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Strict or Substantial Compliance in Letters of Credit: Crafting Guidelines for Verifying Documentary Compliance

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Abstract

In the law regarding letters of credit, the issuing bank is only expected to determine whether the documents, on their face, do not contain any discrepancy that would suggest that the documents are invalid or do not conform with the terms of the letter of credit. Where the issuing bank concludes that there is some non-conformity with the terms of the letter of credit, the issuing bank has a right to reject the documents. Although it is generally agreed that minor discrepancies in the documents lack the degree of materiality sufficient to permit a bank to reject documents for lack of conformity with the terms of a letter of credit, there are currently no guidelines for the verification of documentary compliance. The outcome is a state uncertainty in the law regarding letters of credit. The paper undertakes a comparative examination of the jurisprudence on the doctrine of strict compliance and attempts to craft guidelines for verifying documentary compliance.

Keywords: Documentary Credits, Letters of Credit, Strict compliance, UCP 600

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Strict or Substantial Compliance in Letters of Credit: Crafting Guidelines for Verifying Documentary Compliance

Introduction

In the law regarding letters of credit, the issuing bank is only expected to determine, on a *prima facie* basis, whether the documents on their face, comply with the terms of the letter of credit, i.e., they do not contain any discrepancy whatsoever that would suggest the documents are invalid, or at the very least, questionable. Where the issuing bank concludes that there is some suggestion of invalidity, insufficiency or non-conformity with the terms of the letter of credit, the issuing bank has a right to reject the documents. This requirement that documents presented must comply with the terms of the letter of credit is traditionally known at the doctrine of strict compliance. Although it is generally agreed that minor discrepancies in the documents lack the degree of materiality sufficient to permit a bank to reject documents for lack of conformity with the terms of a letter of credit, there are currently no guidelines for the verification of documentary compliance. Article 14(a) of UCP 600 which is intended to provide some guidance regarding documentary compliance, and is indeed an improvement on earlier UCP versions, is unhelpful. It places the onus on a bank to determine whether documents presented comply, thusly, "a nominated bank acting on its nomination, a confirming bank, if any, and the issuing bank must examine a presentation to determine, on the basis of the documents alone, whether or not the documents appear on their face to constitute a complying presentation." It then provides a very vague definition of "complying presentation" as "a presentation that is in accordance with the terms and conditions of the credit, the applicable provisions of these rules and international standard banking practice." The result of this absence of clarity and guidelines is that while some courts have adopted a literal approach to the application of the doctrine of strict compliance, other courts have tried to modify the doctrine. The outcome is a state of uncertainty in the law regarding letters of credit, with Anglo-common law courts, on the one hand, saying one thing, and US courts, on the other hand. saying

another. So, in the event of a dispute regarding documentary compliance, it is likely that the result will depend on the jurisdiction and forum where the matter is tried. This creates a state of uncertainty in business financing and the possibility of forum shopping. The paper undertakes a comparative examination of the jurisprudence on the doctrine of strict compliance and attempts to craft guidelines for verifying documentary compliance.

A. The scheme of a letter of credit transaction

In import and export transactions, a seller who has contracted to sell goods may be unwilling to dispatch the goods in reliance on the personal credit of the purchaser. The purchaser may also be unwilling to make payment on the mere promise of the seller to dispatch the goods upon the receipt of payment. As a compromise, the purchaser contracts to procure or open the letter of credit in favor of the seller with a bank, the issuing bank, in the country of the purchaser. When the issuing bank opens the letter of credit in favor of the purchaser, it will either inform the seller that the letter of credit has been opened, or it will arrange with a bank in the locality of the seller (the "advising bank") to advise the seller that the credit has been opened. The seller, certain that it will obtain payment for the goods, then dispatches the goods.

At the request of the seller, pursuant to the contract of sale between the purchaser and the seller or, at its own option, the issuing bank may ask the advising bank to confirm the credit. Where the advising bank confirms the credit it undertakes not only to advise the seller, but also to make payment, or accept or negotiate the bills of exchange drawn by the seller. The advantage of confirmation is that it localizes the payment obligation and is considered to be more convenient from the perspective of the seller. Both the issuing and advising banks are thus able to effect payment of the credit. Usually, however, the issuing bank is the bank that pays the beneficiary of the

credit. In this article it is assumed, for the purpose of simplicity, that the issuing bank is also the paying bank.

To obtain payment under the credit, the seller is required to tender documents that comply with the terms of the letter of credit. The letter of credit is thus an undertaking by the issuing bank to pay the seller the amount, for which the letter of credit has been issued, or to accept or purchase the draft or bill of exchange drawn by the seller when the seller delivers certain documents. These documents could include a commercial invoice describing the goods and stating the price, a bill of lading, and a certificate of insurance. The documents are intended to assure the bank, before it makes payment, that the seller has, among other things (1) delivered proper documents of title, (2) insured the goods in accordance with the terms of the contract, (3) dispatched the goods of the right description, to the right destination, and (4) stated the right price of the goods. As one court[1] has observed,

> "the whole commercial purpose for which the system of confirmed irrevocable documentary credits has been developed in international trade is to give the seller an assured right to be paid before he parts with control of the goods that does not permit of any dispute with the buyer as to the performance of the contract being used as a ground for non-payment or reduction or deferment of payment."[2]

1. The seller and purchaser

The rights and obligations of the seller and purchaser are determined by the underlying contract of sale. The contract of sale is independent of the letter of credit transaction once the letter of credit has been issued. This autonomy of the letter of credit transaction

[1] *United City Merchants* v. *Royal Bank of Canada* (1983) 1 A.C. 168 (HL)
[2] Above, 183

influences the role of the issuing bank in the letter of credit transaction.[3] One question that arises in regard to the relationship between the buyer and seller is whether the opening of the letter of credit brings to an end the liability of the buyer to pay for the goods. The legal position is that the opening of the letter of credit does not constitute absolute payment of the price of the goods but only conditional payment[4]. This means that if the issuing bank fails to make payment in accordance with the terms of the letter of credit for any reason whatsoever, including the insolvency of the issuing bank, the liability of the purchaser to pay for the goods revives or crystallizes.

