide whether or not to waive the discrepancies. Both of these cases were decided under Article 16(c) of the 1983 version of the UCP, which allowed banks a "reasonable time" to determine whether to accept or reject. The majority view in *Bankers Trust*[158] was effectively codified in Article 14 (c) of UCP 500, which states that if the issuing Bank determines that the documents appear on their face not to be in compliance with the terms and conditions of the credit it may in its sole judgement approach the applicant for waiver of the discrepancy(ies). This does not however extent the period mentioned in Article 13 (b), time for examining documents.

In *Bayerische Vereinsbank vs. Bank of Pakistan*[159] Mance J. took the view that a bank which handed over to its customer the responsibility of determining whether the documents were discrepant and then simply adopted and communicated whatever decision the customer reached was almost certain to be in breach of article 13 (b). This is also in line with

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[155] Ibid at 476
[156] (1987) 1 Lloyd's Rep 345
[157] (1991) 1 Lloyd's Rep 587
[158] Ibid
[159] (1997) 1 Lloyd's Rep 59

Bankers' Trust position and indeed this law appears to have arrived at a good compromise position. Banks are entitled to consult with the applicant, and are allowed time to do so, but only where they have found discrepancies entitling them to reject, and their purpose is to see if the applicants are prepared to wave the discrepancies. Thus the decision whether to reject is initially made by the bank, not the applicant and the seller's security is not thereby compromised. It also seems unlikely that the Bankers' Trust solution as now codified in the UCP will significantly prolong the decision making process

4. Some Key Elements of the Strict Compliance Doctrine:

4.1 All Documents need to be tendered

If a tender does not include all the documents specified in the documentary credit it should be rejected. Therefore where a full set of bills of lading is called for, the tender of two bills out of a set of three is unacceptable.[160] American authorities also indicate that all certificates required in the credit must be tendered.[161] Ellinger[162] noted that the more difficult problem is whether a tender may include one document, which comprises or performs the function of two documents stipulated in the documentary credit.

In an American case *Richard vs. Royal Bank of Canada* [163] the documentary credit called for an invoice and for a certificate of weight. The tender did not include a separate certificate of weight but the weight was certified by a qualified person on the invoice. It was held that the documents complied with the requirements of the documentary credit. Ellinger however, contends that this decision is doubtful. A buyer may require a separate certificate of weight (or any other specific document) in order to tender it to a sub purchaser. A different question is whether fractional certificates, which cover the whole shipment, may be tendered instead of a single certificate. As the fractional certificates perform the function of the required single certificate, it is arguable that they

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[160] *Donald H Scott & Co. vs. Barclays Bank Ltd* (1923) 1 KB 1

[161] *Anglo- South American Trust Co. vs. Uhe* 184 N.E 741 (1923); *see* also *Bank of New York and Trust Co. vs. Atterbury Bros. Inc.* 234 NYS 442 at 447 (1929); 171 NE 786 (1930); *Bounty Trading Corporation vs. SEK Sportswear Ltd* 370 NYS 2d4 (1975), which indicates that the tender if documents without the stipulated draft constitutes non-compliance

[162] *Supra* , Benjamin's Sale of Goods

[163] 23 F. 2d 430 (1928); Article 38 of the UCP

constitute a good tender.[164]

4.2 Regularity of Documents:

Apart from having to comply strictly with the requirements of the credit each document must also be regular on its face. This means that it must in the first place be effective and legal.[165] Thus a bill of lading, which became void due to the outbreak of war, was considered irregular.[166] Secondly the document must be of the type current in trade generally and one of which questions cannot be raised.[167] But the principle must be applied with care. The banker is not expected to obtain a knowledge of the specific requirements in each trade and is not concerned with particular trade usages.[168]

The point is borne out by Article 13 (a) of the UCP under which the compliance of documents is to be determined "by International Standard Banking Practices as reflected in these Articles." Thirdly a document must not be "stale" that is, to be presented after unduly long delay from the date on which it was issued. Under Article 43 (a) of the UCP, a letter of credit which calls for a transport document should in addition to its expiry date also stipulate a specified period of time after the date of shipment during which presentation must be made in compliance with the terms and conditions of credit. If no such period of time is stipulated, banks will not accept documents presented to them later than 21 days after the day of shipment. In any event documents must be

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[164] *Netherlands Trading Society vs. Wayne and Haylitt Co.* (1952) 36 Hong Kong LR 109
[165] Supra, Benjamin's Sale of Goods
[166] *Korberg (Arnhold) and Co. vs. Blythe, Green, Jourdia and Co.* (1916) 1 KB 495; *Old Colony Trust Co. vs. Lawyers' Title and Trust Co.* 297 F. 152 at 157 (1924)
[167] *National Bank of South Africa vs. Banka Italiana De Sconto* (1922) 10 L1.LR 531 at 536; *Midland Bank Ltd vs. Seymo* (1955) 2 Lloyds' Ref 147 at 152, 155.
[168] *Rayner (JH) & Co. Ltd vs. Hambros Bank Ltd* (1943) 1 kb 37 at 41; *see* also *Marine Midland Grace Trust co. vs. Banco del Pais SA,* 261 F. Supp 884 (1966)

presented not later than the expiry date of the credit.[169]

In the *M. Golodetz*[170] case it was held that a delay of 13 days between the shipment of the goods and the issuing of the bill of lading did not render it stale. In addition the set, as a whole must be regular. Under Article 13 (a) of the UCP, documents are deemed to be a bad tender if they " appear on their face to be inconsistent with one another.[171] This principle however applies only to documents called for in documentary credit under a proviso to Article 13 (a) "documents not stipulated in the credit will not be examined by banks." Instead they may be either returned to the presenter or passed on without responsibility on the bank's part.[172] Obviously the irregularity of such a superfluous document as well as its inconsistency with one of the presented documents is immaterial.[173]

4.3 Originality of Documents:

For obvious reason credits often call for original documents and sometimes the full set of originals. With today's high quality laser printers and photocopiers, however, it is not always easy to determine what is an original document. Neither the UCP nor the courts have dealt with this problem satisfactorily and clearly a radical rethinking is required.[174] An innovative provision has been included in the UCP in order to accommodate needs arising primarily out of these technological developments. Article 20 (b) of the UCP states that "Unless otherwise

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[169] *M.Golodetz & Co. Inc. vs. Czarnikow-Rionda Co. Inc* (1980) 1 WLR 495
[170] Ibid
[171] *Banque de L' Indochine et de Suez SA vs. JH Rayner* (*Mincing Lane*) Ltd. (1983) QB711; and in the US, *Voest- Alpine International Corporation vs. Chase Manhattan Bank NA*. 545 F. Supp. 301 (1982), varied 707 F. 2d 680 (1983
[172] *See Credit Apricole Indo Suez vs. Muslim Commercial Bank* (2000) 1 Lloyd's Rep 275
[173] Supra, Benjamin's Sale Goods
[174] Paul Todd, 'Cases and Materials on International Trade', Thompson- Sweet & Maxwell, London, 2003

stipulated in the credit banks will also accept as originals document(s) produced or appearing to have been produced;
(i) by reprographic automated or computerised systems (such as SWIFT)
(ii) as carbon copies; provided that it is marked as original and where necessary appears to be signed."

