

# PAYMENT AND TRANSFER IN DOCUMENTARY LETTERS OF CREDIT: INTERACTION BETWEEN THE FRENCH GENERAL LAW OF OBLIGATIONS AND THE UNIFORM CUSTOMS AND PRACTICE

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1. This examination of the peculiarities of the letter of credit in French law begins with its post-World War I role as a payment device in international commercial transactions. The first peculiarity of the law elaborated since then pertains to the judicial technique applied to enforcing the bank's promise. This promise is regarded as completely autonomous, and is characterized as an abstract transaction. This is a characterization which the French general law of obligations, a law that relies greatly on the notion of cause<sup>1</sup> when determining the enforceability of obligations, does not readily grant outside the domain of negotiable instruments.<sup>2</sup>

A second peculiarity is found in the source of the judicial rules by which the letter of credit transaction is regulated. Its regulation originates in international commercial practice, whose usages are standardized not by national legislation or by interstate regulation (the classical source for such standardization) but by rules elaborated by a professional and independent international entity, the International Chamber of Commerce (ICC). Without unduly questioning the authority of the ICC's Uniform Customs and Practice (UCP), French courts have referred to its provisions in deciding litigation concerning documentary letters of credit. The documentary letter of credit is so completely identified with the UCP that it may be said to belong to an autonomous legal system and that its doctrine

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1. The "cause" in the creation of abstract commercial promises is described in Kozolchyk, *The Commercialization of Civil Law and the Civilization of Commercial Law*, 40 LA. L. REV. 3, 22-23 (1979).

2. This does not include the delegation of a debt regulated by C. civ. art. 1275 (Fr.)

is the first manifestation of a *lex mercatoria*; an international commercial law distinct from any national legal systems.<sup>3</sup>

2. One cannot dismiss as negligible the theoretical and practical range of this legal phenomenon known as a documentary letter of credit. The factors described above also point, however, to the limits of letter of credit law autonomy. The documentary letter of credit cannot escape a confrontation with the general, or non-commercial, law of obligations. It is not just a matter of questioning, in the name of general law of obligation principles, either the validity of the letter of credit or the functional characteristics which give the letter of credit uniqueness and assure its remarkable efficiency. No such serious challenge has been made in France, and the Cour de Cassation has long ago acknowledged<sup>4</sup> the specificity of the documentary letter of credit and thus prevented its absorption by the law of contractual guarantees. Such absorption would have provoked its failure. In this connection, it is interesting to note that serious difficulties have arisen with regard to first demand guarantees, whose reception by French law and by the laws of French-influenced jurisdictions has met with considerable objection.<sup>5</sup> The contrast is all the more striking since the relationship between the documentary letter of credit and the first demand guarantee is undeniable. In short, the general law of obligations has not hindered the functioning of letters of credit; rather, the former forces the latter to comply with acceptable moral standards and thus legitimized its operation.

3. Surprisingly, the question of the relationship between the UCP and the general law of obligations was posed in French law only recently. Must one suppose that this question was in some way overlooked by the drafters of the UCP? More likely the neglect was a result of changes in international commercial conditions, such as greater numbers of participants having unequal financial standing, and increasingly complex transactions and financial arrangements. The recent *Creditanstalt* litigation submitted to Austrian and Dutch judges illustrates the growing tension between the UCP and the general law of obligations. The informally expressed principles of the UCP met some of their limits in this case. The decision, however, in no way diminishes the immense value of the UCP. An examination of letter of credit court decisions demonstrates that the UCP provides the basis for solutions to the great majority of the problems encountered in commercial practice. Moreover, there is no better proof of the UCP's continuing vitality than its constant and numerous revisions.

In particular, the UCP furnishes an adequate response to the numerous disputes created by the issuance of letters of credit by banks. Nevertheless, there are two inevitable gaps. For example, how can the UCP

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3. B. GOLDMAN, *LA LEX MERCATORIA DANS LES CONTRATS ET L'ARBITRAGE INTERNATIONAUX: REALITE ET PERSPECTIVES* (1979).

4. The Cour de Cassation has said, in a decision of January 26, 1926, that a documentary credit is in the nature of a surety transaction, but this decision has never been followed. See [1926] D.P. I 201, note S. Hamel; [1926] D.P. I 353, note H. Rousseau.