2. The seller and the issuing bank

The rights and obligations of the seller and the issuing bank arise from the terms of the letter of credit. The issuing bank owes a duty to the seller to honor the credit when the documents tendered by the seller conform to the terms of the credit. The role of the issuing bank is solely ministerial and is restricted to ascertaining conformity of the documents with the terms of the letter of credit. The issuing bank is not required to

[3] A discussion of the principle of the autonomy of the letter of credit far exceeds the scope of this work. For cases on the autonomy principle, see; *Sztejn v. Henry Schroeder Banking Corporation* [1941] 31 NYS 2d 631, *Edward Owen Engineering Ltd*. v. *Barclays Bank* (1978) 1 Q.B. 159 (CA), *United City Merchants (Investments) Ltd* v. *Royal Bank of Canada*, [1982] 2 All ER 720 (HL), *Phillips & Another* v *Standard Bank of South Africa Ltd & Others*, [1985] 3 SA 301(W), *Hamzeh Malas and Sons* v *British Imex Industries Ltd*., [1975] 1 All ER 1071, and *Petrosaudi Oil Services (Venezuela) Ltd*. v. *Novo Banco S.A.* [2017] EWCA Civ 9; and for further discussion, see, generally, Roberto L.F. Garcia, "The autonomy principle of letters of credit." 3 *Mexican Law Review*, 67; Hamed Alavi, "Limits of autonomy principle in documentary letters of credit: Perspectives of English Law."(2017) 9 *Journal of Legal* Studies, 18-42, and Ross P. Buckley and Xiang Gao, "The development of the fraud rule in letter of credit law: the journey so far and the road ahead." (2002) 23 *U. Pa. J. Int'l Econ. L.*, 663.

[4] WJ Alan & Co. Ltd. v El Nasr Export (1972) 1 Lloyd's Rep 313, 321-322; R. King *Gutteridge and Megrah's Law of Banker's Commercial Credits 8th Edn* (New York: Routledge, 2001) 35.

investigate the nature of the goods that are being dispatched by the seller, neither is it required to judge the underlying contract of sale. The issuing bank has a right to be reimbursed by the purchaser only if it has acted in accordance with its mandate, and has accepted nothing short of a faultless tender. In examining the documents that are tendered by the seller, the issuing bank is not required to exercise any discretion, and must accept only documents that conform to the terms of the letter of credit. If the bank accepts documents that are faulty, it does so at its own risk. As a general rule, no obligation is imposed on the seller to conform to the terms of the letter of credit. However, the seller can insist on payment only if the seller tenders documents that conform to the terms of letter of credit.[5]

B. The doctrine of strict compliance

Over the years the majority of courts have held that the standard of documentary compliance that is expected of the seller or beneficiary of the letter of credit is nothing short of strict compliance. This standard has evolved into the doctrine of strict compliance. The doctrine requires that the beneficiary of a letter of credit strictly comply with the terms of the letter of credit as a condition precedent to insisting on performance by the issuing bank. Where the documents do not conform to the terms of the letter of credit, the issuing bank must reject the documents and refuse payment. Two reasons have been given to justify the existence of the doctrine of strict compliance. First, without strict compliance the issuing bank cannot insist on reimbursement by its customer. As the authors of *Schmitthoff's Export Trade* explain,

> "[the issuing bank] is a special agent of the buyer. If an agent with limited authority acts outside that authority (in banking terminology: his mandate) the

[5] Carole Murray et al, *Schmithoff's Export Trade - The Law and Practice of International Trade* 12th Edn (London, Sweet & Maxwell, 2012) (hereinafter *Schmithoff's Export Trade*), 171.

> principal is entitled to disown the act of the agent, who cannot recover from him and has to bear the commercial risk of the transaction."[6]

Where the issuing bank acts outside its mandate, the customer cannot be bound by the actions of the issuing bank and is entitled to refuse to reimburse the issuing bank. Further, the doctrine confers protective rights on the bank by ensuring that proper documents are available to the bank and its customer for use against the responsible carriers in the event that the goods are destroyed, lost or damaged.

1. The UCP and the doctrine of strict compliance

The Uniform Customs and Practice of Documentary Credits (UCP), the set of rules published by the International Chamber of Commerce with a view to harmonizing banking practice in letter of credit transactions, currently in its sixth edition, has traditionally incorporated this doctrine of strict compliance, though it has never used that exact expression. Article 13(a) of the fifth edition, the UCP 500, provided 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. Compliance of the stipulated documents on their face with the terms and conditions of the Credit shall be determined by international standard banking practice as reflected in these Articles. Documents which appear on their face to be inconsistent with one another will be considered as not appearing on their face to be in compliance with the terms and conditions of the Credit."

[6] Above, at 172

The sixth edition of the UCP, publication 600, published in 2007 (the UCP 600), is the latest revision. Article 14(a) of the UCP 600 provides, as follows,

> "a nominated bank acting on its nomination, a confirming bank, if any, and the issuing bank must examine a presentation to determine, on the basis of the documents alone, whether or not the documents appear on their face to constitute a complying presentation."

The interpretation section of the UCP 600 defines a "complying presentation" as "a presentation that is in accordance with the terms and conditions of the credit, the applicable provisions of these rules and international standard banking practice."

As the above indicates, while the UCP incorporates the doctrine of strict compliance it falls short of providing an explanation as to the degree of strictness. For instance, while emphasising the need for a "complying presentation," the UCP 600 states, in Article 16(a), that "when a nominated bank acting on its nomination, a confirming bank, if any, or the issuing bank determines that a presentation does not comply, it *may* refuse to honour or negotiate," (emphasis added) thus leaving it up to the bank to decide whether the discrepancy is sufficient enough to justify a rejection.

2. The jurisprudence on strict compliance

The doctrine of strict compliance has been interpreted by a majority of courts to mean absolute compliance. For example, in an early decision,[7] Bailhache J. of the Kings Bench division states 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

[7] *English, Scottish & Australia Bank Ltd*. v. Bank of South Africa (1922), 13 Lloyd's Law Reports 21.

> 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."[8]

Indeed, some have argued that this means that documents that are tendered to the issuing bank by the beneficiary of the credit have to be a "mirror-image"[9] of the documents that are specified in the terms of the letter of credit. What many consider to be the authoritative legal statement of the doctrine came from Lord Sumner who stated as follows:

> "it is both common ground and common sense that in credit transactions, the accepting bank can only claim reimbursement 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. The bank cannot take upon itself to decide what documents will do well enough and what will not."[10]

In this absolute sense then, strict compliance excludes any notion of substantial compliance. Indeed, courts that have adhered to the strict standard have rejected the applicability of the *de minimis* principle. Commenting on the doctrine of strict compliance in the current edition of Schmitthoff's well known work, the authors observe that the refusal by a bank to depart even in a small apparently insignificant matter not

[8] Above, at 24

[9] See Boris Kozolchyk "Strict compliance and the reasonable document checker" (1990) 56 *Brooklyn Law Review*, 45 at 48; Todd Conley "Hanil Bank v. Pt Bank Negara. The problem with form over substance in documentary compliance rules." (2001) 50 *Catholic University Law Review*, 972, at 978.

[10] *Equitable Trust Company of New York* v. *Dawson & Partners* (1927), 27 Lloyd's L Rep 49 at 52 (hereinafter *Equitable Trust Co.*)

sanctioned by the instructions or by the UCP, where applicable, will, in overwhelming majority of cases, be upheld by the courts if litigation ensues.[11] The doctrine has been applied to letter of credit transactions involving a variety of discrepancies.