In all these cases, the document has to be marked as original and where necessary appear to be signed. In *Glencore International AG vs. Bank of China* [175] it was held that the two requisites were cumulative. Accordingly where it was sought to give the status of an original to a document produced or appearing to have been produced, by one of the three methods specified, it had to be marked as an original. Its being signed by hand did not in itself convert it into an original. But where the appearance of a document demonstrates in itself that it is an original there is no need to mark it as original.[176]

As the Court of Appeal observed in the *Kredietbank Antwerp* [177] case, the use of the word "also" suggests that this Article was intended to be permissive rather than restrictive but in the *Glencore* [178] case the Court of Appeal adopted a very literal and restrictive interpretation of it. The beneficiary's certificates certifying as required by the terms of the credit that one full set of non-negotiable documents had been sent to the buyer were either word processed or laser printed or (more likely) photocopies of such documents. The evidence was that the photocopies were undistinguishable from those produced on the laser printer. The certificates were signed but were not marked as original. The Court of Appeal took the view that even though they appeared to be originals, they were in fact authenticated copies rather than original documents.[179]

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[175] (1996) 1 Lloyd's Rep 135
[176] *Kredietbank Antwerp vs. Midland Bank plc* (1999) 1 ALL ER 801
[177] Ibid
[178] Ibid
[179] *Supra* note 183

The requirements of Article 20 were triggered because the certificate (whether laser printed or photocopied) had been reproduced by reprographic, automated or computerised means. They were therefore discrepant even though they had been signed, because they were not marked as original. If the certificates had been handwritten or typed the provision would not have been triggered [180] and there would have been no need to mark them as original but a signature on a copy makes it an authenticated copy not an original.[181]

The decision in *Glencore* is not easy to justify, especially as a bank will have no ready means of distinguishing between typed, word processed or photocopied documents and the Court of Appeal to some extend resiled from its previous view in *Kredietbank Antwerp* taking the view that the Article 20 (b) requirements apply only to copies and not, for example, to an original document produced by a laser printer. The reasoning in *Glencore* was thus limited to the photocopy, which it was accepted, had most likely been tendered in that case. Had one of the laser printed documents been tendered, the decision in *Glencore* would therefore (we now know) have been different. Since it was accepted in *Glencore* that the photocopy was indistinguishable from the laser printed original the *Kredietbank Antwerp* situation is hardly anymore satisfactory from the bank's viewpoint.[182]

Todd [183] observes that the law then appears to have got into a mess, but was however too quick to note that it is difficult to see what solution is possible as long as original documents are demanded, and modern reproduction methods make it impossible to distinguish copies from originals. Thus there is a need to find some method of making

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[180] They would neither have been nor appear to have been reproduced by reprographic, automated or computerized system. The laser printed documents and photocopies were, though they did not appear to be.
[181] Ibid
[182] *Supra* note 60
[183] Ibid

originals more easily recognisable, the problem being not legal but practical.

Glencore looks towards certainty, requiring rejection of anything that is, or appears to be reproduced by a printer or photocopier unless satisfying the proviso to Article 20 (b). It is a restrictive interpretation of a provision that was probably intended to be permissive and requires rejection of almost any document that is not marked as original and signed. *Kredietbank* introduces flexibility but at the expense of certainty.[184] Neither *Glencore* nor *Kredietbank* provides a workable solution, unless it is obvious which is the original and which was the copy. *Glencore* requires a typed original to be accepted, but a laser printed document to be rejected even though it looks original and is therefore indistinguishable from the typed document. *Kredietbank* requires a laser printed original to be accepted but a photocopy to be rejected even though they look identical.[185]

In July 1999, the Commission on Banking Technologies and Practice of the I.C.C.[186] itself provided guidance on what should be regarded as original and what should not. It has already been observed that Article 13 (a) provides that "compliance of the stipulated documents on their face with the terms and conditions of the credit shall be determined by international banking practice as reflected in these Articles. The ICC could be taken to be effectively clarifying banking practice.[187]

The Policy Statement on Originals[188] was expressly referred to and

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[184] Ibid

[185] Ibid

[186] ICC document 470/ 871

[187] See, Dolan (1999) JBL 521 at 525

[188] *Supra* note 195. At the Banking Commission meeting held in Florida during October 1998 it was decided that the dra paper would be submitted for discussion at the 28-29 April 1999 Meeting. The final outcome was a policy statement or decision issued on 12 July 1999.This decision emphasises the need to correctly interpret and apply sub-art 20 (b) of UCP 50 consequently, ICC national committees and associated organisations are strongly urged to distribute their decision as widely as possible to help ensure the correct interpretation in the evaluation of documents issued under letters of credit. This decisi does not amend sub-article 20 (b) of UCP 500 in any way, but merely indicated the correct interpretation thereof which has been adopted unanimously by the ICC Commission on banking Technique and Practice on 12 July 1999 correct interpretati

adopted by David Steel J. in *Credit Industirel vs. China Merchant Bank*[189] where the challenged documents were the packing list, certificate of quantity and certificate of quality. All three had name, address etc stamped upon them with an ink signature but it was not clear how the documents had been prepared prior to this. They would have been photocopied or produced by a computer-controlled printer.[190] David Steel J followed the approach in the Policy statement, holding that the documents before him were ones which had the appearance of originals anyway. The experts in the case being agreed that before the introduction of UCP 400/500 they would have been accepted as originals anyway. *Glencore* was distinguished on the ground that in that case there was evidence as to how the document had been produced which was found to have been a photocopy, (albeit undistinguishable from the original) and

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of sub-article 20 (b).....general approach. Banks examine documents presented under a letter of credit to determine among other things whether on their face they appear to be original. Banks treat as original any document bearing an apparently original signature; mark, stamp or label of the issuer of the document unless the document itself indicates that it is not origi Accordingly unless the document indicates otherwise it is treated as original if it:

1. Appears to be written, typed, perforated, or stamped by the document issuer's hand; or
2. Appears to be the document issuer's original stationary; or
3. States that it is original unless the statement appears not to apply to the document presented (e.g. because it appears to be photocopy of another document and the statement of originality appears to apply to that other documents and signed documents. Consistent with sub paragraph (a) above, banks treat as original any documents that appears to be hand signed b the issuer of the document for example a hand signed draft or commercial invoice is treated as an original document whethe not some or all other constituents of the document are reprinted, carbon copied or produced by reprographic, automated or computerised systems.
4. What is not original?

A document indicates that it is not original if it

- Appears to be a produced on a telefax machine
- Appears to be a photocopy of another document which has not otherwise been completed by hand marking the photocopy or by photocopying it on what appears to be original stationary
- States in the document that it is or the copy of another document or that another document is the sole original

5. Conclusion based upon comments received from ICC national committees, members of the ICC Banking Commission and other interested parties, the statement in clauses 3 and 4 above reflect international standard banking practice in the correct interpretation of UCP 500 sub-article 20 (b), moreover there are some errors which must obviously be trivial even on examination of the documents alone, and there is good argument for relaxing the position, at any rate for such defects.

In *Banque de L'Indochina et de Suez SA vs. Jit Rayner (Mincinglane) Ltd*, Parker J. thought that Lord Sumner's statement cannot be taken as requiring rigid meticulous fulfilment of precise wording in all cases. Some margin must and can be allowed, but it is slight and banks will be at risk in most cases where there is less than strict compliance. In that case the tender was held in fact to be bad, both by Parker J and later by the Court of Appeal, but at least the possibility was alluded t that some defects are so trivial as to not entitle a bank to reject.