5. Y. POULLET, *LES GARANTIES CONTRACTUELLES DANS LE COMMERCE INTERNATIONAL*; 1979 D.P.C. I 387; C. GAVALDA & J. STOUFFLET, *LA LETTRE DE GARANTIE INTERNATIONALE* I (1980).

furnish an appropriate solution to the formidable questions posed by the all-too-frequent beneficiary fraud? Similarly, the UCP sets forth a procedure for the transfer of the credit. But is this the only possible procedure—narrowly circumscribed as it is—which in practice may be discarded by using the procedures prescribed by the general law of obligations?

The focus of this study is the two essential aspects of the documentary letter of credit which were the subject of the *Creditanstalt* affair: payment and transfer. How the courts have come to apply to each aspect the rules formulated respectively by the UCP and the general law of obligations will be examined:

### I. PAYMENT OF THE CREDIT

4. Courts are frequently called upon to examine compliance with the terms and conditions of the payment of the letter of credit from different perspectives. It may be the beneficiary who objects to the banker's refusal to pay based on the alleged irregularity in or tardiness of the letter's presentation. Alternatively, it may be the customer who contests the payment of the credit and refuses to reimburse the sums paid by the bank. The same analytical criteria apply to both situations. The UCP directs banks charged with paying the documentary letters of credit by relatively precise and detailed instructions that do not eliminate all the uncertainties in any one case, but that generally allow the courts to proceed in a relatively easy manner to solid solutions. The subject of the bank's verification of documentary tender is one which the UCP deals with in the greatest depth and clarity, which provisions judges ought to apply rigorously. The UCP articulates all the consequences of the principle enunciated in general provision (c) of the "General provisions and definitions" of the UCP: "Credits, by their nature, are separate transactions from the sales or other contracts on which they may be based and banks are in no way concerned with or bound by such contracts."

This principle requires the banker to take into account, on the one hand, the customer's instructions and the terms of the letter of credit, and on the other hand, the documents tendered by the beneficiary. As to these documents, the commercial court of Brussels has recognized that the banker is to consider nothing but their appearance.<sup>6</sup> Therefore, a bank is not responsible for having paid upon the presentation of a false railroad bill of lading if it has verified the bill with reasonable care and it nevertheless fails to ascertain a falsification which was not patently obvious. The same court correctly held that the credit terms must be explicit. The letter of credit involved in the transaction required the production of a railroad transport document duly stamped at the shipping station. The customer argued that the document required a statement of weight as well. The court refused to accept this argument in the absence of a specific clause so stipulating in the letter of credit.

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6. Tribunal de Commerce de Bruxelles (Feb. 27, 1978). See 1978 REVUE DE LA BANQUE 269 (Belg.). See also Simont & Bruyneel, *Chronique de Droit Bancaire Privé*, 1980 REVUE DE LA BANQUE 107-08 (Belg.).

This decision should be compared with a remarkable 1971 judgment by the Court of Cassation of Lebanon.<sup>7</sup> A letter of credit stipulated: "N.B. Date of sailing and carrying steamer to be nominated by shippers telegraphically to openers." The customers maintained that this phrase required the delivery of a copy of the telegram sent by the sellers to the buyers. The Lebanese judges responded that a document cannot be required unless specifically mentioned in the customer's instructions to the bank issuing the letter of credit:

Considering that it is incumbent upon the bank to verify the documents produced by the beneficiary, the responsibility of the bank would result from the fact that it had omitted to examine them or to append them to the documentary presentation; if a document is to be required by the customer and if the terms utilized in that regard themselves indicate such a document so that that which is required is a copy of a telegram, *it is necessary that the request for this copy be mentioned in the letter of credit and not be merely deduced from it.*

Thus, in principle, and consistent both with the UCP's conception of the transaction and with the logic of the documentary credit, courts evaluate the beneficiary's compliance simply on the basis of the letter of credit's terms. And by limiting themselves to the enumerated documents, the rights of the parties in a documentary credit operation, from the moment of payment to the beneficiary until reimbursement by the customer, are completely dependent upon these documents. It should be emphasized that the documents must be examined for their actual form and not for the rights and duties that they contain. To such rights and duties the banks remain strangers.

