ASSIGNMENT AND PRESENTATION OF DOCUMENTS IN COMMERCIAL CREDIT TRANSACTIONS

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ECONOMIC SIGNIFICANCE OF ASSIGNMENT OF CHOSES IN ACTION

In their work on comparative law, K. Zweigert and H. Kötz point out that "in an era in which a national economic system is heavily reliant on sophisticated monetary and credit facilities, the assignability of choses in action appears to be taken for granted."[1] Their point can be validly illustrated by English legal history. While common law judges persisted in their traditional refusal to recognize that choses in action could be assigned,[2] the Court of Chancery accommodated the needs of trade by entrenching, as from the eighteenth century onwards, the concept of the equitable assignment.[3] With the growth of trade and the emergence of an industrialized economy, Parliament found it necessary to sanction, in addition, a statutory form of assignment.[4]

The important role played by such assignments in a developed economic system is closely related to the two fiscal functions of choses in action. In the first place, a chose in action usually constitutes the right of one party to enforce the performance of a promise or of a duty by another. In the second place, a chose in action constitutes an asset owned by the first party, the "creditor." Modern economic reality requires that this asset be given currency.

In practice, the need to assign arises in respect of the two main types

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1. 2 K. ZWEIGERT & H. KÖTZ, EINFÜHRUNG IN DIE RECHTSVERGLEICHUNG AUF DEM GEBIETE DES PRIVATRECHTS—INSTITUTIONEN 127 (1969).

2. 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 226 (2d ed. 1898); G. TREITEL, THE LAW OF CONTRACT 451 (4th ed. 1975). And see also the reasoning in such cases as Johnson v. Collings, 102 Eng. Rep. 40 (K.B. 1800); Liversidge v. Broadbent, 157 Eng. Rep. 978 (Ex. 1859).

3. Crouch v. Martin, 23 Eng. Rep. 987 (Ch. 1707); Ryall v. Rowles, 27 Eng. Rep. 1074 (Ch. 1750).

4. Initially in § 25(6) of the Supreme Court of Judicature Act, 1873, 36 & 37 Vict., ch. 66; repealed and replaced by § 136(1) of the Law of Property Act, 1925, 15 Geo. 5, ch. 20.

of choses in action: contingent and absolute. The latter category includes all choses in action which constitute unconditional rights of the creditor, for example, a matured debt owed to him, or the price of goods sold and delivered by him. A chose in action may be absolute even if its date of maturity, for example, the date on which the price of goods is due, is in the future. A contingent chose in action is one in which the creditor's right is subject to the occurrence of an event or the performance of an act which may or may not take place. Thus, the seller's right to the price of goods which he has to manufacture and to deliver is a contingent chose in action, as he may, of course, not perform.

Most advanced legal systems sanction the assignment of both absolute and contingent choses in action. In English law a contingent chose in action may be assigned, provided the performance of the condition involved is in the assignor's control. Thus, a builder can assign amounts due under a building contract as the contingency, upon which the amounts involved become due, is his own performance.[5] If the assignment involved is, in itself, absolute, it can be executed under the Property Law Act, 1925.[6] If it is an assignment by way of security or charge, it can be effected in equity.[7] In German law, too, both an absolute and a contingent chose in action can be the subject of an *Abtretung* under section 398 of the Bürgerliches Gesetzbuch [BGB]. The most detailed provisions in point are to be found in the United States, where the assignment of "receivables" is methodically regulated in article 9 of the Uniform Commercial Code (U.C.C.).[8]

ASSIGNMENT OF CHOSE IN ACTION UNDER COMMERCIAL CREDITS

An irrevocable commercial letter of credit confers on its beneficiary the right to the proceeds thereof against the tender of stipulated documents.[9] The amount involved may be payable at the time the documents are tendered. In such a case the letter of credit assumes the form of a cash credit or, if the issuing bank undertakes to accept or to negotiate a bill of exchange, then this "draft" is made payable at sight. Alternatively, the amount may be payable at a given future date, such as ninety days after the presentment of the documents. If payment is to be effected by means of a bill of exchange, then the instrument will be payable at the respective usance. If it is a cash credit, the issuing bank's undertaking will be one for

5. Hughes v. Pump House Hotel Co., Ltd., [1902] 2 K.B. 190.

6. Property Law Act 1925, § 136(1). Durham Bros. v. Robertson, [1898] 1 Q.B. 765; Bank of Liverpool v. Holland, 43 T.L.R. 29 (K.B. 1926). Note that the assignment of part of a debt is considered not to be absolute: Foster v. Baker, [1910] 2 K.B. 636; Williams v. Atlantic Assurance Co. Ltd., [1933] 1 K.B. 81. It follows that the assignment of part of the proceeds of the credit has to assume the equitable form.

7. This is true regardless of whether the chose in action itself is legal or equitable. But see generally G. TREITEL, *supra* note 2, at 453-54, 462-64, as regards certain procedural distinctions related to enforcement of the assigned chose in action against the assignee.

8. *See* U.C.C. §§ 9-102(1)(b), -106; *see generally*, Craig, *Accounts Receivable Financing, Transition from Variety to Uniform Commercial Code*, 42 B.U.L. REV. 187 (1962); G. GILMORE, SECURITY INTEREST IN PERSONAL PROPERTY 308-32 (1965).

9. UNIFORM CUSTOMS AND PRACTICE FOR DOCUMENTARY CREDITS, art. 3 (I.C.C. Pub. No. 290, 1974) (hereinafter U.C.P.); U.C.C. §§ 5-103(1), -114(1). For a particularly clear analysis, see Urquhart Lindsay & Co. v. Eastern Bank Ltd., [1922] 1 K.B. 318, 321-23. The case law in point is too extensive to be cited in full; *but see* BENJAMIN'S SALE OF GOODS § 2146 (2d ed. 1981).

