RISK ASPECTS OF THE IRREVOCABLE DOCUMENTARY CREDIT

Maurice Megrah, Q.C.*

The object of the banker's irrevocable documentary credit is to ensure that the seller-beneficiary of the credit gets paid for the goods he sells and the buyer gets, in the shape of the relative documents of title, the goods which the seller has contracted to deliver to him. This purpose is massively achieved by the issue on behalf of the buyer by his banker of a credit containing the banker's promise to make payment on conditions laid down in the credit. The conditions almost always include the tender of the documents which give title to the goods. Yet documents valid under a credit may not necessarily represent the contract goods. Virtually all credits are made subject to the Uniform Customs and Practice for Documentary Credits (U.C.P.)[1], which introduces a set of rules or practices applicable in cases where the credit is lacking in some essential particular or in which some fact needs construction as to its meaning. Insofar as it is applicable, therefore, the U.C.P. forms part of the credit contract between the banker issuing the credit and the beneficiary who is usually the seller.

Seemingly, it takes little to breach this contract; all conditions must be fulfilled or the seller cannot demand payment. The condition which gives trouble (and would give more if it were not for the integrity of most parties—banker, buyer and seller) is that documents tendered by the seller should be precisely what the credit demands. Herein lies one of the problems facing the banks—the question of strict compliance.

THE ISSUING BANKER

Whenever a credit is issued, the banker issuing it faces the possibility of having to decide, perhaps on vague grounds, whether he would be justified in "paying" pursuant to his promise. The term "paying" is here used in its comprehensive sense as covering any mode of fulfillment of the credit. Article 8(b) of the U.C.P. serves to meet the problem by providing

* Queens Counsel, Temple, London. Hon. Soc'y of Gray's Inn and the Inner Temple; M. Com, London, Honorary Fellow of the Institute of Bankers.

1. UNIFORM CUSTOMS AND PRACTICE FOR DOCUMENTARY CREDITS (I.C.C. Pub. 290, 1974) [hereinafter cited as U.C.P.].

authority for payment, acceptance or negotiation against documents "which appear on their face to be in accordance with the terms and conditions"[2] of the credit. Whether or not there is accord depends upon a comparison of the details of the tender with the conditions laid down in the credit. It is clear that there often must be discrepancies, the issuing banker then being faced with the decision whether to accept or reject the tender. Article 8(c) requires the banker to "determine, on the basis of the documents alone, whether to claim that payment or acceptance or negotiation was not effected in accordance with the terms and conditions of the credit."[3] This wording clearly assumes the introduction of an intermediary banker, generally in the seller's country. Such a claim must, by article 8(e), be brought expeditiously to the attention of the remitter, and herein arises a possible source of trouble. A comparison between the credit description of documents and those tendered would seem a simple matter, but bankers do not always have the same approach to, or understanding of, the question. In addition, reference to the applicant for the credit to ascertain whether he will accept the tender must be made within such time as will, if necessary permit the issuing bank to reject within article 8. Therefore, not only does the banker risk wrongly judging a tender, but he may find himself unable to comply with article 8 if he decides to reject after consulting his customer. It is probably fair to say that unless he can rely on the buyer and seller, he takes the risk of being found by one or the other of the two parties to have acted wrongly.

THE BUYER

The buyer may reject documents if they are not what the contract of sale as translated into the credit requires. But he is not entitled to see either documents or goods before accepting or rejecting; that decision is not his, but his banker's. The banker's promise to make payment is independent of the buyer's rights or wishes. The banker fulfills that promise if he pays against documents which "appear on their face" to be in order from the standpoint of the credit, whatever that may mean in the particular instance. Nevertheless, the fact of payment by the issuing bank or a negotiating bank does not ensure that the buyer gets the goods he wants and has contracted for. He may get the documents which on their face justify the issuing banker in paying; but if the documents do not represent the goods the buyer wants, his recourse is to the seller, not to the buyer's banker. The buyer may proceed against the seller for breach of contract or fraud, which is not an attractive proposition at any time because of the cost and uncertainty entailed.

The U.C.P. places the buyer, who is the applicant for a credit, in an absurdly vulnerable position. Article 12 reads:

> (a) Banks utilizing the services of another bank for the purpose of giving effect to the instructions of the applicant for the credit do so for the account and at the risk of the latter.