[189] (2002) EWHC 973

[190] Michael Brindle and Raymond Cox, ' Law of Bank Payments', Sweet & Maxwell, London, 2004

being a document which would not otherwise have been regarded as original because of its type, compliance with Article 20 (b) was needed to save the document.

This was not the contest of *Credit Industriel.* [191] Given the practical difficulties and uncertainties perceived by the banking industry following *Glencore* and *Kredietbank*, the overwhelming unlikelihood now must be that the guidance set out in the Policy Statement will be followed and approved by the Courts[192] In the United States District Court for 5 Circuit in *Voest- Alpine Trading USA Corp vs. Bank of China,* [193] the ICC policy statement was accepted as determination; Third , the *Bank of China* claimed that the failure to stamp the packing list documents as an "original" was a discrepancy.

Again these documents are clearly original on their face as they have three slightly differing signatures in blue ink. There was no requirement in the letter of credit or the UCP 500 that original documents be marked as such. The ICC's Policy Statement on the issue provides that banks treat as original any document that appears to be hand signed by the issuer of the document.... the failure to mark obvious originals is not a discrepancy.[194]

4.4 Strict Compliance with Time.

According to Article 42 (a) of the UCP all credits must stipulate an expiry date and a place for the presentation of documents for acceptance, or with the exception of freely negotiable credits, a place for the presentation of documents for acceptance or negotiation. An expiry date stipulated for payment or negotiation will be construed to expire on

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[191] *Ibid*
[192] *Ibid*
[193] 167 F. Supp. 2nd 940 (FD Text 2000)
[194] Supra note 60 at 488, (10-044)

expiring date for presentation of documents. The date stipulated is additional to any period or to a latest date specified for shipment[195] It is therefore established that the documents must be presented to the banker before the expiry of the credit.[196] If the documentary credit specifies a date or period of shipment, the banker must reject tender which shows that the goods have not been shipped on time.[197] Under Article 44(b) "if no such latest date for shipment is stipulated in the credit or amendments thereto, banks will not accept transport documents indicating a date of issuance later than the expiry date stipulated in the credit or amendments thereto." The need to strictly comply with the date set for shipment is of particular importance where a credit covers partial shipments. According to Article 41 of the UCP, if any instalment is not shipped within the period stipulated for it, the credit ceases to be available for that or for any subsequent instalment.[198]

4.5 Compliance with Quantity and Weight:

This aspect if provided for by Article 39 (b) of the UCP. This article permits, in the absence of stipulation to the contrary, a discrepancy of up to 5 percent of the stipulated weight or quantity provided the total amount of the drawings does not exceed the amount of credit.[199] The stipulated tolerance does not apply when the credit specifies in terms of a

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[195] American authorities indicate that if an irrevocable credit does not include an expiry date, it remains open for a reasonable time, the length of which depends largely on the shipment period; *Lamborn vs. National Park Bank of New York*, 208 NYS 428 at 434 (1925)

[196] UCP Article 42 (b) and Article 45: Midland Bank Ltd vs. Seymour (1955) 2 Lloyds Ref 147 at 166; In the US *see Liberty National Bank and Trust Co. vs. Bank of America* 116 F. Supp 233 at 244 (1953); 218 F. 2d 831 (1955); *Banco Tornquisk SA vs. America Bank and Trust Co.* 337 NYS 2d 489 (1972); *Flagship Cruises Ltd vs. New England Merchant National Bank of Boston* 569 F 2d 699 (1978). As to accidental delay of tender by mail, see *Second National Bank of Toledo vs. M. Samuel and Sons Inc.* 12 F 2d 963 (1926)

[197] *Ibid*

[198] *Ibid*

[199] *See*, Benjamin's Sale of Goods

stated number of packaging units or individual items.[200] Under Article 39 (a) the words "about" "circa" or other similar expressions permit a tolerance of up to 10 percent. The quantity or weight of the goods must be stated in the documents either in the words of the documentary credit or in such manner as to make it possible to calculate it.[201]

4.6 Compliance with the Description of the Goods

At one point it was thought that each document should contain a full and accurate description of the goods in the words of the documentary credit.[202] Recent authorities however show that it is in fact sufficient if all the documents when read together, give a full description of the goods.[203] A Similar solution is adopted by Article 37 (c) of the UCP, according to which the description of the goods in the commercial invoice must correspond with the description in the credit. In the remaining documents the goods may be described in general terms not inconsistent with the description of the goods in the credit.

The decision in *Glencore International AG vs. Bank of China* [204] confirms that accordingly a packing list need not include a detailed description of the goods. Their Lordships further held that even in the commercial invoice, the description of the goods need not follow the words used in the letter of credit literally. In that case the documentary credit provided inter alia; " original Any Western Brand" The invoice tendered in due course described the origin of the goods shipped as "Any

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[200] But see *Kydon Compania Naviera SA vs. National Westminster Bank Ltd (The Lena)* (1981) 1 Lloyd's Ref 68 at 76 which shows that the provision in point is applicable only to weight and quantity *strict sensu*

[201] *London and Foreign Trading Corporation vs. British and North European Bank* (1921) 9 L1 LR 116

[202] *London and Foreign Trading Corporation vs. British and North European Bank* (1921) 9 L1 LR 116

[203] *Midland Bank Ltd vs. Seymour (1955) 2 Lloyds Rep* 147 at 152; *Soprano SpA vs. Marine and Animal By- Products Corp* (1966) 1 Lloyds Rep367

[204] (1996) 1 Lloyd's Rep 135; See also *Kydon Campania Naviera SA vs. National Westminster Bank Ltd (The Lena)* (1981) 1 Lloyd's Rep 68 at 75-77

Western Brand- Indonesia (Inalum Brand)." The argument for the issuing bank was that as the words used in invoice departed from the plain language of the letter of credit, the invoice was bad tender. Reversing Rix J.'s decision on this specific point, the Court of Appeal rejected this argument.[205] In the words of Bingham MR. "it seems to us quite plain on the face of the document that the additional words were to indicate the precise brand of goods, it being implicit that the brand fell within the brand generic description. That was all that was required. The additional words could not on any possible reading of the documents have been intended to indicate that the goods did not fall within the description of " Any Western Brand."[206]

[205] *See*, Benjamin's Sale of Goods
[206] (1996) 1 Lloyd's Rep 135 at 154

5. How Strict is Strict Compliance:

In the classic case of Equitable Trust Co. vs. Dawson [207] Viscount Summer wrote, ' the bank can only claim indemnity if the conditions on which it is authorised to accept are in the matter of the accompanying documents strictly observed. There is no room for documents which are almost the same, or which will do just as well.' This opinion requires strict compliance, a situation the UCP drafters clearly thought impossible.[208]

However it is fair to say that in 1826 the presentations were rather simpler then than they have become over the intervening years with the increasing complexity of international trade and governmental requirements and restrictions[209] In Banker's *Trust vs. State Bank of India* [210] there were 967 documents presented against the letter of credit. Unfortunately complexity has become one of the weaknesses of the letter of credit mechanism. The more complex the buyer makes the documentary requirements, the more difficult it becomes for the seller to fulfil, often placing the buyer in a most advantageous negotiating poison. Thus the rigour of the present doctrine allows buyers to use technicalities to avoid sale contracts on falling markets,[211] especially if the documentary credit requirements are very strict and the sellers have difficulties in complying.[212]