"deferred payment."[10]

The assignment of the beneficiary's rights against the bank can be utilized in all types of commercial credits. In practice, it may be effected both before and after the tender of the documents by the beneficiary. Where the assignment takes effect before the tender of the documents it relates to a contingent chose in action as the beneficiary's rights are, at this stage, subject to the performance of the conditions spelled out in the credit.[11] Such an assignment will be referred to as an "assignment of proceeds subject to tender." It may be executed either before the beneficiary has procured the documents or thereafter but before tender has been effected.[12] Where the assignment of the proceeds of the credit is effected after the tender of the documents, it relates to an absolute chose in action, that is, the amount of the credit which has become unconditionally payable. Such an assignment, which will be referred to as the "assignment of the accrued proceeds," is economically feasible mainly in the case of "deferred payment" credits. In the case of commercial credits involving a bill of exchange payable at a usance other than sight, a result similar to the assignment of the accrued proceeds can be achieved by the negotiation of the accepted bill.

There can be no doubt as regards the economic importance of the beneficiary's right to assign the proceeds of the credit. Its availability may be crucial where the beneficiary does not have any other asset to be utilized for the financing of the underlying contract between himself and the applicant for the credit. Both in common law and in civil law jurisdictions, however, the validity of such assignments was at one time in question. Indeed, some authors suggested that there was no room for an assignment of the proceeds and that the only method available in the case of a commercial credit was its transfer under the procedure set out in article 46 of the Uniform Customs and Practice for Documentary Credits (U.C.P.) promulgated by the International Chamber of Commerce.[13] Viewed in the light of modern practice, this dispute may justifiably appear perplexing. The reason for this is that the transfer of credit differs altogether, both as regards mechanism and object, from an assignment of its proceeds, be it an assignment subject to tender or one of accrued proceeds.

Where a credit is transferred, the transferee, who is known as "second beneficiary," steps into the transferor's shoes for most practical purposes. The second beneficiary is expected to tender his own documents to the issuing bank and has the right to demand payment from it in his own

10. Such credits are not common in Anglo-Saxon countries. Note that in such a credit the proceeds are accrued at the date the tender is accepted although the date of payment is "deferred" to some future day.

11. BENJAMIN'S SALE OF GOODS, *supra* note 9, at § 2152.

12. Where the credit is realized by means of a bill of exchange, a similar effect can be achieved by the negotiation of the bill before tender.

13. In the United Kingdom these doubts were expressed as late as 1968 by H. GUTTERIDGE & M. MEGRAH, THE LAW OF BANKERS' COMMERCIAL CREDITS 155 (4th ed. 1968). In the United States they were voiced by W. WARD, BANK CREDITS AND ACCEPTANCES 214 (2d ed. 1931); *see also* Eriksson v. Refiners Export Co., 264 A.D. 525, 527-28, 35 N.Y.S.2d 829, 832-33 (1942). In the same spirit, though on a different point, see Lyon v. Van Raden, 126 Mich. 259, 85 N.W. 727 (1901). As regards doubts expressed in German law, see note 28 *infra*.

name. Although the first beneficiary does not step altogether out of the transaction, his only right is to obtain the payment of the balance between the amount transferred to the second beneficiary and the original amount of the credit. Usually the first beneficiary's only remaining function is to tender his own invoice in replacement of that of the second beneficiary. By way of contrast, a mere assignment of the proceeds of the credit does not involve an interposition of the assignee as the party expected to tender the documents. Furthermore, an assignment of proceeds is not meant to be governed by article 46. Both in civil law and in common law jurisdictions it is regulated by the applicable provisions of the law of obligations or of contract.[14] Two basic consequences follow from this distinction. The first is that, unlike the transfer of the credit, an assignment of proceeds does not require the issuing bank's consent.[15] Second, the documents stipulated in the credit have to be obtained by the original beneficiary, who remains the party to effect the tender.[16] As the assignment does not affect the method of performance prescribed in the commercial credit, it ought to be available even if the credit itself is non-transferable.[17]

There is an equally fundamental distinction between the object of the transfer of a commercial credit and that of an assignment of its proceeds. The transfer of a credit is a useful device where the seller is not the manufacturer of the goods, the subject of the transaction, and thus has to procure them from a supplier down the line. The transfer of the credit, which facilitates this sub-purchase, is arranged in a manner that prevents any direct communications between the applicant for the credit and the ultimate supplier. This object is served by the substitution of the first beneficiary's invoice for the one tendered by the second beneficiary. The shipping documents, however, are to be procured by the second beneficiary. In comparison, the usual function of an assignment of the proceeds of the commercial credit is to facilitate the extension of credit. This becomes clear when it is noted that in most cases the assignee is a bank or some other financial house that finances the beneficiary. The assignment of the proceeds is effected to furnish the bank or other house with a security for the amount so advanced. As will be seen, in some cases an assignment of the proceeds can also be used *in lieu* of a transfer of a credit. This, however, is an uncommon type of transaction.

It has already been pointed out that the clear distinctions between the transfer of a commercial credit and the assignment of its proceeds do not preclude arguments questioning the validity of an assignment. These objections have been raised mainly as regards non-transferable credits. In

14. F. EISEMANN & R. EBERTH, DAS DOKUMENTEN-AKKREDITIV IM INTERNATIONALEN HANDELSVERKEHR 139 (2d ed. 1979); Gessler, *Die Verwertung von Dokumentenakkreditiven*, AUSSENWIRTSCHAFTSDIENST DES BETRIEBS-BERATERS 293, 295 (1968); Wheble, *Documentary Credits—Uniform Customs 1974 Revision*, J. INST. BANKERS 266, 272 (1975).