(a) Documentary discrepancies

Documentary discrepancies may result from a variety of circumstances, including (1) where the beneficiary of the credit presents the wrong documents, (2) where the beneficiary presents incomplete documents, and (3) where the documents are inconsistent on their face with the terms of the letter of credit. Some of the cases that illustrate how the courts have applied the doctrine when faced with such discrepancies are discussed below.

Equitable Trust Co.[12] concerned the sale and purchase of vanilla involving the defendant and a seller in what is now Jakarta (at that time Batavia). The defendant had arranged with the plaintiff to open a credit in favour of the seller and payment was to be made upon presentation of a complete set of shipping documents and a certificate of quality to be issued "by experts who are sworn brokers." For reasons which are not too clear from the case law, the advising bank in Jakarta informed the seller that the certificate that was required had to be issued "by [an] expert" who is a "sworn broker." The shipment was made and payment was effected to the seller by the bank based on the tendered documents, including a certificate from the expert. Later it was revealed that the shipment was fraudulent, mainly rubbish, containing less than 1% of the vanilla contracted. In an action brought by the plaintiff bank against the purchasers, who refused to reimburse the bank, the House of Lords held that the bank was not entitled to be reimbursed by the purchaser because the bank had acted contrary to its mandate. It had paid the sellers upon the delivery of a certificate of quality by an expert, instead of a certificate of quality from experts.

[11] *Schmithoff's Export Trade*, note 5.
[12] Note 10.

In *Beyene* v. *Irving Trust Co*.[13], the letter of credit specified that payment be made on the presentation of a bill of lading naming "Mohammed Sofan" as the party to be notified when the goods arrived. However, the bill of lading that was submitted to the bank with the demand for payment misspelled the name as "Mohammed Soran." The confirming bank refused payment because of this discrepancy, and the beneficiary sued. Although the discrepancy was a typographical error, the Second Circuit Court of Appeals held that the tender was a bad tender. The Court observed as follows,

> "First, this is not a case where the name intended is unmistakably clear despite what is obviously a typographical error, as might be the case if, for example, "Smith" were misspelled "Smithh." Nor have the appellants claimed that in the Middle East "Soran" would obviously be recognized as an inadvertent misspelling of the surname "Sofan." Second, "Sofan" was not a name that was inconsequential to the document, for Sofan was the person to whom the shipper was to give notice of the arrival of the goods, and the misspelling of his name could well have resulted in his non-receipt of the goods and his justifiable refusal to reimburse Irving for the credit."[14]

In *Soprama S.p.A v. Maritime & Animals By-Products Corporation*[15] the terms of the letter of credit specified that the documents that were tendered had to include a bill of lading that was payable to order and marked "freight prepaid," and an analysis certificate that stated that the goods contained a minimum of 70% protein. The bill of lading that was tendered by the sellers was not negotiable, and instead of being marked "freight prepaid," as was

[13] 762 F.2d (2nd Cir 1985), hereinafter *Beyene*.

[14] Above, at para 7

[15] (1966), 1 Lloyd's Rep. 367, hereinafter *Soprama*.

required by the terms of the letter of credit, was marked "collect freight." As well, the analysis certificate indicated that the goods contained 67%, as opposed to the required 70% protein. The purchasers rejected the goods and the sellers brought an action against them after their second tender was rejected. The court held that the second tender of the sellers was irrelevant and that the purchasers were entitled to reject the documents the first time because the documents did not strictly comply with the terms of the letter of credit.

Bank Melli Iran v. *Barclays Bank* (*Dominion, Colonial and Overseas*)[16] concerned the sale and purchase of Chevrolet trucks. It was agreed that payment would be made against two letters of credit issued by Bank Melli Iran and confirmed by Barclays Bank. One letter of credit required the tendering of docs evidencing shipment of "sixty new Chevrolet trucks." The documents tendered included an invoice which described the trucks as "in new condition" and a certificate stating "new, good…". Payment was made by the confirming bank to the beneficiary, and the confirming bank then transferred the documents to the issuing bank. The issuing bank rejected the documents and refused to reimburse the confirming bank on the ground that the documents did not comply with the letter of credit. It was held that the confirming bank was not entitled to reimbursement by the issuing bank.

In *Kydon Compania Naviera S.A.* v. *National Westminster Bank Ltd.*(*The Lena*),[17] the issue concerned the sale by the plaintiff company of the Greek vessel, The Lena, to Eurasia Carriers Ltd. in 1974. It was agreed that payment was to be made by way of a confirmed, irrevocable letter of credit, which was required to state as follows: "the amount of US$953,771.00… available by … drafts on them at sight without recourse for full invoice value … purporting to be 100% value of the Greek flag Motor vessel "Lena," built January 1952 of about 11,250 tons gross register 6857 tons net register and about 5790 long tons light displacement "as built," with all equipment outfit and gear belonging to

[16] [1951] 2 Lloyd's Rep 367 (hereinafter *Bank Melli Iran*)

[17] (1981), 1 Lloyd's Rep. 68.

her on board, as per M.O.A. [Memorandum of Agreement] dated the 2nd July, 1974…" The documents tendered by the plaintiff included a commercial invoice which stated: "To net sale price of "LENA"… (US$953,771.00) We hereby certify that the M.T "LENA" registered under the Greek Flag under official number 3723 of 11,123.89 tons gross and 6,297.41 tons net is as per Memorandum of Agreement dated 2nd July 1974." The documents tendered by the beneficiary were rejected by the bank because of the discrepancies on the invoice. The plaintiff sued the bank for wrongful rejection of payment under the letter of credit, arguing that the credit only required a certificate that the vessel complied with the memorandum of agreement and so it was sufficient that the invoice had simply described or referred to the vessel as "the vessel Lena certified to be as per memorandum of agreement dated the 2nd of July 1974." The Court, stressing the importance of adhering to the precise description that the letter of credit required, stated that

> "Unless otherwise specified in the credit, the beneficiary must follow the words of the credit and this is so even where he uses an expression, which, although different from the words of the credit, has, as between buyers and sellers, the same meaning as such words. It is important that this principle should be strictly adhered to. … Departure from the principle would involve banks in just those sorts of uncertainties which, it is essential for the proper operation of the credit system, should be avoided."[18]

Narrow Fishing & Trading Company v. *James Richard Quansah and Ors*[19] an unreported decision of the Court of Appeal of Ghana, which involved a fraudulent transaction and could have been decided on that basis, was also decided on the basis of the doctrine of

[18] Above, at 76

[19] C.A 37/2003 (July 2006).