However, it appears the doctrine of strict compliance does not necessarily demand that every document in the set presented should state every detail required. It may be sufficient that all necessary information is

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[207] (1926) 27 Ll L. Rep 49
[208] Richard Morris, *'Discrepancies: Has UCP 500 Wrought Any Improvement?'* Hong Kong Lawyer, December 1998
[209] *Ibid*
[210] (1991) 2 Lloyd's Rep 443
[211] *Supra*, The *Glencore* case.
[212] *Supra* note 60

clearly presented by the documents taken as a whole.[213] In *Midland Bank Ltd vs. Seymour*[214] the contract demanded documents relating to "Hong Kong Duck feathers- 85% clean "and" 12 bales each weighing about 190lbs. Of the documents tendered to the bank the invoice described the goods fully in the above terms and stated the shipping mark but the bill of lading, while it stated the shipping mark, noted the cargo as "12 bales Hong Kong duck feathers". The buyer purported to reject these documents.[215] Delvin J. stated that "the set of documents must contain all the particulars and of course they must be consistent between themselves otherwise they would not be a good set of shipping documents. But here you have a set of documents (each of) which not only is consistent with itself, but also incorporates the particulars that are given in the other, the shipping mark on the bill of lading leading to the invoice which bears the same shipping mark and which would be tendered at the same time, which sets out the full description of the goods.[216]

The duty of the bank involved in the documents appears in Article 13 of the UCP where it states that banks must examine all documents stipulated in the credit with reasonable care to ascertain whether or not they appear on their face to be in accordance with the terms and conditions of the credit. It is thought that the drafters of the UCP (ICC 5000- May 1993) recognised that compliance could not be absolute in the ICC publication entitled 'UCP 500 and 400 Compared'.

Morris [217] observes that that the notion of reasonable care is usually applied by courts, regardless of the legal system or geographical location, in conjunction with the doctrine of strict compliance. Yet as any experienced banker knows, a word– by – word, letter –by – letter

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[213] *Supra* note 19
[214] (1955) 2 Lloyd's Rep 147
[215] *Supra* note 19
[216] *Supra* note 105
[217] *Supra* note 204

correspondence between the documents and the credit terms is a practical impossibility.[218] Thus courts wedded to a mirror image version of strict compliance and reasonable care have failed to provide a functional standard of document verification.

Conversely, courts that interpret strict compliance as allowing deviations that do not cause ostensible harm to the applicant or that do not violate the court's own version of 'reasonableness', 'equity', 'good faith', or *boni mores* have equally failed to provide a functional standard.[219] Hence a balance must and should be struck without disrupting the primary notions of the doctrine. This may call for a case-by-case analysis by the courts and such an analysis does not lend itself to generalisation. This is evident in the case of *Seaconsar Far East Ltd vs. Bank Markazi Jamhouri Islami Ira* [220] where Lloyd L J. stated that, 'I can not regard as trivial something which whatever may be the reason the credit specifically requires. It would not i think help to define the sort of discrepancy which can properly be regarded as trivial. *But one might take by way of example Bankers' Trust Co. vs. State Bank of India* [221] *where one of the documents gave the buyer's telex number as 931310 instead of 981310. The discrepancy in this case is not in that order.* [222] These words clearly demonstrate that each case will have to be looked on the basis of its circumstances and merits.

It will be argued herein that it is the lack of such a functional standard of verification to be used in conjunction with the strict compliance has resulted in a proliferation of lengthy and costly yet uncertain litigation throughout the documentary credit world.[223] The drafters of the UCP provided what they presumably thought was a

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[218] Ibid
[219] Ibid
[220] (1993) 1 Lloyd's Rep 326
[221] (1991) 2 Lloyd's Rep 443
[222] The emphasis is mine.
[223] *Supra* note 204

functional standard in Article 13 when they stated that, '... compliance of the stipulated documents on their face with the terms and conditions of the credit, shall be determined by international standard banking practice as reflected in these Articles.'[224]

Reference must be made to the *Glencore*[225] case in which the letter of credit called for, 'Any Western Brand' whereas the invoice tendered stated the origin as, 'Any Western Brand – Indonesia (Inalum Brand. The Bank of China rejected the invoice, even though they took no exception to Certificate of Origin, which also made clear the Indonesian origin of the goods. Of important qualification here is the provision of article 37 (c) of the UCP. The Court of Appeal asserted that the additional words were to indicate the precise brand of the goods ... they could not on any possible reading of the documents, have been intended to indicate that the goods did not or might not fall within the description 'Western Brand".

Regarding the second issue, the Court of Appeal through Bingham MR, stated that, 'There is abundant room to debate what in the context of modern technology is an original... Article 20 (b) is designed to circumvent this argument by providing a clear rule to apply in the case of documents produced by reprographic, automated or computerised systems... it is plain that (the certificate) was produced by one or other of the of the listed means and so was subject to the rule ... a rule of strict compliance gives little scope... to have marked the certificate 'original '... would have been simple and without cost. We see no escape from what seems to us the plain language of the Article.'[226] The reading of this judgment leaves one with the impression that the UCP has come in to deal with some of the rigours of the doctrine of strict compliance. Thus a proper reading and

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[224] Article 13 (a) of the UCP
[225] (1996) 1 Lloyd's Rep 386
[226] *Supra* 204 *at* 64

continuous application coupled with constant revision of the UCP will eventually clear the mist surrounding the doctrine.

By way of contrast the words of Lloyd L J in the case of *Seaconsar Far East Ltd*[227], 'I can not regard as trivial something which whatever may be the reason, the credit specifically requires... ', can only be understood, to be an attempt to balance the need for the retention of the traditional common law doctrine of strict compliance and the imperative to move towards a functional purpose of the doctrine. In that regard some have sought to argue that while the UCP and recent case law have tended to relax some of the rigours of the strict compliance doctrine, by and large the doctrine has retained its original form.

The foregoing sentiments can be supported by the views expressed in the Hong Kong case of *Southland Rubber vs. Bank of China*[228] in which the document involved a bill of lading which did not contain anywhere the word 'carrier' and the name of the actual carrier. In terms of Article 23 (a), Banks will accept a bill of lading which appears on its face to indicate the name of the carrier In its decision the court made it clear that the institution that has been presented with the bill of lading must not be placed in a position whereby they had to speculate or make an educated guess of the identity of the carrier. '... I consider one of the fundamental principles in any transaction involving documentary credits to be that of certainty of the identity of the parties involved in the contract of carriage. [229] Thus while relaxation of the doctrine may be desirable, there is need to retain then core values of the doctrine.