15. Contrast, as regards the transfer of a credit, art. 46(b) of the U.C.P., note 9 *supra*. In respect of the assignment of proceeds, note that while the bank's consent is not required, notification to it is mandatory. See text & notes 134-35 *infra*.

16. BENJAMIN'S SALE OF GOODS, *supra* note 9, at § 2152; as regards the position of the assignee, see generally B. KOZOLCHYK, COMMERCIAL LETTERS OF CREDIT IN THE AMERICAS 516, 520-21 (1966).

17. F. EISEMANN & R. EBERTH, *supra* note 14, at 139-40.

the United Kingdom it has been suggested that the contractual relationship between the issuing bank and the beneficiary is of a strictly personal nature so that an assignment of rights conferred thereunder is excluded.[18] Similarly, doubts as to the assignability of a credit have been expressed in the United States.[19] The most detailed discussion of the problem has, however, taken place in Germany. It will therefore be convenient to commence the detailed analysis of the question with a review of the German authorities in point. This discussion will also include an analysis of the recent decision of the Commercial Court of Vienna in *Singer & Friedlander v. Creditanstalt-Bankverein*,[20] which is based on a system *in pari materia* with German law. This treatment will be followed by an analysis of the position at common law. Occasional references to common law principles will, further, be made for comparative purposes in the context of the Austrian and German decisions.

ASSIGNMENT OF PROCEEDS OF CREDIT UNDER GERMAN AND AUSTRIAN LAW

In Germany, doubts concerning the validity of an assignment of the proceeds of a credit were based on the decision of the Bundesgerichtshof of April 9, 1959.[21] The beneficiary, who had entered into a contract of sale with the applicant for the credit, "irrevocably" assigned "the letter of credit and all rights thereunder" to a third party, who undertook to supply the goods.[22] The validity of this assignment was denied on the following unexpected ground: "[The beneficiary] remained the party entitled to enforce the undertaking expressed in the letter of credit because the assignment was invalidated by article 49 of the Uniform Customs and Practice for Documentary Credits."[23] Thus, by means of a "simple phrase sybilline,"[24] the Bundesgerichtshof relied on article 49 of the 1951 Revision, concerning transfer, to invalidate the assignment of the proceeds of a non-transferable credit. It is, of course, undeniable that article 49 of the 1951 Revision, just as article 46 of the current Revision, prohibits the transfer of a commercial credit unless it is expressly stated to be transferable.[25] The Court, however, widened the scope of the provision by equating for its purposes an assignment with a transfer. It seems possible that the Bundesgerichtshof was influenced by the wording of the assignment executed in the case as well as by the purpose the assignment was meant to serve. Indeed, it is quite clear that when the beneficiary purported to as-

18. H. GUTTERIDGE & M. MEGRAH, *supra* note 13, at 155.

19. *See* note 13 *supra*. The "personal element" was raised as an objection to the assignment of proceeds in Eriksson v. Refiners Export Co., 264 A.D. 525, 528, 35 N.Y.S.2d 829, 833 (1942).

20. 17 Cg 72/80 (Handelsgericht Wien 1980) (references are to English translation on file with the *Arizona Law Review*).

21. Bundesgerichtshof (BGH), WERTPAPIER-MITTEILUNGEN 970 (1959).

22. *Id.*

23. *Id.* at 971-72.

24. Eisemann, *Considérations sur les règles et usances uniformes relatives aux crédits documentaires (édition révisée 1974)*, in FESTSCHRIFT FÜR J.BÄRMANN 265, 277 (1975).

25. U.C.P., *supra* note 9, at art. 49(2) (1951 Revision); U.C.P., *supra* note 9, at art. 46(d) (1974 Revision).

sign all his rights under the commercial credit to the ultimate supplier, his aim was to achieve an object identical with that served by the transfer of the credit or by the furnishing of a back-to-back credit. It is thus possible that the Court did not consider whether the assignment would have been treated as valid if it had related solely to the proceeds of the credit.[26] The question of the validity of an assignment of the proceeds of a credit subject to tender as well as of the assignment of the accrued proceeds thereof could therefore be regarded as having been left open in this case.

Unfortunately, the words of the Bundesgerichtshof were given their widest interpretation. Before this decision, the prevailing view in Germany supported the validity of an assignment of the proceeds of the credit.[27] After its publication, opinion was swayed in the opposite direction.[28] One of the standard arguments against the validity of an assignment of the proceeds of a credit was that to recognize such an assignment would be contrary to the interests of the applicant for the credit.[29] A distinction was drawn between the assignment of the proceeds subject to tender and an assignment of the accrued proceeds. Some authors argued that only the latter type was valid.[30]

The entire question was considered by the Banking Commission of the International Chamber of Commerce, which, in collaboration with the United Nations Commission on International Trade Law (UNCITRAL),[31] was charged with the revision of the U.C.P. The Commission realized that an attempt to regulate the details of the assignment of the proceeds of commercial credits could lead to conflicts between the U.C.P. and individual national legal systems. Nevertheless, there was a need to clarify that the provision concerning the transfer of the credit was inapplicable to the assignment of its proceeds. To this end, a new article 47 was added to the 1974 Revision. It provides that "the fact that a credit is not stated to be transferable shall not affect the beneficiary's rights to assign the proceeds of such credit in accordance with the provisions of the applicable law." Despite its terse formulation, this provision settles three points. First, it demarcates between the transfer of credit and the assignment of its proceeds. Second, it indicates that the proceeds may be assigned notwithstanding the fact that the credit itself is non-transferable.[32] Third, it states

26. Compare this decision with the critical position taken by Nielsen, *Selbständige Abtretbarkeit des Zahlungsanspruchs aus einem Akkreditiv*, DER BETRIEB 1727 (1964).

27. *See, e.g.*, J. ZAHN, ZAHLUNG UND ZAHLUNGSSICHERUNG IM AUSSENHANDEL 69 n.110 (2d ed. 1959); J. GESSLER, PFÄNDUNGEN IN AKKREDITIVE 102 (1967).