strict compliance. The case involved an agreement between Narrow Fishing & Trading Company and the first defendant, James Richard Quansah, an agent, (who was the managing director of the second defendant, Saviour Woodworks Ltd), to supply one thousand (1,000) metric tonnes of fresh frozen mackerel, from World Scope Limited, a United Kingdom based company for four hundred and fifty-five thousand dollars (US$455,000.00). Narrow Fishing Company was required to pay a deposit of fifty thousand dollar (US$50,000) amounting to twenty per centum (20%) of the total cost, being sixty-four million cedis (¢64,000.000.00). This deposit was paid. However, the first defendant failed to pay World Scope Limited and so no fish was supplied. Following this debacle and a second one involving a second supplier from Mauritania, Narrow Fishing & Trading Company made consistent demands for the repayment of the deposit of sixty-four million cedis (¢64,000.000.00). However, instead of repaying the deposit, the first defendant advised Narrow Fishing & Company Limited that he had arranged for the supply of two thousand (2,000) metric tonnes of the fish for a price of one million one hundred and ten thousand dollar (US$1,110,000) from a company in South Africa by the name Hyundai International Trading Corporation. The initial deposit of sixty-four million cedis (¢64,000,000.00), would be applied to this transaction. To persuade the plaintiff to agree to this transaction, the first defendant advised that he had used the sixty-four million cedis (¢64,000,000.00) initial deposit to open a letter of credit on behalf of Narrow Fishing & Company Limited at the National Investment Bank (the third defendant), in favour of Hyundai International Trading Corporation, to facilitate the import of the fish. The plaintiff, Narrow Fishing & Trading Company, persuaded by this, and ostensibly agreeing to this third transaction, executed an import declaration form which indicated the quantity of the fish as two thousand metric tonnes. This form was given to the National Investment Bank. The National Investment Bank appointed Midland Bank as the advising or correspondent bank for the letter of credit. Subsequently, the first defendant advised Narrow Fishing & Trading Company that it had

received information from the supplier, Hyundai International Trading Corporation, that instead of the two thousand metric tonnes that was promised, only ninety metric tonnes of mackerel had been shipped. Following this, Narrow Fishing & Trading Company instructed National Investment Bank to cancel the transaction and refund its deposit. National Investment Bank advised that since the letter of credit was irrevocable, it could not be cancelled without the consent of the first defendant until it had expired. Narrow Fishing & Trading Company continued to ask for the cancellation even after the expiration of the Letter of Credit and National Investment Bank continued to deny the request. Later, National Investment Bank wrote to Narrow Fishing & Trading Company advising it that it had been notified by Midland Bank that documents had been presented by the supplier and the supplier had been paid. National Investment Bank further advised the plaintiff that when it received the documents from Midland Bank it would notify Narrow Fishing & Trading Company. It is unclear from the decision why Midland Bank, not being a confirming bank, would have proceeded to pay the supplier. Be that as it may, when National Investment Bank received the documents from Midland Bank, it wrote to Narrow Fishing & Trading Company advising that there were discrepancies on the face of the bill of lading, and other documents, and requested that Narrow Fishing & Company accept the discrepancies. Among other discrepancies, the bill of lading was yellow, instead of blue, and the name of the vessel as indicated on the bill of lading was non-existent; which was fraudulent. Narrow Fishing & Trading Company rejected the discrepancies and issued another demand for a refund of its deposit. When the defendants failed to pay, Narrow Fishing & Trading Company commenced proceedings. At first instance, the Ghana High Court, relying on *Equitable Trust Co* found for Narrow Fishing & Trading Company, holding that the documents that were presented had not complied strictly with the terms of the letter of credit. On appeal, National Investment Bank argued that the doctrine of strict compliance was inapplicable because it conflicted with the UCP 500. The Court of Appeal rejected this argument, and followed *Equitable*

Trust Co, holding that no compliant documents had been presented, and dismissed the appeal.

In *Seaconsar Far East Ltd* v. *Bank Markazi Jomhouri Islami Iran*[20] too, the Court adhered to the doctrine of strict compliance even for what some have considered a trivial discrepancy. Here, the confirmed irrevocable letter of credit required that all documents presented to the bank bear the letter of credit number and the buyer's name. The seller presented documents that did not comply with this requirement to the advising bank and claimed payment. The advising bank refused to pay on the ground that one of the documents did not carry the letter of credit number and the buyer's name. The Court of Appeal held that it could not ignore the requirement that the documents carry the letter of credit number and the buyer's name. In his judgement Lloyd J. observed as follows:

> "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. But one might take, by way of example, Bankers Trust Co v. State Bank of India [1991] 2 Lloyd's Rep 443, 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."[21]

(b) Discrepancies as to the description of the goods

The overwhelming numbers of cases regarding the doctrine of strict compliance have concerned discrepancies in the description of the

[20] (1993) 1 Lloyd's Rep. 236.

[21] Above at 240

goods. Examples are *J.H. Rayner & Co.* v. *Hambros Bank Limited*[22] *Bank Melli Iran*[23], and *Moralice (London) Ltd* v. *ED and F Man*.[24]

In *J.H. Rayner & Co.*, the seller was informed that a letter of credit was opened in its favor and was available against a bill of lading and invoice for "coromandel groundnuts". The invoice that was tendered by the seller described the goods as "machine-shelled groundnut kernels". The bank rejected the documents and refused to pay. At first instance, the judge allowed evidence that "coromandel nuts" were known in the trade as machine-shelled groundnut kernels and judgment was given to the sellers. On appeal, however, the decision was reversed. The Court of Appeal held that the terms of the letter of credit required that both the invoice and bill of lading contain a full description of the goods. Since the documents did not conform strictly to the terms of the letter of credit, the bank was entitled to reject the documents. The court was also of the opinion that the bank was under no obligation to ascertain the trade name of the goods. Justice Goddard further stated that even if the bank was aware of the trade name of the product, it had promised to pay against a bill of lading describing the goods in a particular way. Therefore, it was only obliged to pay against a bill of lading that stated the required description of the goods.

In *Bank Belli Iran,* as discussed above, the issuing bank issued a letter against documents that should have described the goods as "100 new Chevrolet Trucks". Instead, the documents described the trucks as "in new condition" and a certificate stated "new, good…". The bank accepted the documents despite the non-compliance with the terms of the letter of credit and then sought to debit the account of the customer. The court held that the documents tendered did not conform to the terms

[22] [1943] 1. KB. 37

[23] Note 16

[24] [1954] 2 Lloyd's Law Rep 526 (hereinafter *Moralice (London) Ltd*.)

of the letter of credit and so the confirming bank was not entitled to reimbursement by the issuing bank.

Moralice (*London*) *Ltd* involved the shipment of sugar and the letter of credit called for documents showing shipment of 500 metric tons. The documents that were tendered by the seller to the bank however showed a shipment of 499.7 metric tons of sugar. The Court held that the bank was entitled to reject the documents.

