

PREFACE

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The last ten years rank second in the development of letter of credit law only to the decade that followed World War I. The 1920's witnessed an increased realization by the international banks of the need for specialization of their letter of credit functions. With this realization came the distinctions between irrevocable and confirmed letters of credit and between opening, issuing, notifying, confirming, negotiating, paying and clearing banks. Courts and legal commentators joined forces with banking customs to provide the normative support for specialization. These three sources established first, that in documentary letter of credits banks deal with documents and not with goods, and second, that compliance with the bank's documentary specifications must be strict. Finally, they established that the bank's liability in the letter of credit transaction was a result of its function. Thus an advising or notifying bank was only liable as a conveyer of information for its principal (the issuing bank), whereas issuing and confirming banks were liable for their own promises of payment, as principals. Much law was built upon these principles in the ensuing decades.

During the last ten years of letter of credit practice, the above principles have undergone a momentous reexamination. With the increasing involvement of banks in the issuance of promises that are frequently indistinguishable from contractual guarantees (as distinguished from mere payment guarantees), courts and commentators have had to ask themselves whether the law should not ignore the distinction between dealing in documents and dealing in goods. And, with the increasing abuse by beneficiaries of their power to demand payment of guarantee promises whose literal tenor could be read to support such demands, courts and commentators had to reassess the meaning of strictness in letter of credit law. The judicial dilemma was frequently perceived to be as serious as choosing between formalism and assumed certainty of the law on the one hand and equity and uncertainty on the other. To this day, while some of the writers of this Symposium (this writer included) believe this dilemma to be false, others do not, and opt for one or the other of the seemingly conflicting approaches.

In light of the importance of the last ten years of legal activity, the

choice of topics for the Symposium was inevitable. *Creditanstalt*¹, about which all the writers in this Symposium (except this writer) have something to say, had been decided in Austria and its repercussions were felt in international banking circles around the world. *Creditanstalt* implied a re-examination of the separation of documents and goods and of the rights and duties of intermediary banks on a larger scale than was customary in European law. Experts of many nations were asked to submit their opinions and legal and banking journals have been ablaze with controversy. Meanwhile, the use of the injunction as a device with which to effect equity against formalistic abuses of standby and guarantee credits acquired in the United States what Henry Harfield, one of the Symposium participants, described as "epidemic proportions." In addition, the International Chamber of Commerce issued publication no. 325, setting forth the Uniform Rules for Contract Guarantees, which was adopted by some bankers' associations and rejected by others, including among the latter those in the United States. The question then was whether these rules, intended only for bank guarantees, also represented a sound addition to the customary law of letters of credit. Finally, it was necessary to examine developments in United States customary, administrative and court-made law, not only to take stock, but also to discern future directions.

The order of the articles follows loosely the preceding description of topics. It reflects what this writer believes is the most understandable presentation of the total picture bearing in mind most American readers' unawareness of European developments.

Surprising as it may sound, this Symposium marks the first occasion in which letter of credit law specialists from around the world have addressed issues of current interest to practitioners, lawmakers and scholars in many nations. It is a by-product of Henry and Marion Harfield's visit to the University of Arizona College of Law in the spring of 1981. After contributing to Harfield's grueling cross-examination as the expert witness for plaintiff Bank of America in *Bank of America v. United States*,² and fearing deserved retribution when I would be on the stand testifying for the defendant, I decided to appeal to his better instincts by inviting him to Arizona. His highly successful seminar on contemporary issues in letter of credit litigation prompted the editors of the Arizona Journal of International and Comparative Law to suggest the publication of his presentation. Quite coincidentally, I had received copies of the most recent publications by Dean Stoufflet and Professor Eberth, other Symposium participants, and in short order, publication commitments were obtained from them and other noted specialists.

The Symposium's guest participants include some of the leading world authorities in this area of law. Henry Harfield is the most influential United States letter of credit practitioner and writer. *Banks, Credits and Acceptances*, the book he originally co-authored with Wilbur Ward (pres-

1. Singer & Friedlander v. Creditanstalt-Bankverein, 17 Cg 72/80 (Handelsgericht Wien 1980) (English translation on file with the *Arizona Law Review*).