Be that as it may, the quest for a departure from the traditional position (the opinion expressed in Equitable Trust Co.[230]) has continuously

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[227] Supra note 221
[228] (1997) 3 HKC 569
[229] *Supra* note 204
[230] (1926) 27 Ll L. Rep 49

been sought. In the *Kredietbank vs. Midland Bank*[231] case judge Diamond QC stated that, ' The doctrine of strict compliance did not require a rigid and meticulous adherence to the precise wording of the letter of credit and that some leeway must and can be allowed... (and) ... while a banker is not concerned as to whether the documents serve any useful commercial purpose, a banker does not have to make decisions as to whether a document which has been tendered complies with the requirements of the credit. Where these requirements are ambiguous, it is permissible, and in indeed I would have thought essential in practice, for the banker to adopt a reasonable interpretation of those requirements. In considering what is a reasonable interpretation a banker is not precluded from having regard to the commercial function of the document if that function is or should be apparent to the banker examining the with reasonable care. It is in this sense that in my view a banker's approach to document verification should be functional rather than literal or rigid.' [232]

Applying these principles, his Honour found the documents tendered by the K Bank to be regular. Referring to the principle that a sheer misprint or typographical error doers not render a document irregular, he pointed out that, although a certificate and a draft survey report were made out by a firm whose name differed from the one spelt out in the credit, the logo and the words printed beneath it showed that they were executed by a firm that was a member of the Griffith Inspectorate Group. [233] He went on to conclude that, 'a banker examining the documents on their face would have realised that there was an obvious misnomer in the letter of credit, and that what it required was certificates issued by a Griffith company, part of the Inspectorate organisation.'[234]

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[231] (1998) Lloyd's Rep Bank 1`73: affd. (1999) C.L.C 1108 (CA)
[232] *Ibid*
[233] (1998) 2 Lloyd's Rep Bank 173 *at* 179
[234] *Ibid* at 184

As regarding the insurance policy, the Judge had this to say, ' ... it would bee repugnant to the whole scheme for the tender of documents under a letter of credit, and for the examination of those documents by a bank, to construe Article 20 (b) as requiring the word 'original' to be placed on a document ... where the other markings on the document clearly indicate that it is the original and there can be no doubt about it that it is the original. It seems to me ... it would serve no purpose to make compliance with a letter of credit dependent upon whether **an empty ritual had been carried out,**[235] of stamping the word 'original' on the face of the document.[236]

Peter Ellinger has thus pointed that Diamond QC did not seek to depart from the tenets of the strict compliance doctrine as understood traditionally but read it subject to the principle that obvious misprints or meaningless trivialities are to be ignored. In a sense he considered the functional significance of the deviation rather than its formal import.[237] The Court of Appeal affirmed, treating the discrepancy in the two documents as insignificant. However, Evans L.J who delivered the court's judgment, departed in certain regards from Judge Diamond's reasoning on the tenets of the doctrine of strict compliance. His Lordship reiterated that an issuing bank was concerned only with the form of the documents presented to it and not with the underlying facts. At the same time his Lordship accepted that mere trivialities or misprints had to be ignored.[238]

Evans L.J concluded that, 'the requirements of strict compliance is not equivalent to a test of exact literal compliance in all circumstances and as regards all documents. To some extent, therefore, the banker must exercise his own judgment whether the requirement is satisfied by the

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[235] The emphasis is mine
[236] Supra note 204
[237] Peter Ellinger, 'The Doctrine of Strict Compliance: Its Development and Current Construction.'*et al* Lex Mercatoria, Essays in Honour of Francis Reynolds, London 2000.
[238] Chao Hick Tin's decision in *United Bank vs. Bank National de Paris* (1992) 2 S.L.R 64 and *Beyene vs. Irvin Trust Co. Ltd* (1985) 762 F. 2d 4

documents presented.' [239] While a welcome development, the difficulties posed by these propositions are that in such circumstances the banks are tasked to judge what is trivial or not. Yet it may well be argued that banks do not have the expertise to judge materiality and or what amounts to trivialities without risking forfeiture of reimbursement. In any event the bank has limited time to verify the documents and decide whether to take them up or reject.[240] Be that as it may, what is clear from the decision in the *Kredietbank* case is that it militates against any future attempts to apply a ' mirror image' test as the yardstick of strict compliance.[241]

Crucially, in credit operations, the bank is under no duty to take further steps to investigate the genuineness of the signature, which on the face of it purports to be the signature of the person handed or described in the credit. This was stated by Lord Diplock giving the judgement of the Privy Council in *Gian Singh and Co. Ltd vs. Banque de L' Indochine.*[242] In this case the credit required the tender of a certificate signed by a named person to be identified by a passport number. The certificate was tendered apparently signed by the named person and a passport bearing the correct number and the apparent signature of the named person, was presented for the bank's inspection. The bank accepted these documents. Both the certificate and the passport were forgeries. The buyer sued the bank but failed to obtain a judgement that he had been wrongly debited with the sum paid to the beneficiary. Obviously a bank can hardly be required to submit every document tendered to it to exhaustive examination. As Lord Diplock said. " In business transactions financed by documentary credits bankers must be

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[239] *Supra* note 231

[240] Article 13 (b) of the UCP states that the Issuing Bank, the confirming bank, if any, or the Nominated Bank acting on their behalf, shall have reasonable time not exceeding seven banking days following the day of the receipt of the documents, to examine the documents and determine whether to take up or to refuse the documents and to inform the party from which it received the documents accordingly.

[241] *Ibid*

[242] (1974) 2 ALL ER 754 at 757; (1974) 1 WLR 1234

able to act promptly on presentation of the documents. In the ordinary case visual inspection of the documents presented is all that is called for".

Documents, which appear on their face to be inconsistent with one another, will be considered as not appearing on their face to be in compliance with the terms and conditions of the credit.[243] The bank is looking only for apparent conformity. It is not required to look beyond the face of the documents.[244] This is consistent with the principle expressed in Article 15. " Banks assume no liability or responsibility for the form sufficiency, accuracy, genuineness, falsification or legal effect of any document (s) or for the general and or particular conditions stipulated in the documents or superimposed thereon nor do they assume any liability or responsibility for the description, quality weight quantity, condition, packing, delivery, value or existence of the goods represented by any document (s).

Perhaps recognising the foregoing, Parker J. in *Bank de L'Indochine vs. Rayner*[245] stated that 'I have no doubt that so long as the documents can be plainly seen to be linked with each other, are not inconsistent with each other or with the terms of the credit, do not call for enquiry and between them all that is required in the credit to be stated, the beneficiary is entitled to be paid ... *some margin must be allowed, but it is slight, and banks will be at risk in most cases where there is less than strict compliance .*[246] The critical question however is as to what this margin is? Guidance may be drawn from the writings of Gutteridge and Megrah in their book *Bankers' Documentary Credits*[247] who pointed out that the strict compliance doctrine does not extent to the dotting of I's and the crossing of T's or the obvious typographical errors in the credit or

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[243] See, *United City Merchants (Investments) Ltd vs. Royal Bank of Canada* (1983) AC 169 at 184
[244] *Supra* note 86
[245] (1983) 2 WLR 841
[246] The *italics* are mine
[247] See generally, Richard Morris, *supra* note 204

the documents.[248]

In the Hong Kong case of *Hing Yip Hing Fat Co. Ltd vs. Daiwa Bank*[249] in which the letter of credit called for a 'certificate of quality/ quantity issued by CCIB', but what was presented was an 'inspection certificate of quality/ quantity'. Furthermore the Applicant of the letter of credit was Cheergoal Industries Ltd' but the bill of exchange was drawn on Cheergoal Industrial Ltd. On the first issue the bank had argued that the certificate certified not the quality / quantity of the goods, but only the fact an inspection had taken place. Kaplan J. however thought that it was clear that a printed inspection certificate has been adapted to meet the facts of this case. 'I therefore find that this certificate is in conformity with the terms of this credit.'[250]