2. *Id.* at art. 8(b).
3. *Id.* at art. 8(c).

(b) Banks assume no liability or responsibility should the instructions they transmit not be carried out, even if they have themselves taken the initiative in the choice of such other bank.

(c) The applicant for the credit shall be bound by and liable to indemnify the banks against all obligations and responsibilities imposed by foreign laws and usages.[4]

In view of the unlimited extent of this provision and of the worldwide use of irrevocable credits, it may be doubted whether the provision is not unreasonably broad. In fact, in the United Kingdom article 12 can be regarded as contrary to the Unfair Contract Terms Act.[5] Article 12(b) is especially unreasonable. Banks normally take indemnities from customers asking for credits to be opened; but the extent of the subarticle is such that, to be effective, it ought to be brought expressly to the notice of the applicant. The applicant is under no duty to acquaint himself with the U.C.P., and banks are better equipped to keep abreast of changes in commercial and banking practice. In addition, the buyer is usually not as competent as a banker to judge the effect of the U.C.P.

The courts of many countries have discussed fraud in relation to an irrevocable credit—an ever-present danger in commercial transactions. In the United States, the courts have taken account of what is called "fraud in the transaction," which is not restricted to the credit alone.[6]

ISSUING BANKER AND BUYER

It is generally appreciated that fraud may vitiate the promise contained in an irrevocable credit, at least if it comes to the notice of the issuing banker before he is called upon to implement the promise. The implicit obligation of the banker is to pay against "genuine" conforming documents; otherwise credits would be a sham and open to all sorts of chicanery. On the other hand, if documents appear on their face to be in compliance but are in fact forged or false, the issuing banker paying in ignorance of the fact is protected and is not liable to his customer. False documents can be manufactured which cannot be distinguished from genuine ones. Further, a banker has only a short amount of time in which to examine the documents in order to verify that they fulfill the conditions on which he has promised to pay. If it were otherwise, the practice of financing foreign trade by irrevocable credit would be seriously weakened, if not made impossible. The banker must also decide on the basis of the documents alone; he may not take into account extraneous matters.[7]

In the end, the chance of loss to the buyer can be reduced, if not eliminated, only if the buyer satisfies himself in advance (with the help of his banker if necessary) of the substance, good faith and reputation of the

4. *Id.* at art. 12.

5. Unfair Contract Terms Act, 1977, ch. 50, § 3.

6. In a recent action before the Austrian Commercial Court, fraud was a major issue. Singer & Friedlander, Ltd. v. Creditanstalt-Bankverein, 17 Cg 72/80 (Handelsgericht Wien 1980) (references are to English translation on file with the *Arizona Law Review*). *See* text & notes 15 & 16 *infra*.

7. U.C.P., *supra* note 1, General Provision (b) & art. 8(a).

seller. Clearly this cannot be conclusive, for the situation may change between the conclusion of a contract of sale and its implementation through the issue of a credit. It may be added that the situation is not ameliorated where the credit is transferred to a supplier or financier. Nevertheless, it is the banker who constantly runs a risk. Documents do not always tally with those described in the credit, yet strict compliance is taken to be a sine qua non. In an English case decided in 1927 Viscount Sumner made a statement which has often been cited both in the United Kingdom and the United States, to the effect that "there is no room for documents which are almost the same, or which will do just as well."[8] He was not intending that any discrepancy, however trifling, would invalidate the promise in a credit. For instance, typists' errors unless materially misdescribing or otherwise affecting the validity of a document would not invalidate the promise. But this leaves open the question of what discrepancies will have that effect. It is only necessary to consider a few types of discrepancies to see how hard it is to be dogmatic about the irreconcilability of a document tendered with the one described in the credit.[9]

Fraud

The leading decision on the effect of fraud in relation to credits is the American case *Sztejn v. J. Henry Schroder Banking Corp.*,[10] which went some way to relieving a buyer from the fraud of his seller. The New York Supreme Court said:

> It would be a most unfortunate interference with business transactions if a bank before honoring drafts drawn upon it was obliged or even allowed to go behind the documents, at the request of the buyer, and enter into controversies between the buyer and the seller regarding the quality of the merchandise shipped. If the buyer and the seller intended the bank to do this they could have so provided in the letter of credit itself, and in the absence of such a provision the court will not demand or even permit the bank to delay paying drafts which are proper in form,[11]

but made the exception that

> where the seller's fraud has been called to the bank's attention before the draft 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.[12]

This judgment does not tell what degree of knowledge of fraud is necessary to justify the issuing bank in refusing to pay, and whether payment without knowledge of fraud is protected or can be upset and recoverable as money paid in mistake as to the authenticity of the tender. In *Sztejn* the

8. Equitable Trust Co. v. Dawson Partners, Ltd., [1927] 27 Lloyds List L.R. 49, 52.

9. H.C. GUTTERIDGE & M. MEGRAH, THE LAW OF BANKERS' COMMERCIAL CREDITS (6th ed. 1979); H. HARFIELD, LETTERS OF CREDIT, ch. 5 (5th ed. 1976); B. KOZOLCHYK, COMMERCIAL LETTERS OF CREDIT IN THE AMERICAS 416-53 (1966).

10. 177 Misc. 719, 31 N.Y.S.2d 631 (Sup. Ct. 1944).

11. *Id.* at 721, 31 N.Y.S.2d at 633-34.

12. *Id.* at 722, 31 N.Y.S.2d at 634.

court was not called upon to answer these questions. It would damage the value of the irrevocable credit, however, if money paid in ignorance of a false tender was always recoverable. In fact, payment to a fraudulent beneficiary would probably be irrecoverable because of the physical inaccessibility of the seller and his assets. Nor does *Sztejn* touch on the position of a negotiating banker on discovering that knowledge in the issuing bank of fraud means that his payment cannot be reimbursed. Certainly, a fraudulent beneficiary cannot take the benefit of his own wrong. In *Bank Russo-Iran v. Gordon, Woodroffe & Co. Ltd.*,[13] Browne, J. said that a fraudulent beneficiary would be liable to repay money paid in mistake of fact. Article 9 of the U.C.P. frees banks from liability or responsibility for the falsification or legal effect of documents;[14] but such relief may not be enough to avoid all the consequences of fraud.

There appears to have been fraud in the case of *Singer & Friedlander v. Creditanstalt-Bankverein*.[15] The fraud was in the transaction and apart from the credit. As stated by Henry Harfield, the "entire transaction must be infected for an injunction restraining the bank from paying to be justified."[16]

RISK OF ASSIGNMENT OF THE BENEFIT OF A CREDIT

No apology need be offered for treating the *Creditanstalt* case in some detail. The judgment aroused in the plaintiffs a sense of grievance and not unreasonably so. Pursuant to an alleged sale of pharmaceuticals by a Dutch seller to Austrian buyers, the defendant-bankers—at the instance of the buyers—issued letters of credit. These letters of credit were subject to the U.C.P. but were not transferable by the Dutch seller, who was financed by Singer and Friedlander. By way of assignment, Singer and Friedlander, the plaintiffs, purchased the seller-beneficiary's rights and benefits under the credit. Those rights were understood by the plaintiffs to be to tender the prescribed documents to the issuing banker and to receive payment if all the conditions of the credit were complied with. The assignment was notified to Creditanstalt and the documents, delivered to Singer and Friedlander by the beneficiary, were submitted to Creditanstalt for approval. Approval was granted with statements to the effect that the documents satisfied all requirements and that in due course payment would be made. Ultimately the tender was rejected, hence the action. The judgment appears to give rise to the following points without specifically stating them:

> (I) Unless a credit is designated "transferable" in accordance with Article 46 of the Uniform Customs and Practice for Documentary Credits, there can be no transmission of the rights of the beneficiary other than the right to the proceeds.[17]

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13. The Times (London), Oct. 4, 1972, at 16, col. 5.
14. *See* U.C.P., *supra* note 1, at art. 9.
15. 17 Cg 72/80 (Handelsgericht Wien 1980).
16. H. Harfield, Drowned in a Shallow *Sztejn* (Mar. 1978) (unpublished manuscript); *see also* Harfield, *Enjoining Letters of Credit Transactions*, 95 BANKING L.J. 596 (1978).
17. Singer & Friedlander v. Creditanstalt-Bankverein, 17 Cg 72/80, at 8-10 (Part II).