28. *Cf.* J. ZAHN, ZAHLUNG UND ZAHLUNGSSICHERUNG IM AUSSENHANDEL 83 (3d ed. 1964); W. HEFERMEHL in SCHLEGELBERGER, HANDELSGESETZBUCH § 365 App., at annot. 149 (4th ed. 1965); VON GODIN in RGRK-HGB § 365 App. I, at annot. 50 (2d ed. 1963); W. LIPPISCH in H. SOERGEL & W. SIEBERT, BÜRGERLICHES GESETZBUCH, §§ 780-81, annot. 27 (10th ed. 1969); A. BAUMBACH & K. DUDEN, HANDELSGESETZBUCH § 406 App. I, at annot. 8 F (22d ed. 1977).

29. W. HEFERMEHL, note 28 *supra*.

30. W. LIPPISCH, note 28 *supra*; W. HEFERMEHL, note 28 *supra*.

31. UNCITRAL collaborated with the I.C.C. in the preparation of the 1974 Revision of the U.C.P. *See* U.C.P., *supra* note 9, Foreword to 1974 Revision, at 6; GUIDE TO DOCUMENTARY CREDIT OPERATIONS 39 (I.C.C. Pub. No. 305, 1978).

32. *Cf.* 3 E. SCHINNERER & P. AVANCINI, BANKVERTRÄGE 92 (3d ed. 1976); Wheble, *supra* note 14, at 272; Wheble, *Uniform Customs and Practice for Documentary Credits (1974 Revision)*, J. BUS. L. 281, 286 (1975).

that the assignment of the proceeds of a credit is not governed by article 46 concerning transfer, but by the applicable domestic law. Usually, this will be the law of the place at which the credit is available.[33]

Article 47 is of a declaratory nature. Even before its inclusion in the 1974 Revision, there was a body of opinion which asserted that a mere assignment of the proceeds of a credit was outside the scope of the provision governing transfer. According to this view, such a mere assignment was contrary neither to the interests of the applicant for the credit nor to those of the bank.[34] This view, which was also supported by some common lawyers,[35] was eventually adopted by the Landgericht Frankfurt a.M. in its decision of March 17, 1976.[36]

The facts of this case, which concerned a commercial credit governed by the 1962 Revision and which was therefore not subject to the new article 47, were as follows: The firm V., which was the second beneficiary of a fraction of a transferable credit, assigned its rights and benefits thereunder to a third party, whom it expressly empowered to enforce the rights so assigned against the issuing bank. The validity of this assignment was assailed on the ground that it constituted a "second transfer" of the commercial credit in contravention of article 46.[37] The Landgericht rejected this argument and upheld the validity of the assignment.[38] In reaching its decision, the Court left open whether the transaction constituted a mere assignment of the proceeds subject to tender or whether the phrase "rights and benefits" was not to be understood as a pleonasm but as including, in addition to the reference to "rights," a reference also to "the benefit of the credit as an independent undertaking for the payment of the amount of the credit."[39] The Landgericht found it unnecessary to decide this point as

> a second transfer of the credit, which could possibly be attained under an 'assignment' and which was prohibited under article 46, was converted into a valid assignment of the right to obtain the payment of the amount of the credit against the tender of documents furnished by the beneficiary and not by the assignee.[40]

On this basis, the Landgericht concluded that the assignment of the beneficiary's right to the proceeds subject to tender was outside the scope of article 46.[41] Under the general precepts of the German law of obligations such a right could be enforced through the agency of a third party. It

33. Power Curber Int'l Ltd. v. National Bank of Kuwait S.A.K. [1981] 2 Lloyd's L.R. 394. For a recent analysis of the relevant conflict of laws issues under German law, see Schütze, *Kollisionsrechtliche Probleme des Dokumentenakkreditivs*, WERTPAPIER-MITTEILUNGEN 226 (1982).

34. *Cf.* J. ZAHN, ZAHLUNG UND ZAHLUNGSSICHERUNG IM AUSSENHANDEL 90 (4th ed. 1968); *see also* C. CANARIS, BANKVERTRAGSRECHT § 357 App., at annot. 436 (1st ed. 1975) (with further references).

35. H. HARFIELD, BANK CREDITS AND ACCEPTANCES 191-92 (5th ed. 1974); B. KOZOLCHYK, *supra* note 16, at 501; BENJAMIN'S SALE OF GOODS § 2021 (1st ed. 1974); BENJAMIN'S SALE OF GOODS, *supra* note 9, at § 2152; *see also* Ufford, *Transfer and Assignment of Letters of Credit Under the Uniform Commercial Code*, 7 WAYNE L. REV. 263 (1960).

36. Landgericht Frankfurt a.M., WERTPAPIER-MITTEILUNGEN 515 (1976).

37. *Id.* at 516.

38. *Id.* at 518-19.

39. *Id.* at 518.