Turning to the second issue, 'Industries' versus 'Industrial' the learned Judge took the view that the use of the word 'Industrial' was an obvious typographical error for the word industries ... this was not a discrepancy on which Daiwa can rely on'. [251] Arguably the Judge's reasoning may be questioned as it appears to require the banker to go beyond the face of the documents presented to it by the seller, contrary to the provisions of Article 13 (a) of the UCP.[252]

The bank must determine on the basis of the documents alone whether or not there is compliance with the mandate.[253] It has a reasonable time not to exceed seven banking days following the day of the receipt of the documents to determine whether or not to take up the documents without regard to the sufficiency of performance under the

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[248] Ibid
[249] (1991) HKC 383
[250] Ibid
[251] Ibid
[252] Article 13(a) of the UCP provides that banks must examine all documents stipulated in the Credit with reasonable care, to ascertain whether or not *they appear on their face* to be in compliance with the terms and conditions of the credit.
[253] Article 14(b) of the UCP

contract of sale.[254] If the documents comply with the terms of the credit, then the bank must pay against them. If the buyer feels that the bank has wrongly accepted the documents from the seller and failed to take reasonable skill and care then it is for the buyer to prove that lack of care on the part of the bank.[255]

In determining whether or not the documents comply the bank will have no regard to trade custom. The bank cannot be involved in evaluating whether what was asked for in the credit has in fact been supplied despite the fact that it is differently referred to in the documents. This would not only be time consuming, but would also involve the bank in going beyond the sale contract to examine the goods themselves.[256] Therefore in *Rayner vs. Hambro's Bank*[257] the bank-rejected documents, which showed shipment of machine-shelled nut kernels instead of coromandel groundnuts as required by the credit even though by trade custom the description in the documents meant the same thing. They are carrying on a mandate and are thus strictly bound by their principal's instructions[258] though in cases of ambiguity they are permitted to follow a reasonable interpretation of those instructions.[259]

5.1 Principles Used to Ameliorate Strict Compliance:[260]

As seen above, a rigid application of the doctrine of strict compliance is, obviously bound to lead to results that would, on many occasions be

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[254] *See* Article 13(b) of the UCP. Also, *Bankers Trust Co. vs. State Bank of India* (1991) 2 Lloyd's Rep 443
[255] *See, Base & Selve Bank vs. Bank of Australia* (1904) 90 LT 618
[256] *Supra* note 65; *See* also *English Scottish and Australian bank Ltd vs. Bank of South Africa* (1922) 13 Ll. LR 21 at 24
[257] (1943) 1 KB 37
[258] *Bank Melli Iran vs. Barclays Bank (Dominion Colonial and Overseas)* (1951) 2 Lloyd's Rep 367
[259] *Midland Bank vs. Seymour* (1955) 2 Lloyd's Rep 147
[260] *Supra* note 233

regarded as both unfair and unsound by the business world in general.[261] Indeed, such is the trepidation invoked by the doctrine that, there has been a shift from the traditional forms of documentary or commercial letters of credit to standby credits. Although the doctrine of strict compliance applies even to such transactions,[262] it is, quite erroneously believed that the simple nature of the documents to be tendered under standby credits renders compliance an easy task.[263]

Ellinger[264] gives a summary of some five principles that the courts and the business world have come up with to combat the doctrine of strict compliance. While some of these were discussed above it is worth to restate them here. The first principle is that, in construing a letter of credit, the documents have to be construed as a whole. This effectively means that specific terms of the letter of credit may be read together with, or elucidated on the basis of other clauses.[265] American courts have achieved similar results by construing the terms of the credit so as to uphold or even to give business efficacy to the transaction.[266] It appears to me that the American position is more of incorporating the tenets of good faith in the letters of credit operation. In that regard it would appear that while a minor discrepancy may allow the bank to reject the documents, and be rightly held entitled to do so in the English courts, the courts in America may look at what may be in the interest of the transaction. In essence reference is made to the underlying transaction and conclude that all else is there to ensure that the transaction goes through and hence all else should work for and not against the transaction. Arguably the result is more functional doctrine of strict compliance.

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[261] Ibid
[262] See *Kelly vs. First Westroads Bank* (1988) 840 F.2d 554 (8th Circuit): Article 2 of the UCP 500
[263] Ibid
[264] *Supra* note 233
[265] *Elder Dempster Lines Ltd vs. Ionic Shipping Agency Inc.* (1969) 1 Lloyd's Rep 529, *at* 535- 536
[266] *Venizelos S.A vs. Chase Manhattan Bank* (1970) 425 F.2d 461

The second principle also developed by the courts, is to dismiss patent misprints and meaningless deviations as trivialities to be distinguished from discrepancies. Originally proclaimed in United States[267] and was applied by Kaplan J. in the High Court of Hong Kong in *Hing Yip Fat Co.*[268] the same principle has been used in Singapore[269] and the English courts.[270] In commercial terms this principle gives effect to a view held for a long time amongst bankers according to which not "every little discrepancy" is a "discrepancy." [271] The doctrine asserts that not every trivial departure in the documents from the wording of the documentary letter of credit is a discrepancy justifying rejection of the documents. Obviously *de minis non curat lex* has now been made applicable to letter of credit.[272]

The third principle is to found in U.C.P Article 13(a) which states in the second sentence that, "Compliance of the stipulated documents on their face with the terms and conditions of the credit, shall be determined by international banking standard as reflected in these Articles." Clearly this article militates against any attempt to treat the compliance of a document as a mere exercise of proof reading based on mere comparison of its language with the words of the letter of credit.[273]

The fourth principle likewise developed in practice is stated in Article 13 (c) which states that, "If a credit contains a condition without stating the document(s) to be presented in compliance with them, banks will deem such conditions as not stated and will disregard them." Ellinger argues that while this provision does not combat the utilisation of trivial

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[267] *Supra, Benjamin's Sale of Goods;* Beyene vs. Irvin Trust Co. (1985) 762 F. 2d 4; *Bank of Montreal vs. Federal National Bank* (1986) 622 F. Supp 6
[268] (1995) 2 HKLR 35
[269] *United Bank Ltd vs. Banque National de Paris* (1992) 2 S.L.R 64
[270] *Banker Trust Co. vs. State Bank of India* (1991) 1 Lloyd's Rep 587; (1991) 2 Lloyd's Rep 443; *Kredietbank Antwerp vs. Midland Bank Plc* (1988) Lloyd's Rep Bank 173
[271] *Supra* note 233
[272] Ibid
[273] Ibid

deviations in the documents, it enables banks to ignore onerous conditions which usually seek to introduce into the letter of credit terms of the underlying contract of sale without specifying documents to be tendered in order to establish compliance therewith.

The last principle which seeks to so soften the rigours of strict compliance is based on an American doctrine, under which the bank is treated as waiving discrepancies not stated in the notice rejecting the documents.[274] This principle which was consistently rejected by the English courts [275] was adopted with some modifications in Article 16 of the 1983 revision of the UCP and is currently set out in Articles 13 (b) and 14 of the UCP –500. Article 13(b) and 14 seek to combat the highly formal doctrine of strict compliance by laying down an equally formal doctrine governing the rejection of a faulty tender. An issuing bank that has failed to follow the precepts of the latter relinquishes the right to rely on the former. It is true that in *Seaconsar Far East Ltd vs. Bank Markazi Jomhouri Islami Iran* [276] the Court of Appeal held that a rejection notice can be communicated in a telephone conversation [277]or *inter presentem.* In this way their Lordships have abated the strict, purely formal construction of the provisions, which, earlier on, had been given a predominantly mechanical construction.[278]

As stated earlier on in this discussion, the UCP- 500 has gone a long way in dealing with the rigours of the doctrine of strict compliance. However there are still a number of issues that are herein felt that the drafters could address more directly.