At that time, the U.C.P. did not contain article 47, which confirms that an assignment of proceeds is permissible.

> (II) No assignment of a credit can give the assignee the right himself to tender the documents to the issuing bank.[18]

Even under a credit transferable according to article 46(f) of the U.C.P., "the paying, accepting or negotiating bank has the right to deliver to the issuing bank the documents received under the credit, including the second beneficiary's invoices . . . ,"[19] which it can get only from the transferee.

> (III) An assignment by way of security (such as was said to be the case) is an equitable assignment requiring the participation of the assignor for its enforcement.[20]

It is not clear that the assignment in the case was not a legal assignment not requiring the assignor's assistance for its enforcement. The assignment had to be construed either according to Dutch or English law as determined by where it was executed.

> (IV) Fraud may affect the rights of an assignee.[21]

The judgment implies further that the representations made by Creditanstalt to Singer and Friedlander in the period leading to the latter's tender did not raise against Creditanstalt a binding estoppel.

Some time prior to the tender, the Austrian buyers had obtained an injunction restraining Creditanstalt from paying under the credit. The injunction was directed to the seller-beneficiary, but it effectively prevented the implementation of the credit in favor of Singer and Friedlander. Whatever the merits of the matter, the consequences of the decision are significant beyond the instant case. It is obvious that the judgment of the Austrian Court cannot be fully appreciated except by someone with a sound knowledge of the subject and of the German language; two English translations differ somewhat. Certain deductions, however, can properly be made without impugning the judgment and this article is concerned with the lessons which can be learned rather than with the correctness of the decision. The first lesson is the precariousness of an assignment of the benefit of a credit.

Transfer

The translation of the *Creditanstalt* judgment asserts that: (1) "a transfer of the letter of credit itself, with the result that a second beneficiary should have been entitled to present his documents did not take place;"[22] and (2) "there was no assignment of the letter of credit itself which might have the effect of a second beneficiary being entitled to present the documents."[23]

Article 46(d) of the U.C.P. prescribes that: "A credit can be transferred only if it is expressly designated as 'transferable' by the issuing bank

18. *Id.*
19. U.C.P., *supra* note 1, at art. 46(f).
20. 17 Cg 72/80, at 11 (Part II).
21. *Id.* at 13.
22. 17 Cg 72/80, at 3 (Part I).
23. *Id.*

. . . ."[24] Thus the credit in the instant case was described in the judgment as "non-transferable."[25] It might be argued by implication that there can be no other method of transmitting the benefit of a credit, although the U.C.P. does not say as much. Transfer according to article 46 is the obvious and usual method by which the beneficiary is enabled to pay for the goods which he does not himself possess. If, however, he wishes to secure a borrowing by means of credit, article 46 would seem from this judgment not to be altogether appropriate. Rather, only a back-to-back credit, not popular in the United Kingdom, would do. The assignment in the instant case was clearly intended to achieve that purpose, and it is not clear that it was invalid in English law.

Payment pursuant to a letter of credit depends upon the fulfilment of the terms and conditions of the credit—and as shown above this is by no means a simple matter. As a rule, payment embodies the promise of the issuing banker to pay on that basis. In an unrestricted credit any bank may negotiate the beneficiary's documents and draft. Strictly speaking, it matters not to the issuing banker by whom tender is made; if the documents appear on their face to be in order,[26] he must pay in the absence of fraud. Payment accordingly binds the bank's customer, the applicant for the credit. The words "on their face" indicate that in such circumstances the banker who pays without knowledge of fraud is protected even if there is fraud in the transaction. Therefore, to maintain that no one but the prime beneficiary may tender is to introduce into the credit contract a new condition which, if needed, should be expressly laid down in the credit. If, as the *Creditanstalt* judgment appears to admit,[27] the beneficiary could designate a third party as his agent for the purpose of tender, it is playing with words to suggest that an interested third party such as a financing agent cannot do so. Clearly a negotiating banker can establish such an agency relationship. The restrictive rule would play havoc with credits if a buyer could not avail himself of a negotiation in his own country.