40. *Id.*

41. *Id.*

was, therefore, assignable.[42] To support its conclusion the Court pointed out that an assignment of the proceeds of the credit, be it an assignment of accrued proceeds or of proceeds subject to tender, did not run counter to the "protective object" served by the prohibition of successive transfers of a credit in article 46.[43] Neither type of assignment would defeat the main interest of the credit applicant—a reliable and trustworthy seller (beneficiary) charged with the duty to tender the documents.[44] The reason for this was that, even after the execution of an assignment, the original beneficiary remained the party obligated to procure and to tender the set.[45] The Court further concluded that the two types of assignment envisaged did not have to be prohibited "in order to shield the bank from demands for payment made by unknown third parties, as the noncompliance with conditions precedent prescribed in the credit, as well as any counterclaims available to the bank, could be raised against such third parties just as against the beneficiary."[46]

The Landgericht reviewed the Bundesgerichtshof's decision of April 9, 1959,[47] discussed above, and concluded that it did not invalidate an assignment of the proceeds of the credit.[48] The Landgericht relied in this respect on article 47, although this new provision was inapplicable to the commercial credit in issue.[49] The Landgericht explained that article 47 of the U.C.P., which was of a declaratory nature, showed that, although the earlier revision of the U.C.P. did not expressly provide for the assignment of the proceeds of a commercial credit, it did not rule it out.[50]

The decision of the Landgericht Frankfurt a.M. gives effect to the view currently prevailing on this subject in Germany. This is also the current view in the United Kingdom and in the United States.[51] Thus, the earlier controversy has been settled in favor of the view that an assignment of the proceeds of the credit subject to tender is just as valid as the assignment of the accrued proceeds.[52] One additional point which is strongly in support of the validity of an assignment of proceeds subject to tender is that the payment of the amount of the credit to the assignee does not modify the basic nature of the claim or chose in action. Under German law

42. *Id.*
43. *Id.* at 519.
44. *Id.*
45. *Id.*
46. *Id.*
47. Bundesgerichtshof, WERTPAPIER-MITTEILUNGEN 970 (1959).
48. Landgericht Frankfurt a.M., WERTPAPIER-MITTEILUNGEN 515, 519 (1976).
49. *Id.*
50. *Id.*
51. See authorities cited in note 35 *supra*.
52. *Cf.* C. CANARIS, BANKVERTRAGSRECHT, annot. 1031 (2d ed. 1981); F. EISEMANN & R. EBERTH, *supra* note 14, at 140; A. BAUMBACH & K. DUDEN, HANDELSGESETZBUCH, § 406 App. I, at annot. 8 F (24th ed. 1980); J. NIELSEN in BANKRECHT UND BANKPRAXIS 5/389 (1979); Horn, *Internationale Zahlungen und Akkreditiv* in N. HORN, W. FRHR. MARSCHALL v. BIEBERSTEIN, L. ROSENBERG & B. PAVIĆEVIĆ, DOKUMENTENAKKREDITIVE UND BANKGARANTIEN IM INTERNATIONALEN ZAHLUNGSVERKEHR 9, 18-19 (1977); W.HEFERMEHL in SCHLEGELBERGER, HANDELSGESETZBUCH, § 365 App., at annot. 232 (5th ed. 1976); F. GRAF VON WESTPHALEN, RECHTSPROBLEME DER EXPORTFINANZIERUNG 145 (2d ed. 1978); Liesecke, *Neuere Theorie und Praxis des Dokumentenakkreditivs*, WERTPAPIER-MITTEILUNGEN 258, 261 (1976); J. ZAHN, ZAHLUNG UND ZAHLUNGSSICHERUNG IM AUSSENHANDEL 96-97 (5th ed. 1976).

this means that the assignment would not be ruled out by section 399 of the BGB.[53] It must, however, be appreciated that this view may not be accepted universally. Each and every assignment of the proceeds of a credit is valid only if it is sanctioned by the applicable national law.

Both in German civil law and in common law systems there is a clear-cut distinction between the position of a second beneficiary who is entitled to enforce the rights transferred to him against the tender of documents procured by himself, and the position of an assignee of the proceeds of the credit who is entitled to payment against documents obtained by the first beneficiary.[54] While there is no direct English or American authority in point, German legal literature and decisions indicate that the enforcement by assignee of the rights acquired by him against the issuing bank is subject to the tender of the documents *by the assignor*. Thus, it was emphasized by the Landgericht Frankfurt a.M. in its decision of March 17, 1976,[55] discussed above, that where the proceeds of the credit are assigned, "the beneficiary continues to be under the duty to tender the documents."[56] A similar view is expressed by Zahn:

> The tender of the documents remains the beneficiary's duty even after an assignment has taken place. The assignment relates solely to the proceeds of the credit. When the beneficiary has assigned the amount due to him, the proceeds are paid to the assignee after the tender of the required documents by the beneficiary.[57]

These words may be described as expressing the prevailing view of the mid-seventies. Zahn polarized the transfer of the credit and the assignment of the proceeds. A new question did, however, arise in the case which came up before the Commercial Court of Vienna in the matter of *Singer & Friedlander v. Creditanstalt-Bankverein*.[58] The issue was whether, apart from the transfer of the credit under article 46 of the U.C.P. and the assignment of the proceeds, there was room for an intermediary type of transaction. Under this hybrid arrangement, the beneficiary would be able

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53. BGB § 399 reads: "A claim is not assignable if the performance cannot be effected in favor of any person other than the original creditor without alteration of its substance, or if assignment is excluded by agreement with the debtor." I. FORRESTER, S. GOREN & H. ILGEN, THE GERMAN CIVIL CODE 64 (1975) (English translation). *See* W. HEFERMEHL, note 52 *supra*; F. EISEMANN & R. EBERTH, *supra* note 14, at 141; Eberth, *Die deutsche Rechtsprechung zum Dokumenten-Akkreditiv von 1970 bis 1976* in 3 C. BALOSSINI, NORME ED USI UNIFORMI RELATIVI AI CREDITI DOCUMENTARI 413, 429 (3d ed. 1978); Eberth in RECHT DER INTERNATIONALEN WIRTSCHAFT 522, 527 (1977); C. CANARIS, note 52 *supra*.

54. As far as German law is concerned, see, *e.g.*, C. CANARIS, note 52 *supra*. As regards the common law position, see B. KOZOLCHYK, *supra* note 16, at 516, 518, 520-521; BENJAMIN'S SALE OF GOODS, *supra* note 9, at § 2152.

55. Landgericht Frankfurt a.M., WERTPAPIER-MITTEILUNGEN 515 (1976).

56. *Id.* at 519.