2. 81-1 U.S. Tax Cas. (CCH) ¶ 9161, 47 A.F.T.R.2d 81-652 (P-H) (Ct. Cl. Jan. 28, 1981).

ently under his own authorship), continues to be one of the finest in the field, combining accessible explanations of the various transactions with keen legal analysis and wit. During the last ten years, Henry Harfield has continued his involvement as a litigator and writer in shaping the very law discussed in this Symposium.

Maurice Megrah is Great Britain's most distinguished banking lawyer. He also co-authored with Professor Gutteridge a veritable classic, *The Law of Bankers Commercial Credits*, presently in its ninth edition. Those of us close to Maurice Megrah know not only of his superb legal analysis, including an unequalled ability to state tersely and reliably facts, issues and *ratio decidendi*, but also of his unerring sense of fairness and innate wisdom. It is no wonder that his opinions are sought after by courts, arbitrators and practitioners in virtually every corner of the world.

Dean Jean Stoufflet is one of France's leading commercial and letter of credit lawyers. Like Harfield and Megrah, he has written an influential treatise on the law of letters of credit, *Le Crédit Documentaire*, and has kept pace with developments by publishing highly regarded commentaries in French and continental European legal periodicals. Like Megrah, Stoufflet has the gift of terse formulation, but in keeping with the French civil law tradition, he applied it to the conceptualization of factual patterns, rules and principles of interpretation.

Professors Eberth and Ellinger's outstanding comparative law studies reveal a rare understanding of common and civil law institutions. Professor Ellinger, trained in Israel and Great Britain and presently teaching in Australia (Monash University) and Singapore, is the author of *Documentary Letters of Credit*, a book which quickly established his credentials as one of the most knowledgeable letter of credit comparativists. Similarly, Dr. Rolf Eberth's article, *Der Standby Letter of Credit im Recht der Vereinigten Staaten von Amerika*, ranks among the best surveys of United States standby letter of credit law decisionmaking in any language.

Bernard Wheble usually complains about lawyers' traits, and lest he attribute the order of this introduction to yet another legalistic trick, it is important that he learn from one member of the legal community how much we lawyers appreciate his contribution to letter of credit law. A bankers' banker, Bernard Wheble has also contributed some of the most relied-upon legal language in the history of banking and international banking law. As Chairman of the International Chamber of Commerce Commission on Banking Technique and Practice, a position he held successfully for many years until his recent retirement, he was primarily responsible for putting together various versions of the *Uniform Customs and Practice for Documentary Credits* (UCP). These rules have been adopted by bankers' associations in most if not all countries, and as such, have become not only the banks' living law of letters of credits but also the basis for much judicial statutory law. That Wheble has succeeded as draftsman, while being surrounded by able banking lawyers from every conceivable legal system and political persuasion, is a tribute to his considerable diplomatic skills. He is also a frequent contributor to legal and banking journals.

Finally I should explain the length of my own article. Aside from lacking Megrah's and Stoufflet's gift of economy of expression, I promised other Symposium participants that in exchange for their coverage, other authors would cover the remainder of what we had agreed were the most timely topics. Two prospective writers could not contribute their pieces in time and rather than delay the publication of the Symposium, the student editors and I decided that I should increase my coverage so as not to breach the faith placed with those who had relied on such coverage. In concluding this introduction, I would like to thank Michael Urman, Gail Daniel, John Rambow, Mike Widener, Jean Florman, Lisa Weseman and Billie Kozolchyk for their editorial assistance. I would also like to thank Victoria Witt for research assistance and Jonathon Yarger for helping to organize the Harfield visit and the first board of the *Arizona Journal of International and Comparative Law*, now a pleasant reality at the University of Arizona College of Law, for their willingness to let this symposium appear under the friendly auspices of the *University of Arizona Law Review* at a time when the timetable for publication of the Journal was not yet established.