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[274] *Bank of America vs. Whitney- Central National Bank* (1923) 291 F. 929, 937; *Dovenmuehle Inc. vs. East Bank of Colorado Springs* (1977) 563 F. 2d 24; *Pringle –Associated Mortgage Corp vs. Southern National Bank* (1978) 571 F. 2d 871; *Kerr-McGee Chemical Corp vs. Federal Deposition Insurance Corp.* (1989) 872 F2d 971

[275] *Skandinaviska Kreditaktiebolaget vs. Barclays Bank* (1925) 22 Ll. L.R 253 *at* 525; *Saproma SpA vs. Marine and Animal By- Products Corporation* (1966) I Lloyd's Rep 367 at 387; *Kydon Compania Naviera vs. National Westminster Bank* (1981) 1 Lloyd's Rep 68 *at* 78- 80

[276] (1999) 1 Lloyd's Rep 36, (1997) 2 Lloyd's Rep. 89

[277] *Supra*, Bankers Trust Co.

[278] Ibid

5.2 The English and American Approaches to the doctrine of Strict Compliance:

There appears to have been some differences in the English and American approaches to the doctrine of strict compliance. The emergence of the standard of "substantial compliance" in the American jurisprudence seems to separate the two systems.[279]

In English law, the dictum in the case of *Equitable Trust Co. of New York*[280] remains largely the reference point. This is made clear in the *J.H. Rayner*[281] case in which Parker J. commenting on Viscount Sumner's reasoning had this to say,

> "I also accept ... that Lord Sumner's statement cannot be taken as requiring rigid meticulous fulfilment of precise wording in all cases. Some margin must and can be allowed but it is slight and *banks will be at risk in most cases where there is less than strict compliance*. They may pay on reasonable interpretation... where instructions are ambiguous, but where the instructions are clear they are obliged to see to it that the instructions are complied with and entitled to refuse payment to the beneficiary unless they are."[282]

I t would appear that Parker J accepts that in principle there may exist a discrepancy in the documents so trivial that it may be ignored. However it has subsequently become clear that English courts favour a restrictive interpretation of this dictum.[283]

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[279] Carl F. Hugo, 'Documentary Credit', Dissertation Presented for the Degree of Doctor of Law at the University of Stellenbosch- August 1997
[280] *Supra* (1926) 27 Ll.L.Rep 49
[281] (1983) 1 QB 711 (CA)
[282] Ibid
[283] *Supra* note 275

The remarks of Lloyd L.J in the *Seaconsar Far East Ltd*[284], that, "I cannot regard as trivial something which whatever may be the reason, the credit specifically requires. It would not I think help to attempt to define the sort of discrepancy which can properly be regarded as trivial...."[285] Thus in English law, strict compliance is rather strict. However this is with due regard to the application of the UCP –500 and hence the doctrine is not absolute.

In the United States of America, Article 5 of the UCC requires tat an issuer must honour a draft or demand for payment, "which complies with the terms of the relevant credit." However both the Code and Official Commentary are silent on the standard to be applied for determining whether a document complies.[286] However, a differentiation has been made between what has been termed the "New York rule" where the standard is one of strict compliance and the rule of "substantial compliance" which inspired by notions of equity is favoured in some other jurisdiction.

In the *Tosco Corporation*[287] case the United States Court of Appeals held that the standard of conformity was by no means settled in the law of Tennessee and that, "the district court did not err in concluding that the strict compliance defence was not controlling under the facts of the present case."[288] Commenting on this decision, Dolan stated that, "the court need not have rejected the strict compliance... Under the strict rule, this draft is clearly conforming. The reason for the strict rule is to protect the issuer from having to know the commercial impact of a discrepancy in the documents. Under the strict rule, a bank document examiner does not need to judge whether dried grapes are the same as

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[284] (1993) 1 Lloyd's Rep 236 (CA) at 240
[285] Ibid
[286] Ibid
[287] (1983) 723 F2d 1242 (US Court of Appeals 6th Circuit)
[288] Ibid at 1248

raisins."[289]

This reasoning was referred to with approval and applied in the case of *New Braunfels National Bank vs. Odiorne*. [290] The court in rejecting the bank's refusal remarked that maintaining the integrity of the strict compliance rule was important to the continued usefulness of letters of credit, but that this did not mean that strict compliance demands an oppressive perfectionalism. Thus according to this approach strict compliance does not mean a blind adherence. The effect of adopting standard practice as a way of measuring strict compliance is that strict conpliance does not mean slavish conformity to the terms of the credit.[291]

To that end it appears that generally the American approach is rather more functional than the English approach. Interestingly however, is the realisation that irrespective of geographical location, the courts have been innovative in, while maintaining the strict compliance rule, to arrive at a just and equitable decision. While this is commendable, the lack of a uniform and rather universal approach on a universal issue creates uncertainties on such an important aspect of the world economy with far reaching consequences.

5.3 Arguments in Support of the Retention of the Strict Compliance Doctrine

There is a more fundamental reason for caution when considering relaxation of strict compliance. The international sales that are the underlying basis of many documentary credits are merely parts of a wider network, since multiple re-sales while the goods are at sea are more

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[289] Ibid
[290] (1989) 780 SW 2d 313 (Court of Appeals of Texas)
[291] Ibid

common-place. Since it is impossible to inspect the goods while they are at sea, even a buyer (who unlike a bank may well be presumed to have expertise in the goods themselves) can only form a judgement on the basis of inspection of documents. Moreover it is vital that if the second buyer is required to accept the documents, he can use those same documents in his resale to a third buyer.

The prospect of multiple resales was a factor in requiring certainty, and hence the preference in international sale contracts for conditions over innominate terms in the well-known House of Lords decision in *Bunge Corporation vs. Tradax SA.*[292] In *Sang Co. Ltd vs. Glencore Grain Ltd*[293] Mance J. adopted a test similar to common law strict compliance for documentation under C and F sale contract and in refusing leave to appeal, Hobhouse L J, was clearly unimpressed by the seller's contention that "there is a distinction to be drawn between a case which requires documents to be tendered to a buyer and where they are to be tendered to a bank under a letter of credit."[294]

There are other arguments perhaps of lesser substance but which lend further support to retention of strict doctrine. It may be a technicality but the contract between confirming bank and beneficiary must be unilateral since the beneficiary makes no undertaking to the bank. Acceptance is tender of documents and innominate term reasoning simply has no place in unilateral contracts.[295] The other contracts to which the banks are party are bilateral, but strictly the same documentary requirements must apply to all these contracts if the credit is to be workable. A more convincing argument, perhaps is that the courts do sometimes intervene to import requirements of fairness or good faith

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[292] (1981) 1 WLR 711
[293] (1996) 1 Lloyd's Rep 398, applied in *Soules CAF vs. PT Transap of Indonesia* (1999) 1 Lloyd's REP 917
[294] *Supra* note 60
[295] Ibid

whatever the contracting parties have stipulated but usually only where there is an inequality of bargaining power between the parties; there is no reason to assume that this is usually the case in international trade transaction.[296]

The insistence upon strict compliance is continually reiterated. In *English, Scottish and Australia Bank vs. Bank of South Africa,* [297] Bailhache J. remarked that, "it is elementary to say that a person who ships in reliance on a letter of credit must do so in exact compliance with its terms it is also elementary to say that a bank is not bound to or indeed entitled to honour drafts presented to it under a letter of credit unless those drafts with the accompanying documents are in strict accord with the credit opened."