57. J. ZAHN, *supra* note 52, at 97. For this view, also see Nielsen, *supra* note 26, at 1728: "Even in the case of such an assignment (of the proceeds) there is no change as regards the position of the beneficiary, i.e., he remains the party obliged to tender." The same position is taken up, among others, by F. EISEMANN & R. EBERTH, *supra* note 14, at 140, 142; *see also* Liesecke, *supra* note 52, at 261. For a different view of the matter expressed recently, see C. CANARIS, *supra* note 52, at annot. 1033-34; text & notes 107-18 *infra*.

58. 17 Cg 72/80 (Handelsgericht Wien 1980); *see also* Ryder, *The Creditanstalt Case*, BANKERS' MAG. 32-33 (Dec. 1980); Goldsworth, *Documentary Credits: Fundamentals Challenged*, 2 INT'L CONTR. L. & FIN. REV. 287 (1981); Schwank, *Use and Abuse of Documentary Credits*, 2 INT'L CONTR. L. & FIN. REV. 222, 227-28 (1981).

to confer two separate rights on the assignee: the right to the proceeds of the credit and the right to present, in the assignee's own name, a set of documents furnished by the beneficiary (the assignor).[59]

The facts of this recent case, which became of world-wide interest and which culminated in a settlement reached after the delivery of the judgment,[60] were as follows: In November, 1974, the defendant bank, in Vienna, opened its irrevocable non-transferable letter of credit for $9,700,000 (U.S.) in favor of Aronson, a merchant of Amsterdam.[61] The plaintiff, a London based merchant bank, was ordered by the defendant bank to advise this credit.[62] In addition, the plaintiff agreed to grant Aronson credit facilities in connection with the transaction.[63] As a security, plaintiff obtained from Aronson a document which read: "I hereby irrevocably and unconditionally assign to you all my rights and benefits under [the commercial credit in question]."[64] The defendant bank, the issuer of the credit, was duly informed by the plaintiff of this assignment.[65] A set of apparently regular documents was in due course furnished by Aronson and presented to the defendant bank by the plaintiff.[66] These documents were rejected by the defendant bank on the ground of an alleged fraud concerning the goods.[67] When the documents were tendered again through a notary, the defendant bank inquired on whose behalf they were being presented.[68] The plaintiff's representative, who accompanied the notary, answered that they were presented "in the name" of the plaintiff.[69]

The Commercial Court of Vienna cited Zahn's view[70] to the effect that the beneficiary's right to the proceeds of the credit was assignable.[71] The assignee's rights were, however, subject to the tender of a set of conforming documents before the expiration of the commercial credit.[72] Relying on Zahn, the Court emphasized that the "right to present the

59. As a further intermediary form, different from both the assignment of proceeds and the transfer of a credit under art. 46 of the U.C.P., C. CANARIS, note 52 *supra*, at annot. 1032, recently postulates an arrangement in which the bank confers on the assignee of a non-transferable credit the role of a "beneficiary," who "in cases of doubt" is not entitled to tender his own documents but who, just as under art. 46, is free from equities based on claims against the first beneficiary. But this concept runs counter to the spirit of the U.C.P., which uses the term "beneficiary" in a technical sense, as emerges from General Provision b, under which the "beneficiary" is the person to whom the bank is ordered to pay at the request and in accordance with the instructions of the applicant for the credit. The bank cannot unilaterally confer the status of a beneficiary on a third party without committing a breach of its duties to the other parties to the transaction.

60. *Cf.* Blick durch die Wirtschaft 8 (Frankfurt a.M. April 23, 1981); Die Presse (Vienna April 22, 1981).

61. Singer & Friedlander v. Creditanstalt-Bankverein, 17 Cg 72/80, at 2, 20 (Handelsgericht Wien 1980) (Part I) (references are to English translation on file with the *Arizona Law Review*).

62. *Id.* at 2, 20.

63. *Id.* at 2.

64. *Id.* at 17.

65. *Id.* at 18.

66. *Id.* at 23.

67. *Id.* at 25.

68. *Id.* at 26.

69. *Id.*

70. J. ZAHN, *supra* note 52, at 97.

71. 17 Cg 72/80, at 8 (Part II).

72. *Id.* at 9.

documents" was retained by Aronson, the beneficiary.[73] He alone was entitled to perform the condition precedent spelled out in the commercial credit.[74] Once he tendered the required documents, the bank was placed under a definite duty to pay.[75] The beneficiary could, further, prevent this duty from maturing by failing to tender.[76]

The Court considered whether, apart from his right to assign the proceeds of the credit, the beneficiary was also entitled to assign his "right to present the documents."[77] Could the beneficiary, in this way, confer on the assignee the right to perform the condition precedent set out in the commercial credit by tendering the beneficiary's documents in the assignee's own name? The Court answered this question in the negative, concluding that

> it would contradict the nature of a non-transferable credit, if, in addition to the proceeds, the beneficiary could also *transfer* the right to realise the claim by presentation of documents in conformity with the letter of credit or to impede the paying out of the proceeds by not presenting the documents.[78]

The Court added that if the right to present the documents was held to be assignable, it would become difficult to draw a notional distinction between transferable and non-transferable credits.[79] It held "that under a non-transferable letter of credit the beneficiary [could] indeed transfer the (pure) right to receive payment but not the right to present documents."[80]

On the basis of this reasoning, and in reliance on Zahn,[81] the Commercial Court of Vienna held that even following the execution of an assignment of the proceeds of the credit, the tender of the documents remained the beneficiary's province.[82] This could be of considerable practical importance if, as a result of a dispute between the assignor and the assignee, the former wished to prevent the payment of the proceeds to the latter. At the same time, the Court stressed that the beneficiary, the assignor, was not under a duty to tender the documents in person at the issuing bank's counter.[83] He could, indeed, present them through an agent. Turning to the facts of the case before it, the Court noted that the plaintiff/assignee had presented the documents in its own name and not as Aronson's (the assignor's) agent.[84] For this reason, the tender was not effected in accordance with the terms of the credit and was, accordingly, bad.[85]