5. Formalism provides certainty, but it is also blind to inequities. Inevitably it provokes the adverse reaction of injured interests. It is not surprising that a party suffering as a result of formalistic rigor tries to evade its consequences by appealing to the general law of obligations. Such is the customary fate of formalistic legal norms. Does the singular formalism of letter of credit law have limitations, then, justified as formalism is by the unique position as intermediary occupied by a bank in a documentary credit transaction?<sup>8</sup> The Swiss courts were faced with just this issue in a case where a bank detected some uncontested irregularities in the tendered documents. The bank called these irregularities to the attention of the party tendering the documents. Instead of returning the documents, notably the maritime bill of lading, however, it released them to the carrier to permit the unloading of the merchandise at the port of destination. To justify its behavior, contrary to article 8 of the present UCP,<sup>9</sup> the bank claimed that it had acted in the best interests of the beneficiary of the credit. To return the documents would have delayed the unloading of

7. [1972] J.C.P. II No. 17126, note J. Stoufflet; see Gannage, Note, JOURNAL DU DROIT INTERNATIONAL 95 (1972).

8. See Stoufflet, *Les Devoirs de la Banque qui Recoit des Documents Irreguliers*, 1965 REVUE DE LA BANQUE 418 (Belg.).

9. See UNIFORM CUSTOMS AND PRACTICE FOR DOCUMENTARY CREDITS art. 8(c) & (e) (I.C.C. Pub. 290, 1974) [hereinafter cited as U.C.P.].

the vessel and would have entailed higher charges, fees and costs. The bank claimed to have accomplished a timely and reasonable management of the beneficiary's affairs. The Swiss federal court refused to legitimize any behavior contrary to the UCP provisions.<sup>10</sup> Thus, the rigors of formalism prevailed.

Currently, the question of beneficiary's fraud is of considerable practical interest. It is necessary at the outset to properly identify the issue involved. Several types of fraudulent conduct must be distinguished. First, a document may be falsified in order to mask a defect in its conformity with the credit terms. Thus, a beneficiary in one instance added an "on board" reference to a bill of lading indicating only the receipt of the merchandise. This type of maneuver can extend to fabrication of an entire document which would be completely devoid of authenticity.

A second case occurs when the document, while itself authentic, is devoid of genuineness. For example, a certificate may attest to an origin of merchandise or to a quality or weight inconsistent with the facts because the beneficiary of the credit procured the complicity of the authorities that issued the document. Or the dispatched packages may contain valueless objects but are marked as containing highly priced merchandise, and the carrier has not been able to check them, as is the case in parcel mailing of sealed packages.

In either case, the banker charged with payment of a documentary credit has the right to reimbursement of the sums disbursed by him, despite fraud, as long as the documents remitted by the beneficiary are formally regular and carry no outward sign of fraud. The French Cour de Cassation in a 1974 decision<sup>11</sup> applied this rule, which also finds specific support in the UCP.<sup>12</sup>

7. The UCP leaves unanswered two essential questions frequently encountered in practice in recent years. The first question is whether the issuing, confirming, or paying banker who is sure that a document is false may reject it and refuse to pay. One would naturally assume that the bank holds unquestionable proof of the beneficiary's fraud. Moreover, the UCP, although not providing a positive response to the question, does not foreclose the bank's right of rejection either. It is one thing to say that the bank need only verify the formal regularity of the documents; it is another to obligate it to pay even if the banker is convinced that fraud has been committed by the beneficiary.

The objection could be made that the customer's attachment of the documents because of fraud is contrary to the spirit of the UCP because such an attachment ignores that the banker is to be concerned only with the documents and not with the underlying transaction. This objection clearly lacks merit when the fraud consists of tampering with a document, or occurs at the instigation of a beneficiary. Such fraud affects the very

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10. Tribunal Federal de Lausanne (July 7, 1964). See Lison, 1964 REVUE DE LA BANQUE 747 (Belg.).

11. [1974] Bull. Civ. IV No. 307, at 253 (Cass. civ. com. Dec. 2, 1974).

12. See U.C.P., *supra* note 9, at art. 9.

validity of the credit documents, and one cannot conceive that a banker must pay a credit where the lack of documentary authenticity has been discovered.