Assignment

The effect of an assignment of the benefit of a letter of credit has not been judicially considered in the United Kingdom. *The American Accord*[28] concerned an assignment of rights, entitlements and benefits due under the credit, but their effect was not in question. An assignment is normally subject to equities,[29] but in *Re Agra & Masterman's Banking Corp.*,[30] Cairns, L.J. said:

> [The rule that] a chose in action assignable only in equity must be assigned subject to the equities existing between the original parties

24. U.C.P., *supra* note 1, at art. 46(d).
25. 17 Cg 72/80, at 21 (Part I).
26. U.C.P., *supra* note 1, at art. 7.
27. 17 Cg 72/80, at 10 (Part II).
28. [1979] 1 Lloyd's L.R. 267. *See* United City Merchants (Investments) Ltd. v. Royal Bank of Canada, [1981] 1 Lloyd's L.R. 604.
29. Government of Newfoundland v. Newfoundland Ry. Co., [1887-88] 13 App. Cas. 199; Young v. Kitchen, [1878] 3 Ex. D. 127.
30. [1867] L.R. 2 Ch. App. 391.

> to the contract . . . must yield when it appears from the nature or terms of the contract that it must have been intended to be assignable free from and unaffected by such equities.[31]

In *Re Hercules Insurance Co.*[32] Malins, V.C. said:

> the authorities are all in accordance with what I now decide, that whatever equities a company may have against the original obligee on a bond issued by them, they may, either by direct admission or by conduct, preclude themselves from setting them up against an assignee for valuable consideration.[33]

If it is the law that there can be no transmission other than pursuant to article 46, assignment is out of the question. The court in *Creditanstalt* went into great detail to deprive the actual wording of the assignment of the meaning it would almost certainly carry in English law. It is hard to understand how "all rights and benefits" (alle Rechte und Ansprüche) could only mean "the proceeds."[34] The court found that the assignment was equitable, not legal, and thus that it could be enforced only with the assistance of the assignor. As a reason the court said: "[I]t goes without saying that the right to present the documents belongs to the beneficiary. . . . It would contradict the nature of the non-transferable [letter of credit] if in addition to the proceeds the beneficiary could also transfer the right to realise his claim."[35] This is understandable; it would make no sense of article 46 if the beneficiary of a credit which was not designated 'transferable' could achieve his end by executing an assignment. Yet as the law stands at present, it would seem that the beneficiary could do precisely that, and until it is prohibited the legal effect of a normal assignment should not be denied. It is true that in English law, an assignment is subject to any equities that the debtor can raise. It is submitted that in the case of an irrevocable credit the statement of Cairns, L.J. in *Re Agra & Masterman's Banking Corp.*[36] provides the answer.

It is not entirely clear from the *Creditanstalt* judgment what was the position regarding the injunction at the crucial time, that is, the time of tender. Nor is it clear at what time fraud on the part of the Dutch beneficiary was established. It may be accepted that Singer and Friedlander did not know of any fraud at the time of tender, and if Creditanstalt did know beforehand they were under duty to inform Singer and Friedlander. At the time of the assignment there may have been no fraud except, perhaps, in the mind of the beneficiary. It is accordingly submitted that unless at the time of tender Creditanstalt knew (beyond a mere, or even a strong, suspicion) that there was fraud in relation to the credit, they were under liability to pay, and the customer for whom the credit was issued would have been liable for the payment. The oft-quoted opinion of Justice Shientag in *Sztejn v. J. Henry Schroder Banking Corp.* is illuminating in

31. *Id.* at 397.
32. [1874] 19 L.R. Eq. 302.
33. *Id.* at 315.
34. 17 Cg 72/80, at 22 (Part I).
35. 17 Cg 72/80, at 9 (Part II).
36. [1867] L.R. 2 Ch. App. 391.

this connection.[37] If payment is made to a fraudulent beneficiary it is recoverable when the fraud is discovered as money paid under a mistake of fact or as money had and received. The payment is recoverable from the beneficiary, but *quaere* from a bona fide negotiating banker. Article 8(b) of the U.C.P. states:

> Payment, acceptance or negotiation against documents which appear on their face to be in accordance with the terms and conditions of a credit by a bank authorised to do so, binds the party giving the authorisation to take up the documents and reimburse the bank which has affected the payment, acceptance or negotiation.[38]