The issue decided by the Commercial Court of Vienna may be de-

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73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.* at 10.
81. J. ZAHN, *supra* note 52, at 97.
82. 17 Cg 72/80, at 10 (Part II).
83. *Id.*
84. *Id.* at 12.
85. *Id.*

fined in a somewhat different manner. Does the tender of the documents under a commercial credit constitute a strictly personal right exercisable by the beneficiary alone[86] or is it to be treated as an assignable right, which may be conferred by the beneficiary on the assignee in a manner that would enable the assignee to tender in his own name documents furnished by the beneficiary? To answer this question, it is necessary to consider the exact legal nature of the tender of the documents under a commercial credit. Two views are arguable in German law.

In a recent analysis of the subject, Wassermann describes the beneficiary's right to present the documents as a *Gestaltungsrecht* which is conferred automatically on the assignee of the proceeds either as something ancillary to his right to obtain payment or tacitly as part and parcel of the assignment.[87] A *Gestaltungsrecht* is a right which entitles the party on whom it is conferred to effect by his own unilateral act or declaration of will a legal relationship with another. This concept is, of course, alien to common lawyers. The *Gestaltungsrecht* may give the first party the power to establish, define, amend, or cancel the relevant relationship.[88] Rights of this type may arise by operation of law, as does the right to exercise an option conferred on a party under section 262 of the BGB.[89] They may likewise be based on an agreement between the parties, as where one party to a contract agrees to be bound by a specific determination or decision to be made by the other.[90] Usually, a *Gestaltungsrecht* may be exercised not only by an express declaration of the relevant party's intention, such as his disapproval, withdrawal or cancellation, but also by means of a disposition, such as the appropriation of a chattel.[91]

Wassermann suggests that the right to present documents under a commercial credit constitutes a *Gestaltungsrecht* exercisable by a proprietary disposition.[92] This right enables the beneficiary of the credit to produce at will a situation in which his claim to the proceeds of the credit becomes unconditional.[93] Obviously, the exercise of this *Gestaltungsrecht* does not lead to the creation of a new legal relationship, to its clearer definition or to its termination. It involves, according to Wassermann, an *Änderungsrecht*, which is a right to modify an existing relationship.[94]

86. This view has been put forward by the Commercial Court of Vienna in Singer & Friedlander v. Creditanstalt-Bankverein, 17 Cg 72/80 (Handelsgericht Wien 1980).

87. H. WASSERMANN, DIE VERWERTUNG VON ANSPRÜCHEN AUS DOKUMENTENAKKREDITIVEN 82 *et seq.*, 161 (1981).

88. K. LARENZ, ALLGEMEINER TEIL DES DEUTSCHEN BÜRGERLICHEN RECHTS 192 (5th ed. 1980); *see also* 1 L. ENNECCERUS & H. NIPPERDEY, ALLGEMEINER TEIL DES BÜRGERLICHEN RECHTS 441 *et seq.* (15th ed. 1959); H. LEHMANN & H. HÜBNER, ALLGEMEINER TEIL DES BÜRGERLICHEN GESETZBUCHES 88-89 (16th ed. 1966); H. WASSERMANN, *supra* note 87, at 90; *cf.* 1 A. VON TUHR & H. PETER, ALLGEMEINER TEIL DES SCHWEIZERISCHEN OBLIGATIONENRECHTS 22 *et seq.* (3d ed. 1979).

89. BGB § 262 reads: "If several acts of performance are due, of which only either the one or the other may be demanded, the right to choose belongs to the debtor in case of doubt." I. FORRESTER, S. GOREN & H. ILGEN, *supra* note 53, at 44. *See, e.g.*, K. LARENZ, *supra* note 88, at 193.

90. K. LARENZ, *supra* note 88, at 193. *See also* H. WASSERMANN, *supra* note 87, at 90.

91. *Cf.* 1 L. ENNECCERUS & H. NIPPERDEY, *supra* note 88, at 441; H. LANGE & H. KÖHLER, BGB—ALLGEMEINER TEIL 102 (17th ed. 1980).

92. H. WASSERMANN, *supra* note 87, at 90 *et seq.*

93. *Id.* at 90.

94. *Id.* at 91.

Wassermann's view is open to criticism. Its Achilles' heel is the suggestion that the tender of the documents leads to a modification of the contractual relationships in the transaction.[95] This is simply not so. In reality, the tender of the documents under the documentary credit constitutes the performance of the contract between the beneficiary and the issuing bank. It is therefore wrong to regard it as a *Gestaltungsrecht*, which can be transferred to the assignee either tacitly or as something ancillary to the proceeds of the letter of credit.

The same objection, formulated in a broader sense, can be raised against both Wassermann and the rationale of the decision of the Commercial Court of Vienna in *Creditanstalt*. The objection relates to the basic view, adopted by both sources, to the effect that the tender of documents constitutes a "right." It is submitted that "the tender of documents" is more accurately described as a duty or as an obligation owed by the beneficiary. Admittedly, the tender of documents does not constitute an ordinary contractual undertaking. Generally, the decision whether to tender the documents is left to the beneficiary; the commercial credit does not place him under a binding duty to do so.[96] Thus, the beneficiary's duty to tender the documents is not legally enforceable. It is, rather, a duty which he "owes to himself;" he has to perform it, if he wishes to obtain payment under the commercial credit.