(c) Avoiding the doctrine of strict compliance

The literal application of the doctrine of strict compliance has come under increasing attack over the years. It has been said to be inflexible and likely to lead to unfairness. In *Equitable Trust Co.,* for instance, Scrutton L.J., with whom Lord Carson agreed in a dissenting opinion, held that persons engaged in business would not be able use letters of credit if banks raised objections to honest attempts to carry out instructions that could be ambiguous. It has also been observed that in the day-to-day experience of parties involved in such transactions, it is unrealistic to expect that where documents are drawn up by different parties, in different jurisdiction, to protect different interests, there would be absolute conformity and no divergence whatsoever. One court has gone so far as to state unequivocally that the requirement of strict compliance is "not equivalent to a test of exact literal compliance in all circumstances and as regards all documents,"[25] thus suggesting that the doctrine ought not to be applied in a mechanical or robotic way.

In its 1989 report[26], the American Bar Association's Task Force while agreeing that the standard that should be applied to documentary verification should be strict, went on to state that this strict standard meant different things to different courts. Then, in an attempt to provide some clarity, the Task Force defined strict compliance as what a

[25] *Kredietbank Antwerp* v *Midland Bank Plc*., [1999] 1 All ER (Comm) 801.

[26] *Report on Article 5 of the Uniform Commercial Code.* (1989), New York: American Bar Association.

"reasonable and diligent document checker", upon examining the documents, would consider to be in compliance with the terms of the letter of credit. However, the reasonable and diligent documents checker test has done nothing to ameliorate the state of uncertainty in the law regarding letters of credit. It is unclear for instance, whether the reasonable document checker is one who takes trade practices into account when he or she checks documents. Further, what would a reasonable document checker consider to be a trivial discrepancy?

(d) Methods employed to avoid the doctrine

In view of the criticisms leveled against the doctrine, as well as the challenges encountered by courts when applying the doctrine, various attempts, employing a variety of methods, have been made by courts to avoid the literal application of the doctrine of strict compliance. These attempts are discussed below.

(i) Side-Stepping the doctrine

One of the methods used by courts is to side step the doctrine by, for example, declaring that the disputed phrase or word is not part of the description. A case that illustrates this is *Chailease Finance Corporation* v. *Credit Agricole Indosuez*.[27] The case involved the sale of a shipping vessel, the MV Mandarin. The credit was for an amount of US$56,750 - covering "vessel MV Mandarin" sale agreement dated July 31, 1998 for delivery in Taipei during August 17-20, 1998 … available … against presentation of the following documents: [among others] … a bill of sale… and a copy of acceptance of sale." The seller presented the documents, including a bill of sale dated August 21, 1998 and an acceptance of sale stating that delivery had taken place on August 21. The bank rejected the documents because the "date of delivery of the vessel was stated in the bill of sale and the signed acceptance of sale to be 21 August 1998 when the letter of credit stated

[27] [2000] 1 Lloyd's Rep. 348

that the vessel was for delivery... August 17-20 1998." In an action brought by the Plaintiff, the court found that the delivery date was not part of the good's description thus the documents complied with the requirements of the credit.

In another case before the Supreme Court of Hong Kong,[28] the court, in contrast to the decision of the Court in *Beyene*,[29] which had held that a typographical error involving the name of a third party was a discrepancy, held that a typographical error of the applicant's name was not a discrepancy. Here, a document tendered to the issuing bank by the beneficiary gave the name of the applicant for the credit as 'Cheergoal Industrial Limited', when it should have been 'Cheergoal Industries Limited.' Since the typographical error was not a misspelling, for example, if the name had been spelled, Chheergoal Industries Limited, and could have referred to another company, it is arguable that the Hong Kong Supreme Court sought to side step the strict compliance doctrine by finding that the typographical error was not a discrepancy.

Also, in *Kredietbank Antwerp* v. *Midland Bank Plc.*,[30] the letter of credit required an "original insurance policy or certificate." The original document that was presented had been produced by a word processor and printed by a laser printer on the insurance company's letterhead, bearing the company's logo. A duplicate of this original policy; a photocopy, was also presented. Midland Bank Plc refused to accept the original document, notwithstanding that it was the genuine original, because it had not been marked "original" as was required by Article 20(b) of UCP 500, and, accordingly, refused to indemnify Kredietbank. Kredietbank commenced proceedings. The buyer also commenced separate proceedings against Midland, contesting its own liability to indemnify Midland. At first instance the court found for Kredietbank and Midland and the buyer appealed. Kredietbank argued

[28] *Hing Yip Hing Fat Co Ltd* v. *Daiwa Bank Ltd*., [1991] 2 HKLR 35

[29] Note 13

[30] Note 25

on appeal that the two insurance documents satisfied the requirements of Article 34 of UCP 500, which required that "insurance documents must appear on their face to be issued and signed by insurance companies or underwriters or their agents." Midland contended, however, that Article 20(b) of UCP 500 as interpreted in another case, *Glencore* v. *Bank of China*,[31] meant that the documents did not comply with the terms of the letter of credit because the first document had been produced "by reprographic, automated or computerised systems," and Article 20(b)(i) of UCP 500 required that it be marked as original, which had not been done.

Lord Justice Evans held that the proviso in Article 20(b) of UCP 500, applied expressly to photocopies ("reprographic systems") and to carbon copies; which were copies of some other original documents. Accordingly, a document that was not itself a copy of some other document, but contained the original contract, was an original document for the purposes of the rule. Thus, the first insurance document, which was not a copy of some other document, and did not appear to be a copy document, was clearly the original policy. So, Kredietbank was entitled to accept the document tendered as the original insurance policy, and Midland had been wrong to reject it. The court made the following statement about the doctrine of strict compliance.

> "The requirement of strict compliance is not equivalent to the test of exact literal compliance in all circumstances and as regard all documents. To some extent, therefore, the banker must exercise his own judgment whether the requirement is satisfied by the documents presented to him…Where the credit requirements are ambiguous, it is permissible and essential for a banker to adopt a reasonable interpretation of those requirements. It is in this sense

[31] [1996] 1 Lloyd's Rep 135

> that a banker's approach to document verification should be functional rather than literal or rigid."[32]

Courts have also side stepped the literal application of the doctrine of strict compliance by applying principles derived from contract law and equity. Some of the principles that have been applied include estoppel, and waiver; where the conduct of the defendant has misled the plaintiff into believing that full compliance with the letter of credit has either been attained, or is not required. Some of the cases that illustrate this approach include *Floating Dock Ltd*. v. *Hong Kong and Shangai Banking Corporation*,[33] *Courtalds North America Inc*. v. *North Carolina National Bank*[34] and *Chase Manhattan Bank* v. *Equibank*[35], are discussed below.