Therefore if a certificate signed by experts is required, a certificate signed by a *single expert* is a bad tender.[298] Similarly, a set is non-conforming if the bill of exchange is drawn on the issuing bank. The strict compliance doctrine prevails in all the contracts which occur in a documentary credit transaction, that is the contract between the buyer and the banker, the contract of seller and seller and the relationship of issuing bank and correspondent banker.[299] Notwithstanding the

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[296] Ibid

[297] (1922) 13 L1LR 21 at 24 see also *Belgian Grain and Produce Co. Ltd vs. Cox and Co. (France) Ltd* (1919) 1LR 256 at 259; *Donald H Scott and Co. Ltd vs. Barclays Bank Ltd.* (1923) 2 KB1 at 11; *Bank Melli Iran vs. Barclays Bank D.C.O* (1951) 2 Lloyds' Rep. 367 at 374; *Midland Bank Ltd vs. Seymour* (1955) 2 Lloyds Ref 147 at 154; *Kydon Compania Naviera vs. National Westminster Bank Ltd* ("*The Lena*") (1981) 1 Lloyds Ref 68 at 74-75; *Glencore International AG vs. Bank of China* (1996) 1 Lloyds Rep 135, In the USA see *Venizelos SA vs. Chase Manhattan Bank* 425 F 2d 461 (1970); *Oriental Pacific (USA) Inc. vs. Toronto Dominion Bank*, 357 NYS 2d 957 (1974); *Flagship Cruises Ltd vs. New England Merchants National Bank of Boston* 569 F 2d 699 (1978); *Re Coral Petroleum* 878 F 2d 830 (5th Cir. 1989); *Trinity vs. Banque Paribas* 762 F. Supp. 110 (SONY 1991); *Ocean Rig ASA vs. Safa National Bank of New York* 72 F Supp. 2d 193 *Of Banco Espanol de Credito vs. State Street Bank and Trust Co.* 385 F. 2d 230 (1967) (which suggests that the standard of strict compliance may be relaxed when a discrepancy does not relate to the description of goods). In Canada, see *Davis O'Brien Lumber Co Ltd vs. Bank of Montreal* (1951) 3 DLR 536 at 550.

[298] Benjamin's Sale of Goods; *see Equitable Trust Co. of New York vs. Dawson Partners* (1927) 27 L1 LR 49.

[299] Thus *Equitable Trust Co.* (Supra) (which was an action between a banker and a buyer has been cited in *Rayner (J. H) & Co. Ltd vs. Hambros Bank Ltd* (1943) 1 KB 37(on 1943).

arguments raised above, it is still thought that the doctrine is best illustrated by the fact that the rule de minimis non curat lex does not apply in documentary credit transactions.[300] Moreover in respect of many other breaches of contract the UK courts at any rate have tended to move away from treating terms as conditions, any breach of which, however trivial allows the other party to repudiate in favour of the innominate or intermediate term where the lawfulness of repudiation depends on the effect of the breach.[301]

While Paul Todd acknowledges that developments along these lines may enhance the security of the credit from the seller's viewpoint, he however argues that there are other possibilities, and relaxation of the strict compliance doctrine is not a desirable method of achieving this goal. If the rules were changed to require rejection of documents only where discrepancies were material, the bank would have to judge materiality but they do not have relevant expertise.[302] Both the general law and the UCP reflect the actuality that whereas banks can check documents they probably have no knowledge of the goods underlying the transaction nor of relations or disputes between buyer and seller. Thus Article 4 of the UCP, provides "In credit operations all parties concerned deal in documents not in the goods, services and or other performances to which the documents may relate."

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[300] Article 13 (a) of the UCP.*Maralice (London) Ltd vs. ED and F. Man* (1986) 2 Lloyds Rep 526; *Soproma SpA vs. Marine and Animal By- Products Corporation* (1966) 1 Lloyds Rep 367 at 390; *Astro Exito Navigation Sit vs. Chess Manhattan Bank (the Messiniaki Tolrui)* (1986) 1 Lloyds Ref 455 at (d) (1988) 2 Lloyds Rep 217; *Seaconsor Far East Ltd vs. Bank Markzi Jomhouri Iran* (1993) 1 Lloyds Rep 236; where Lloyd LJ at 240 said, "I cannot regard as trivial something which whatever may be the reason the credit specifically requires"

[301] *Hong Kong Fir Shipping Co. Ltd vs. Kawasaki Kisen Kaisha Ltd* (1962) 2 QB 26

[302] *Supra* note 60

6. Conclusion:

There is no doubt at this point that the doctrine of strict compliance is fundamental to the operation of documentary credits. It is further clear that the rigours of the doctrine of strict compliance have not always produced the best results in the use of documentary credits. In this regard Peter Ellinger has stated that, "One result of the doctrine of strict compliance is that the person to whom the documents are tendered may raise lawful objections against the documents, even if in fact his objection is purely technical and the true motive for his rejection of the tender is to be found in a falling market or in some extraneous circumstances."[303]

Consequently there have been calls to find innovative ways of dealing with the rigours of strict compliance without at the same time eroding the values of the doctrine. The revisions of the UCP undoubtedly reflect that the drafters never intended a rigid interpretation of the strict compliance doctrine and each version of the revisions done to date bears testimony to the foregoing. Richard Morris adds weight and states that, "while the drafters of the UCP recognised the difficulties to which discrepancies give rise and the corresponding need for a functional standard to reduce the proliferation of litigation, they have failed in my view to provide that standard. As a result of the continuing uncertainty, the litigation has continued at least until UCP 600."[304]

I however, think that it is not entirely correct that the advent of UCP 600, will necessarily see a reduction of the volumes of litigation matters involving documentary credits issues. Unscrupulous trades will always be there. Admittedly some grey areas will be clarified but the

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[303] Ellinger .EP, "Documentary Credits and Finance by Merchant Housed", *et al* Guest AG, *Benjamin's Sale of Goods*, 3rd Edition, Sweet and Maxwell- London, 1987

[304] *Supra* note 204

coming of the UCP 600 must be bolstered by the introduction of the principles of good faith. While some jurisdictions do not directly recognise this principle, it must be made in such a manner that parties who will incorporate the UCP in their dealings will automatically be guided by the tenets of the good faith principle irrespective of jurisdictional location.

Writing from Zimbabwe, and there being no case in point on the subject, I seek to suggest a position that the Zimbabwean courts should take when seised with such a matter. I am of the opinion that the common law concept of strict compliance is too strict to be good. Thus the courts must adopt a functional interpretation of the doctrine of strict compliance, each case being determined on the basis of its own merits having due regard to the precepts of the principles of good faith. However care must and should be taken that the strict compliance doctrine is not generalised that may in turn take away the security aspects that has long been rightly associated with the doctrine of strict compliance.

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