One might be more hesitant to advocate attachment if the fraud consists of the delivery by the beneficiary of documents conveying factually inaccurate information. In this situation the argument based on the independence of credit from the underlying transaction is more compelling. The Cour de Cassation, however, has not been impressed by this proposition. Faced with this procedural question, the court, in an already outdated 1954 decision,<sup>13</sup> explicitly held that a shipping document may be rejected as long as proof is made that the merchandise entrusted to the shipper is worthless and unrelated to merchandise for the payment of which the letter of credit was originally issued. If the fraud is unquestionable, the beneficiary's claim is defeated by the maxim *fraus omnia corrumpit*. Any doubts about this ruling were dispelled by a decision rendered by the Cour de Cassation in 1969.<sup>14</sup> This case holds that the beneficiary is responsible to the banker when he has knowingly submitted a document containing false statements.

An explicit reference is made in the rationale of the 1969 decision to the maxim *fraus omnia corrumpit*. If the deceived banker has an action for damages or restitution against the beneficiary, it is hard to see how one could deny him the ability to reject a false document, if he timely discovers the deception of which he risks being the victim. The formalistic rules of the documentary credit yield here to a general principle of the law of obligations. As court-made law, this decision is noteworthy. One must add that it would be particularly unwarranted to deny the banker the prerogative to reject a document that he knows to be false, when the fraud in question undermines the security interest that he is acknowledged to possess over the shipped merchandise.

8. The second dilemma unresolved by the UCP is that if the banker *can* reject a document when he is certain of its falsity, does he have the *duty* to reject it in behalf of his customer? In other words, would the banker fail in his duty toward his customer by not rejecting a document which he recognized as false or ungentuine? This question has not been solved by French courts, and is not to be confused with the one examined in the preceding discussion. When a bank convinced of a fraudulent attempt to collect on a documentary credit rejects the documents, it runs the risk, or suffers the attendant legal and commercial consequences, of the beneficiary's subsequent demonstration that the bank's fears were unfounded. To decide that the bank should reject the false documents, then, is to place it in a delicate situation, because the very notion of falsity or inaccuracy of the documents is not necessarily clear, and because the banker very often will have doubts about the genuineness of a document but no real proof.

In practice, except in the case of a conspicuous anomaly in a docu-

13. [1954] S. Jur. I (Cass. civ. com. Mar. 4, 1954), note Lescot, at 124.

14. [1970] J.C.P. II No. 16216 (Cass. civ. com. May 2, 1969), note J. Stoufflet.

ment (a case where the bank's duty of formal verification will take care of the rejection), the banker will be warned about the fraud by the customer. Obviously, the bank is not going to know whether to be satisfied with the warning because the customer's act may be only an attempted revocation of the credit in disguise, ineffective though the revocation is in an irrevocable letter of credit.<sup>15</sup>

One sees only one true option for the customer trying to prevent the payment of the credit once he has discovered fraud: to appeal to a court for a provisional and "conservatory" decree prohibiting the bank from paying the credit. Such a provisional remedy has its basis in French law in article 873 of the new Code of Civil Procedure which permits the President of the Commercial Court to prescribe preventive or conservatory measures to avoid imminent harm or to stop a manifestly illicit transaction. The remedy is naturally conditioned on the presentation of sufficient proof to the judge. This type of procedure has not yet been applied to documentary credits, at least judging from published decisions, but it has been applied to avoid the fraudulent collection of a first demand guarantee.<sup>16</sup> As discussed earlier, both transactions give rise to rather similar obligations on the bank's side.

By judicious use of the rule *fraus omnia corrumpit*, it is possible to avoid the perpetration of an injustice as a result of the application of letter of credit law. Such is the purpose of resorting to the general law of obligations. The objective is very different when the general law of obligations intervenes in the rights and duties of parties to a transfer of a documentary credit. What is at stake in such an intervention is the broadening and development of the utility of the transfer mechanism.

## II. TRANSFER OF CREDIT

9. The transfer of the credit frequently is required by commercial need. The merchant or manufacturer who receives a purchase order, and who thus acquires a firm debt from his buyer, will usually try to convey the debt to a third party in order to "feed" his finances. The bank discount of a bill of exchange drawn by the seller on the buyer is an application of this method of financing. When the seller has obtained the buyer's tender of a bill of exchange he can also, in theory, use it to pay his own supplier.