Floating Dock Ltd concerned an agreement to sell sections of a floating dock. The agreement contained terms regarding the place of arrival and delivery, and the time of delivery. Pursuant to the terms of the agreement, payment was to be made by letter of credit and the letter of credit was to be issued two days after the arrival of the sections of the floating dock, and was to contain details regarding the arrival of the sections of the floating dock. The purchasers, in accordance with the agreement, sought to open a letter of credit on behalf of the seller with the defendant bank. During the course of negotiations, the issuing bank noticed certain discrepancies in the documents of the buyers and recommended that certain amendments be made. The letter of credit was then issued after the amendments had been made. Subsequently, when the sellers presented the documents for payment, the issuing bank refused to make payment on the ground that the discrepancies were breaches of the terms of the letter of credit. In an action commenced against the defendant bank, the seller argued that the defendant had agreed to accept the documents in the manner in which they were

[32] Above, para 12

[33] [1986] 1 Lloyd's Rep. 65 (hereinafter *Floating Dock Ltd*)

[34] 387 F. Supp. 92 (1975) (hereinafter *Courtalds North American Inc*.)

[35] 394 F. Supp. 352 (W.D. Pa. 1975) (hereinafter *Equibank*)

presented and so there was no breach of the terms of the letter of credit that justified rejection and refusal to pay. The court saw the case as one involving estoppel and held that because of the conduct of the defendant, they were estopped from denying the validity of the documents.

In *Courtalds North America Inc.*, the issue that the court was asked to determine was whether the invoice submitted by Courtaulds North American Inc., through its confirming bank, to the defendant, conformed with the requirements of the letter of credit. Here, at the request of its customer, Adastra Knitting Mills, North Carolina National Bank issued an irrevocable letter of credit in favour of the plaintiff. The terms of the letter of credit required that the description of the goods in the invoice should include the expression "100% Acrylic." The invoice tendered by the plaintiff described the goods as "Imported Acrylic Yarn," omitting the expression "100% Acrylic." However, there was a packing list stapled to the invoice which provided the "100% Acrylic" description as required by the terms of the letter of credit. The court considered whether it was sufficient that the full description that was required by the terms of the letter of credit could be ascertained if the invoice was read in conjunction with the one-page packing slip. The plaintiff argued that the stapled documents (the invoice and packing slip) were integrated and ought to be considered as one complete document which provided the required description. The defendant argued that the invoice did not strictly comply with the requirements of the letter of credit and that it was under no obligation to examine the additional stapled packing slip to determine if it supplied the requisite description. The court in making its ruling relied on traditional guiding principles concerning contracts generally, and stated as follows:

> "a fair and reasonable construction that will sustain an instrument will be preferred to one that will defeat it; if an agreement is fairly capable of a construction that will make it valid and enforceable, that construction will be given to it. Where a letter of credit is fairly

> susceptible of two constructions, one which makes it fair and customary and one which prudent men would naturally enter into, while the other makes it inequitable, the former interpretation must be preferred to the latter, and a construction rendering the contract possible of performance will be preferred to one which renders performance impossible or meaningless. And finally, a general rule of construction most important to the disposition of this case is that in construing letters of credit the same general principles which apply to other contracts in writing govern letters of credit."[36]

The Court was of the view the stapled documents should have been regarded as one document and that the packing slip "supplemented and was an integral part of the commercial invoice." According to the Court, if the stapled documents were viewed together, then there was compliance with the terms of the letter of credit. The court also bolstered its finding in favour of the plaintiff on another legal ground, that of waiver. As it stated,

> "Over the entire course of dealing between the seller and the bank, the bank did not once communicate to the seller any objection to the description supplied in the invoice. The bank paid several drafts pursuant to documentary demands which supplied identical descriptions as the description contained in the dishonored invoice. Hence, the bank has waived the objections which it now seeks to offer in an effort to avoid liability… The bank's conduct of honoring the previous drafts without notice to the beneficiary of a deficiency lulled the beneficiary into believing the documentation was proper and complete. It would be

[36] Above, at 100.

> an injustice to allow the bank to avoid liability based on an alleged technical defense it had previously waived without notice to the beneficiary."[37]

In *Equibank*, Chase Manhattan Bank ("Chase"), the beneficiary of the letter of credit, was required to present certain documents to Equibank, the issuing bank, before the expiration date. Before Chase presented the documents to Equibank, Chase called Equibank and was informed by an employee that the documents could be forwarded through domestic collections. The document arrived ten days after the expiration date and Equibank refused to honor the documents. In an action commenced by Chase, Chase argued that because of the information of the employee, Equibank had waived any right it had to insist on the timely presentation of the documents. The US Federal District Court nevertheless granted summary judgment to Equibank. On appeal, though, the US Court of Appeal for the Third Circuit, holding that there was the possibility of an estoppel or waiver on the part of Equibank, reversed the decision and remanded the case for a rehearing on the issue of waiver.

(ii) Rejecting the doctrine of strict compliance

In other decisions, notably decisions from the United States of America, the courts, have avoided the doctrine by rejecting it outright and substituting a doctrine of substantial compliance. Some of these decisions are *Bank of America National Trust & Savings Association* v. *Liberty National Bank and Trust Co.*,[38] *Banco Espanol del Credito* v. *State Street Bank &Trust Co.*,[39] *Crocker Commercial Services* Inc. v.

[37] Above, at 103. The Court relied on *Miche on Banking*, citing a provision therein that "[a] person who is entitled to draw against a letter of credit must strictly observe the terms under which the credit is to become available, and has no cause of action against a bank refusing to honor a draft where such terms are not complied with. Courts must enforce a letter of credit as written, unless the parties have waived their rights thereunder by subsequent action."

[38] 116 F. Supp., 233 (DC Okl, 1953); 218 F.2d 831 (10th Cir. 1955)

[39] 266 F. Supp. 106 (D. Mass. 1967)

C*ountryside Bank,*[40] *Flagship Cruises Ltd.* v. *New England Merchants National Banks,*[41] and *Transamerica Delaval Inc* v. *Citibank NA*[42].

In *Bank of America National Trust & Savings Association* v. *Liberty National Bank and Trust Co.,* the court unequivocally stated that "where the letter of credit is substantially complied with, every reasonable effort should be made by the courts to uphold the validity, particularly where the objections are technical in nature and made only in an effort to escape from the legal effect of a business bargain"[43].

Banco Espanol del Credito v. State Street Bank & Trust Co. concerned a contract for the supply of clothing and garments. The terms of the letter of credit required that the documents include a certificate of inspection that stated, among other things, "that the goods are in conformity with the order." The beneficiary presented a certificate that stated that on the basis of an examination of a sample of ten per cent of the goods, "the whole…[was] found conforming to the conditions stipulated on the order stock sheets." The certificate that was presented by the beneficiary thus did not comply with the exact terms of the letter of credit. The court overlooked this discrepancy in the documents. According to the court, since the stock order sheets referred to in the certificate were stock sheets with which the parties had dealt, that relationship was enough to supplant the original order. The court was also of the opinion that it would have been unreasonable to expect the inspector to examine all the garments that were the subject of the contract. Thus the compliance of the documents with the terms of the letter of credit was considered by the court to be substantial, and the discrepancy was considered to be immaterial.