If credits are to continue to hold the confidence of those who use them it is essential that there should be no recovery of a payment properly made, that is, against a tender of documents which on their face comply with the terms of the credit. This means that recovery can be justified only when there is fraud in the transaction for which the beneficiary is responsible, as where he has deliberately tendered documents he knows to be false. The *Sztejn* judgment with this addendum should maintain the credibility of the documentary credit. If an issuing bank is unlucky in having paid bona fide against false documents, the loss should be borne by the applicant for the credit because the fraud, while vitiating the contract between buyer and seller, should not affect the contract between the issuing banker and anyone entitled to rely upon the credit.

The court in *Creditanstalt* seems to have concluded that the time of the discovery of fraud is not of the essence: "A choice does not have to be made on principle between defences raised during the action or beforehand. If this were so the result would be that a letter of credit is subject to a stricter exclusion of defences than a bill."[39] The reasoning of the court is not clear. The court is correct only where the fraud is that of the beneficiary. If the beneficiary is innocent, the fact that there may be falsity in documents unknown to him should not affect his right to payment. In this respect the decision of the House of Lords in *United City Merchants v. Royal Bank of Canada*[40] is eloquent. There should be no recovery whether or not the payee has changed his position as the result of the payment.

Pre-Tender Communications

The *Creditanstalt* construction of the communications between the parties from the time of the assignment to the tender by Singer and Friedlander may raise doubt as to the correctness of the decision in this respect. The court appeared to think that Creditanstalt's acknowledgment of the notices given by Singer and Friedlander did not amount to confirmation that they would pay in any circumstances. Creditanstalt may have confined itself to acquiescence in the facts of the communications, making no

37. 177 Misc. 719, 722, 31 N.Y.S.2d 631, 634 (Sup. Ct. 1941).
38. U.C.P., note 1 *supra*.
39. 17 Cg 72/80, at 10 (Part II).
40. 1 INT'L BANKING L. 15 (BUS. L. COMMUNICATIONS LTD.) (House of Lords May 20, 1982).

admission regarding their legal effect. There can be no doubt, however, that Singer and Friedlander were misled into believing that Creditanstalt was confirming their (the plaintiffs') rights. The case amply illustrates how an irrevocable credit may place banks and merchants at risk.

However puzzling one may find the judgment, certain conclusions are clear. The matters which call for an answer can properly be answered by an amendment of the U.C.P. The issues are these:

1. Is article 46 to be the only method of transfer of a credit?
2. If it is, the U.C.P. must say so, for such a decision may well run counter to a national law.
3. If it is not, is assignment of the whole benefit—that is, the right to tender as well as the right to proceeds—possible?
4. If assignment is to be permitted, is it to be affected by the fraud of the beneficiary vis à vis the applicant for the credit as against a bona fide third party?

It is to be remembered that there is nothing to prevent the applicant for a credit from requiring the issuing banker to insert in his credit that the credit is to be neither transferable nor assignable—in other words, that it is available to the beneficiary only. This, it appears, is the effect of what in the United States is termed a "straight" credit.

It is important to stress that the above observations derive from the *Creditanstalt* judgment as translated into English. Whether accurate or not, the lesson for the compilers of the U.C.P. is clear.

THE RISK OF TRANSFER AND ASSIGNMENT

Article 46 of the U.C.P. has been described as conceptually the most obscure of all the provisions.[41] It is not hard to guess what this means. Nevertheless, the risk of misinterpretation of the article generally does not seem serious. The risk which makes banks reluctant to transfer is said to provide an opportunity for middlemen without capital to engage in transactions beyond their financial capacity.[42] The risk is more a commercial than a legal risk. But transmission of the benefit of a credit by assignment raises questions which have yet to be answered. Perhaps the chief importance of assignment lies in its effect in relation to the U.C.P. in its pointer to what seems a new risk touching credits.