Are these options available to the beneficiary of a letter of credit? At first glance, the facts point to an affirmative response because if the credit is irrevocable, it requires the bank's firm promise of payment, which should provide an eventual transferee a maximum of certainty of collection. The transfer is nevertheless fraught with grave difficulties. The documentary credit is opened for the financing of a sale of merchandise or of a rendering of services, and the stipulated documents have as their object proof of the performance of the underlying contract. Thus it is not a matter of indifference to the buyer (customer of the credit) whether its per-

15. [1978] Bull. Civ. IV No. 103, at 85 (Cass. civ. com. Apr. 3, 1978).

16. [1980] D. Jur. 488 (Tribunal de Commerce de Paris May 13, 1980), note Gavalda & Stoufflet.

formance is carried out by the beneficiary or by some other person. The personal nature of the underlying contract is inevitably related to the letter of credit, which is not ordinarily transferable to a third party. This is the principle embodied in article 46(d) of the UCP.<sup>17</sup> A contrary instruction by the customer is nevertheless effective. A letter of credit may be stipulated to be transferable, but such a clause authorizes only one transfer.<sup>18</sup>

10. The transfer of a documentary credit is regarded with a certain distrust by bankers. It gives rise, in effect, to complex transactions where the documents delivered by the second beneficiary are substituted for by documents (most notably invoices) furnished by the first beneficiary.<sup>19</sup> The banker's task can be delicate. To the classic difficulties encountered in the verification of documents are added those stemming from comparing the consistency of documents delivered by successive beneficiaries. For example, the French Cour de Cassation was faced with a case<sup>20</sup> where a marked difference existed between the fixed unitary prices in the successive transactions. Was not this proof that the merchandise delivered by the second beneficiary was not that ordered by the customer of the credit? Basing its decision on the independence of the credit from the underlying contracts, the court held that the bank was not at fault in failing to detect the difference in prices because the bank had not received any particular instructions in that regard.

11. Transferable credits pose risks for all the banks involved. They can be equally dangerous to purchaser-customers of the issuing bank because by their very nature they induce beneficiaries to engage in transactions beyond their means. Transferable credits provide, as previously discussed, a means by which to pay the beneficiary's own suppliers. This is why buyers often refuse to allow the transferability of the credit.

The beneficiaries have, naturally, set their imaginations to work to surmount the obstacle of the nontransferability of their irrevocable credits in order to finance transactions with their suppliers. One of the most frequently utilized methods is the back-to-back credit. This is a new and independent documentary credit, opened upon the beneficiary's request in favor of his supplier, that relies on the security of the original credit in the beneficiary's favor.<sup>21</sup> From a legal standpoint, this combination marks no significant transactional innovation, though the UCP fails to mention it.

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17. "A credit can be transferred only if it is expressly designated as 'transferable' by the issuing bank." In its decision of October 4, 1981, [1981] Bull. Civ. IV No. 357, at 284, the Commercial Chamber of the Court of Cassation rejected a customer's attempt to attach the amount of a letter of credit. The customer claimed the status of creditor of the beneficiary alleging that the merchandise shipped by the latter was not what he had requested. The Court of Cassation held that since the documents tendered by the beneficiary were in compliance with the credit, attachment was not possible. The interpretation of this decision is limited: It does not appear to question current opinions concerning cases of fraud because no claim was made that the documents were fraudulent.

18. U.C.P., *supra* note 9, at art. 46(e).

19. See *id.* art. 46(f).

20. [1975] Bull. Civ. IV No. 300, at 247 (Cass. civ. com. Dec. 15, 1975); Gavalda & Stoufflet, *Chronique de Droit Bancaire*, [1976] J.C.P. II No. 62, at 2801.

21. See H. HARFIELD, LETTERS OF CREDIT 101-02 (1979) for an illustration of the back-to-back credit's operation.



Its sole noteworthy aspect is the agreement between the bank and the customer of the subsidiary credit, providing that the proceeds of the initial credit will serve to reimburse the bank for the amount of the subsidiary credit.

One easily perceives the risk run by the bank: It is irrevocably obligated to the beneficiary of the subsidiary credit and will in fact bear the risk of problems that may arise during the compliance with and payment of the original or first credit. Bankers should be on the alert again here, and it seems in actuality that prudence is well advised.