In *Crocker Commercial Services* Inc. v. C*ountryside Bank,* the terms of the letter of credit required that the beneficiary of the letter of credit tender a certificate that included the following statement

[40] 538 F.Supp. 1360 (1981)
[41] 569 F.2d 699 (1st Cir. 1978)
[42] 545 F. Supp. 200 (S.D.N.Y. 1982)
[43] Note 38, at 243

"invoice(s) issued to them by Crocker Commercial Services." Instead, the certificate that was presented to the bank stated as follows: "invoices issued to them by factored clients of Crocker Commercial Services, and which are assigned to Crocker Commercial Services." The bank rejected the documents and refused to pay, arguing that the certificate was not in compliance with the terms of the letter of credit. The court was of the opinion that the non-compliance was inconsequential. For the court, there was no difference between a statement saying that invoices were issued by Crocker and another saying that invoices were factored by Crocker. In this case as well, the court was of the opinion that the compliance was substantial and reasonable.

In *Flagship Cruises Ltd.* v. *New England Merchants National Banks*, the terms of the letter of credit required that the documents be accompanied by a signed statement that the "draft is in conjunction with Letter of Agreement dated May 23, 1972 and Addendum dated June 15, 1972." The documents that were presented to the bank were accompanied by a signed statement which stated that "(t)his irrevocable Letter of Credit is in conjunction with our Letter of Agreement dated May 23, 1972, and Addendum dated June 15, 1972." In an action following the bank's refusal to pay, the court held that the document was in compliance with the terms of the letter of credit because the discrepancy, the replacement of the word "draft" with the expression "irrevocable letter of credit" was, immaterial. The court saw the substitution of the words as a case of the greater including the smaller, and was of the opinion that there was no way in which a paying bank would have been misled to its detriment by the discrepancy. Here, the court took into consideration the likelihood that the discrepancy could mislead a bank to its detriment.

C. An assessment of the status quo

In point of fact, whether some courts explicitly reject the standard of strict compliance, or merely side step the doctrine of strict

compliance, the end result is the substitution of a standard of substantial compliance, for that of strict compliance. The standard of substantial compliance is not without its own problems. First, the standard of substantial compliance is very vague. None of the cases that have avoided the doctrine and have applied the substantial compliance standard have provided any guidelines regarding the degree of conformity that will qualify as substantial compliance. As the above discussion indicates, there is no single basis for the decision of the courts that have declined to apply the strict compliance standard. Also, the substantial compliance standard does not take into consideration the fact that issuing banks are required to accept or reject documents upon prima facie examination of the documents. The status quo, then, is one of confusion and uncertainty in the law regarding letters of credit. In the event of a dispute regarding documentary compliance, then, it is likely that the result will depend on the forum where the matter is tried. This state of insecurity in business financing cries out for guidelines to guide both courts and banking professionals. The next section attempts to craft guidelines for documentary compliance.

D. Crafting guidelines for documentary compliance

In making a determination regarding documentary compliance, this article proposes that banking professionals and the courts should be guided by the following considerations: (1) Inconsequentiality or Immateriality, (2) Form and Substance, (3) Reasonable and justified expectations of the parties and (4) Obvious typographical errors. No single consideration is more important than another and they are to be considered holistically, as appropriate, in the context of the specific letter of credit transaction.

1. Inconsequentiality or Immateriality

In many letter of credit transactions, banking professionals and courts may be confronted with a discrepancy that may be referred to as

an inconsequentiality; that is a discrepancy that is inconsequential to the transaction. Whether a discrepancy is inconsequential or material depends on whether it would make a difference to the transaction if it is taken at face value or accepted for what it is. Where the discrepancy would make no difference to the transaction if it is accepted for what it is, then it is an inconsequentiality. To determine whether a discrepancy is immaterial or inconsequential, a variety of factors may be considered. One of these is the possibility that a paying bank could be misled to its detriment. Where the discrepancy is of a character that would not mislead a paying bank to its detriment, then it is immaterial. In *Flagship Cruises*, the Court applied this test of whether a paying bank would be misled to its detriment, and concluded that the discrepancy was inconsequential. The other consideration, borrowing from the notion of breach of contract, is where the discrepancy goes to the root of the letter of credit contract in the sense that it is so fundamental to the letter of credit transaction that its presence substantially deprives a party of that for which he contracted.

Crocker Commercial Services Inc. v. *Countryside Bank* is another example of a case where the court relied on this principle of immateriality or inconsequentiality. It will be recalled that here, rather than tendering a certificate that included the following statement "invoice(s) issued to them by Crocker Commercial Services," the beneficiary tendered a certificate that stated as follows: "invoices issued to them by factored clients of Crocker Commercial Services, and which are assigned to Crocker Commercial Services." For the court, there was no difference between a statement saying that invoices were issued by Crocker and another saying that invoices were factored by Crocker. The non-compliance was thus inconsequential or immaterial. The discrepancy was neither of a character that would mislead a paying bank to its detriment, nor one that substantially deprived the party of that for which it contracted.

The decision in *Beyene* may also be justified on the basis that the discrepancy there was one that was not inconsequential. In that case,

the misspelling of the name of the party to be notified when the goods arrived, from "Mohammed Sofan," to Mohammed Soran, on the bill of lading, was a discrepancy that went to the root of the transaction. In the context of that particular letter of credit transaction, it was crucial that the right person be notified that the goods had arrived. The misspelling of the name thus rendered this impossible. This may be contrasted with *Hing Yip Hing Fat Co Ltd* v. *Daiwa Bank Ltd*[44] where the Supreme Court of Hong Kong held that a typographical error of the applicant's name was not a discrepancy. It is arguable that in this particular letter of credit transaction, the typographical error of the name of the applicant for the credit as 'Cheergoal Industrial Limited', instead of 'Cheergoal Industries Limited,' was inconsequential or immaterial for two reasons. First, to the extent that the error concerned the name of the applicant for credit, and letter of credit had already been issued, the error was immaterial to the transaction and did not go to the root of the transaction. It would have made no difference to the transaction if the error was taken at face value because unlike the case of *Beyene*, it was still possible to identify the applicant for credit.