THE RISK OF STATE CLAIMS TO IMMUNITY

In recent years in the United Kingdom, the problems of foreign trade have been beset by the plea of immunity from process where a contracting party is a government or a government agency. The problem has been reduced to some extent by the passage of the State Immunity Act in 1978.[43]

41. Goode, *Reflections on Letters of Credit V*, 1981 J. BUS. L. 150, 150 (1981).
42. Nash, *Transferable Credits*, 73 J. INST. BANKERS 15 (1952).
43. State Immunity Act, 1978, C. 33 provides that:
(1) A State is not immune as respects proceedings relating to—
(a) a commercial transaction entered into by the State; or
(b) an obligation of the State which by virtue of a contract (whether a commercial

Broadly speaking, the courts have held that a contracting party, if contracting as an independent contractor in a commercial matter, shall not be permitted to escape liability on the ground that it is immune from suit. Documentary credits have not escaped consideration in this context. The first case was that of *Trendtex Trading Corp. v. Central Bank of Nigeria*,[44] in which the credit was issued in favor of the plaintiffs by the defendant through Midland Bank Ltd. The plaintiffs were not required to confirm; if they had done so and the plea of the Central Bank had succeeded on the issue of immunity, the Midland Bank would have found itself liable to pay under the credit and unable to recover except perhaps from any assets of the Central Bank which it held. The State Immunity Act preceded the *Trendtex* case, whose value lay "in the reasoning that if the act in question was of a commercial nature the fact that it was done for governmental or political reasons did not attract sovereign immunity."[45] Today, therefore, it is hardly likely that an irrevocable credit will be affected unless a claim to immunity is successful, which in view of the range of the Statute,[46] is unlikely.

CONCLUSION

The risks run by a banker in relation to documentary credits is never likely to be resolved by any addition to the rules of practice applying to them. There will always be the question whether the terms and conditions of a credit are complied with, and the infinite variety of credits today prevents any general or comprehensive solution. On the whole, the banker should have little to fear from the buyer of goods, but the buyer may be

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transaction or not) fails to be performed wholly or partly in the United Kingdom.

(2) This section does not apply if the parties to the dispute are States or have otherwise agreed in writing; and subsection (1)(b) above does not apply if the contract (not being a commercial transaction) was made in the territory of the State concerned and the obligation in question is governed by its administrative law.

(3) In this section "commercial transaction" means—

(a) any contract for the supply of goods or services;

(b) any loan or other transaction for the provision of finance and any guarantee or indemnity in respect of any such transaction or of any other financial obligation; and

(c) any other transaction or activity (whether of a commercial, industrial, financial, professional or other similar character) into which a State enters or in which it engages otherwise than in the exercise of sovereign authority.

44. [1977] Q.B. 529.

45. *I. Congreso del Partido*, [1981] A.C.

A further aspect of the English scene is the issue by the Courts of injunctions restraining banks which hold funds or other assets of foreign defendants to actions here from parting with those funds or other assets prior to the conclusion of the action. It is hard to see that documentary credits could be affected. But where a plaintiff in a pending action was aware that moneys were due from a United Kingdom bank which had issued or confirmed an irrevocable credit in favor of the defendant, the plaintiff might apply for an injunction restraining the bank from implementing its promise. This could only happen where the moneys were actually due under the credit and not paid.

The first case decided was Mareva Compania Naviera v. International Bulk Carriers Ltd., [1975] 2 Lloyd's L.R. 509, but there have been many since and recently the Court of Appeal laid down guidelines designed to facilitate the procedure without harming innocent third parties. Z Ltd. v. A-Z, [1982] 2 W.L.R. 288.

46. State Immunity Act, 1978, C. 33.

quite unable by means of a credit to cover himself against the seller. The seller runs little risk except that which derives from want of knowledge of documentary credit practice, which he can resolve by reference to his banker.

As regards assignments of the whole benefit of credits, if they are to be possible it must be on the basis that an innocent assignee for value of the benefit of an irrevocable credit shall not be liable to defeat by the equities which a debtor can ordinarily raise. The view of Cairns, L.J. in *Re Agra & Masterman's Banking Corp.*[47] should preclude any question of recovery. If, after payment, the issuing bank discovers that the documents against which it paid were false, the loss should lie with the applicant for the credit. Otherwise, assignments of this kind should be discouraged or prohibited by a clause in the credit or a prohibiting amendment of the U.C.P.

47. [1867] L.R. 2 Ch. App. 391.