12. If the beneficiary cannot assure himself of the cooperation of the customer and the paying bank to effect one of the techniques described above, in order for him to transfer the proceeds of the documentary credit to a third party he must appeal to the general law of obligations. Under this law, a bill of exchange drawn on the bank or on the customer can be negotiated. The transaction which has long been used in practice is known as the discount of a documentary draft. If among the documents there is a negotiable document of title, the discounter acquires, in addition to the rights on the bill of exchange, a pledge of the merchandise. If there is no bill of exchange, an assignment of debt owed by the bank is possible according to the law that regulates beneficiary claims upon the banker.<sup>22</sup> Article 47 of the 1974 edition of the UCP explicitly permits this.

Again it is necessary to define exactly the rights of the transferee. It is apparently one of the questions presented to the courts in the previously mentioned *Creditanstalt* case.<sup>23</sup> The Commercial Court of Vienna there distinguished the right to present the documents from the right to demand payment. In the case of a non-transferable credit, only the second right could be assigned. To be sure, the court observed, the beneficiary is not obligated to present the documents himself at the bank's counters. He may deliver them by an agent, but such an agent should act in the beneficiary-principal's and not in his own name. Thus, the paying bank has grounds to refuse payment to another bank which presents the documents in its own name and not as the beneficiary's agent.

It is difficult to take sides in the controversy engendered by this decision without being thoroughly apprised of the facts. Some observations may nevertheless be made. It is certain that the assignee of a debt, except in the case where a transfer has been made by a negotiable instrument, acquires only the assignor's rights. This at least is the prevailing doctrine in French law: The assignee does not obtain rights independent of those held by the assignor.<sup>24</sup> In the case of an assignment of the debt resulting from a documentary credit, the assignee's rights are subject to the tender of

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22. The required forms under C. civ. art. 1690 (Fr.) for raising defenses against third party assignees of a debt are cumbersome, and their application is difficult in the daily course of business affairs.

23. In *Singer & Friedlander v. Creditanstalt-Bankverein*, 17 Cg 72/80 (Handelsgericht Wien 1980) (English translation on file with the *Arizona Law Review*), the Commercial Court of Vienna held that the "non-transferable" clause appearing in the letter of credit does not prevent assignment of proceeds in accordance with the documentary credit. This determination deserves approval.

24. It is different in the case of transfer of a documentary credit, where the bank undertakes a

the documents stipulated in the credit.<sup>25</sup> But the assignee has a direct right against the banker, and one fails to see on what authority the Austrian court required the delivery of documents to be made by the beneficiary himself or by his agent. What is important is that the documents be those required by the credit and that they appear to be authentic.

13. The Viennese court mentions the possibility of the beneficiary of a documentary credit granting authority to a third party to present the documents. This authority is capable of multiple uses. Nothing prevents the beneficiary from directing a bank to recover on the credit as his agent. This agency is common in practice, and may be combined with an advance to the beneficiary by the agent bank of all or part of the amount of the credit. The Cour de Cassation has established that a bank granting such an advance has recourse against the beneficiary if the credit is not paid because of the irregularity of the documents.<sup>26</sup>

14. In introducing this study it was stated that the documentary credit is generally considered an institution of international commercial law. It essentially belongs to an autonomous law recognized almost universally, and has performed very effectively in the service of international commerce. It has been shown, nevertheless, that this autonomous law cannot completely ignore the general law of obligation, the interjection of which is at times necessary. Must there then be an attempt to unify the law of documentary credit with the general law of obligations? This is not an inevitable development because the general law of obligation principles which are implicated in letter of credit transactions, such as those concerning fraud, are recognized by the legal systems of all nations. If these principles are applied with prudence by the national judges and arbiters, the healthy development of documentary credit transactions law will continue unimpeded.

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new obligation vis-a-vis the new beneficiary. See J. STOUFFLET, *LE CREDIT DOCUMENTAIRE* no. 416 (1957).

25. The lack of authenticity may be raised as a defense against the assignee as well as against the beneficiary of the credit. Sentence arbitrale, International Chamber of Commerce, aff. no. 3031 (1977); Defains, *JOURNAL DU DROIT INTERNATIONAL* 999 (1978).

26. [1977] J.C.P. II No. 18536 (Cass. civ. com. Feb. 23, 1976), note J. Stoufflet.