Another example of an inconsequentiality is that which arose in *Courtalds*. It will be recalled that here the letter of credit required that the description of the goods in the invoice should include the expression "100% Acrylic." However, while the invoice tendered described the goods as "Imported Acrylic Yarn," there was a packing list stapled to the invoice which provided the "100% Acrylic" description. While the court did not expressly discuss the notion of inconsequentiality, it is arguable that the principle of inconsequentiality is inherent in the contractual principle on which the court relied to find that there was compliance with the letter of credit. The court held that "if an agreement is fairly capable of a construction that will make it valid and enforceable, [then] that construction will be given to it." The issue, then, was whether a description of the goods as 100% Acrylic could be ascertained from the documents submitted, and the answer is yes. While

[44] Note 28

the letter of credit required that the invoice contain this description, it was sufficient that the description was in another document that was appended to the invoice. It would have been a different matter if the documents contained a different description, for example, 50% Acrylic.

In *Bank of Cochin Ltd. v. Manufacturers Hanover Trust Co.*[45], involving fraud on the part of the seller, the issuing bank commenced proceedings against the confirming bank for wrongful honour of letter of credit. It alleged that there were several discrepancies in the documents presented to the confirming bank. One of the discrepancies was that the confirming bank had negotiated documents for St. Lucia Enterprises when the letter of credit had been procured in favour of St. Lucia Enterprises Ltd. Further, a cable sent by St. Lucia Enterprises Ltd to the insurance company quoted a wrong insurance cover note number; 4291 instead of 429711. The court, adopting the inconsequentiality test, held first, that although there did not seem to be any difference between the names, St. Lucia Enterprises and St. Lucia Enterprises Ltd, it was not clear whether the party that was supposed to be paid had indeed been paid. Further, the difference in the names rendered the document untrustworthy and could point to possible forgery. Accordingly, the discrepancy was not inconsequential. Second, concerning the mistakes in the cable quoting the insurance cover note number, the court held that since the purpose of the cable was to notify the insurance company of the shipment by quoting the proper cover note, and the failure to do so could result in the refusal by the insurance company to honour the insurance policy, the discrepancy was not inconsequential.

2. Form and Substance

Banking professionals and courts are frequently confronted with documentary compliance issues that also raise questions regarding the distinction between matters of form and substance. Generally, "form"

[45] 612 F.Supp. 1533, D.C.N.Y.,1985, affirmed in *Bank of Cochin, Ltd*. v. *Manufacturers Hanover Trust Co*., 808 F.2d 209,

as distinguished from "substance" refers to a legal or technical requirement, usually in connection with the use of proper phrases, terminology or methodology to make something formally correct, while "substance' refers to the actual substance of the matter. It is sometimes said that the distinction between "form" and "substance" is a reference to the choice between, on the one hand, the form through which to achieve some goal, and, on the other hand, the goal itself. It is submitted that in determining documentary compliance, banking professionals must always be cautious not to sacrifice the goal of the letter of credit on the altar of excessive requirement of formality.

One case that is a perfect illustration of the notion of preferring substance over form is *Courtalds*; discussed above, where the Court found that while the letter of credit required that the description of the goods in the invoice should include the expression "100% Acrylic," it was sufficient that this description could be determined from a packing list that was stapled to the invoice. To have insisted that only the invoice could contain the "100% Acrylic" description would have been a rigid adherence to form over substance.

3. Reasonable and justified expectation of the parties

It is a general principle of contract law that provisions of a contract should be construed so as to protect the justified and reasonable expectation of the parties, and a court will imply a term into a contract to, among other things, protect such expectations and achieve business efficacy. Since *Joachimson* v *Swiss Bank Corp.*,[46] it is clear that the courts are prepared to imply terms into the contractual relationship between a bank and its customer, in the same manner as other contracts. Indeed, as the court in *Courtalds* , noted, "in construing letters of credit the same general principles which apply to other contracts in writing, govern letters of credit." Accordingly, it is possible for a court to imply terms into the letter of credit contract to protect the justified and reasonable expectation of the parties and achieve business efficacy.

[46] [1921] 3 KB 110

This should be especially so in two specific contexts, first, where a party's argument in favour of strict compliance is a disguised attempt to escape from a business bargain, especially where the goods have already been shipped, and second, where the trade practice is in favour of a relaxation of the strict rule. This is in line with the statement of the court in *Kredietbank*, that where there is some ambiguity in letter of credit requirements, it is permissible as well as essential for a banker to adopt a reasonable interpretation of the documents, one that is functional as opposed to being strict.

4. Obvious typographical errors

Finally, banking professionals and courts must always be cognizant of what are obvious typographical errors as opposed to genuine discrepancies. This is in line with International Standard Banking Practice 745 Paragraph A23 which stipulates that "a misspelling or typing error that does not affect the meaning of a word or the sentence in which it occurs does not make a document discrepant." An example is the Hong Kong decision in *Hing Yip Hing* where the spelling of the applicant for credit's name as Cheergoal Industrial Limited', instead of 'Cheergoal Industries Limited,' was viewed by the Supreme Court of Hong Kong as a typographical error, and not an example of non-compliance with the terms of the letter of credit.

Another example of an obvious typographical error arose in *South Korean Hyosung Corp.* v. *China Everbright Bank (Xiameng Branch)*.[47] Here, the issuing bank alleged that there were discrepancies including one where the documents that were presented misspelled the word BANK as BNAK. The court held that in accordance with international standard banking practice, a typographical error should

[47] Civil Judgement (2003) Min Jing Zhong Zi Bo. 069; Fujian High People's Court [China]. Cited in Danute Krazovska *Impact of the doctrine of strict compliance on a letter of credit transaction*. Masters Thesis (2008), University of Aarhus, at 39.

not be regarded as a discrepancy. Here, the word "bank" had clearly been wrongfully typed as "bnak."

Conclusion

As this article has shown, in the law regarding letters of credit, the issuing bank is only expected to determine, on a *prima facie* basis, whether the documents tendered for payment comply with the terms of the letter of credit, i.e., they do not contain any discrepancy whatsoever. Where the bank concludes that there is some non-conformity with the terms of the letter of credit, however, negligible it may appear to be, the bank has a right to reject the documents. As this article has shown, some commentators and courts have argued that the doctrine of strict compliance ought not to be applied rigidly. However, in the absence of any guidelines for verifying documentary compliance, some courts have side stepped its application, while others have rejected it and substituted a doctrine of substantial compliance in its stead. The result of this is that success or otherwise in a suit involving alleged non-compliance with the terms of the letter of credit will depend on the forum where the dispute is being adjudicated. This does not augur well for certainty in letter of credit transactions. This article has argued that there is the need for guidelines for verifying documentary compliance and has attempted to craft such guidelines. The article has argued that in making a determination regarding alleged non-compliance with the terms of a letter of credit, banking professionals and courts should be guided by the following considerations: (1) the inconsequentiality or immateriality of the alleged discrepancy, (2) whether the alleged discrepancy is more of "form" as opposed to "substance", (3) the reasonable and justified expectations of the parties and (4) whether the alleged discrepancy is an obvious typographical error. As this article has argued, no single consideration is more important than another and they are all to be considered holistically, as appropriate, in the context of the specific letter of credit transaction.

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