German law recognizes the existence of imperfect duties or obligations of this sort. They are known as *Obliegenheiten*, and are defined as duties which the obligee has to perform in his own interest.[97] Usually, an *Obliegenheit* is performed by the "obligee" in order to obviate his incurring some financial detriment or the loss of a right. The other party, however, does not have the right to enforce the *Obliegenheit* or to recover damages if the obligee opts not to perform.[98] *Obliegenheiten*, which assume the form of duties to give notice, are common in insurance contracts.[99] The BGB also includes a series of provisions setting out duties which have the character of *Obliegenheiten*. Thus, under section 121(1) of the BGB, the right to defend a claim is lost unless it is exercised without delay.[100] A

95. *Id.*

96. *See* F. EISEMANN & R. EBERTH, *supra* note 14, at 144; J. ZAHN, *supra* note 52, at 72 (5th ed. 1976). Note that a duty to present the documents, arising under the contract of sale, is owed by the seller (the beneficiary) to the buyer. But this obligation, based on the underlying contract, does not form part of the legal relationship between the seller and the bank as manifested by the letter of credit. *Cf.* J. ZAHN, *supra* note 52, at 33.

97. *Cf.* K. LARENZ, *supra* note 88, at 179.

98. *See* H. LANGE & H. KÖHLER, *supra* note 91, at 98; H. HEINRICHS in O. PALANDT, BÜRGERLICHES GESETZBUCH, Introduction to § 241, at annot. 4 b (41st ed. 1982); R. SCHMIDT in H. SOERGEL & W. SIEBERT, BÜRGERLICHES GESETZBUCH, § 278, at annot. 11 (10th ed. 1967); W. WEBER in 2 J.V.STAUDINGER, KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH—RECHT DER SCHULDVERHÄLTNISSE, Introduction, at annot. M 9 (11th ed. 1967); H. WASSERMANN, *supra* note 87, at 85. For a recent critical analysis of the term *Obliegenheit*, see J. SCHMIDT in J.V.STAUDINGER, KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH-RECHT DER SCHULDVERHÄLTNISSE, Introduction to § 241 *et seq.*, at annot. 221-43 (12th ed. 1982).

99. *See, e.g.*, W. WEBER, *supra* note 98, at annot. M 5.

100. BGB § 121(1) reads: "The rescission must be made, in cases provided for by §§ 119, 120, without culpable delay (immediately) after the person entitled to rescind has gained knowledge of the grounds for rescission. A rescission as against a person who is not present is deemed to have been effected in due time if the rescission has been forwarded immediately." I. FORRESTER, S.

case under the Handelsgesetzbuch (HGB) is to be found in section 377 of the HGB, which imposes on the purchaser a duty to examine goods, delivered under a contract of sale, without delay and to inform the vendor forthwith of any defect discovered in the process.[101] If the purchaser fails to act promptly, he loses any right accrued with respect to defects which ought to have been disclosed by such an examination.[102] From the obligee's point of view, an *Obliegenheit* constitutes a duty which he has to perform unless he is prepared to forfeit a right.[103]

In German law, the tender of documents under a commercial credit constitutes an *Obliegenheit* of the beneficiary. If he fails to tender the documents before the prescribed expiration date, the letter of credit is discharged. The beneficiary thereupon loses his right to be paid the proceeds. But the issuing bank cannot bring an action in breach of contract based on the beneficiary's failure to present the documents. The tender of the documents is, thus, a typical *Obliegenheit*, a duty which the beneficiary "owes to himself,"[104] and which he performs, accordingly, in his own interests. It would thus be wrong to describe the tender of documents as a genuine duty owed by the beneficiary to the issuing bank. Furthermore, the analysis involved demonstrates that it would be equally wrong to regard the tender of documents as a right of the beneficiary against the issuing bank.[105]

The fact that the tender of the documents constitutes an *Obliegenheit* does not necessarily lead to the conclusion that, even after the assignment of the proceeds, the beneficiary/assignor remains the only party entitled to perform. The provision of section 267 of the BGB, under which a "duty" may be performed by a third party unless the obligee is expected to act personally, is applicable to *Obliegenheiten*.[106] In reliance on this provision

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GOREN & H. ILGEN, *supra* note 53, at 19. *Cf.* W. WEBER, *supra* note 98, at annot. M 4. Note, however, that the term *Obliegenheit* is used, explicitly, only in BGB § 2217(1) with respect to the duties of an executor; in this connection, see W. WEBER, *supra* note 98, at annot. M 3.

101. HGB § 377 reads:

> (1) If the sale is a commercial transaction as regards both parties, the buyer should examine the goods immediately after their delivery by the seller to the extent that this is practical in the ordinary course of business, and if a defect is found, he should without delay notify the seller. (2) If the buyer fails to give notice, the goods are considered approved, unless the defect is one which was not discernible on examination. (3) If such a defect appears later, the notice must be given immediately after the discovery; otherwise the goods are deemed to be approved even as regards this defect. (4) The sending of the notice in due time is sufficient for the preservation of the rights of the buyer. (5) If the seller has fraudulently concealed the defect, he may not invoke these provisions in his favor.

S. GOREN & I. FORRESTER, THE GERMAN COMMERCIAL CODE 64 (1979) (English Translation).

102. *See also* K. LARENZ, *supra* note 88, at 179.

103. *See* R. SCHMIDT, *supra* note 98, at annot. 8 before § 241; *see also* H. WASSERMANN, *supra* note 87, at 85.

104. W. WEBER, *supra* note 98, at annot. M 11; H. LANGE & H. KÖHLER, *supra* note 91, at 98.

105. *Cf.* F. EISEMANN & R. EBERTH, *supra* note 14, at 144. For a detailed discussion of the subject, see H. WASSERMANN, *supra* note 87, at 85 *et seq.* On this point, see also R.M. Goode, *Reflections on Letters of Credit—V*, 1981 J. BUS. L. 150, 154, who observes: "[T]he tender of documents and the fulfillment of other stipulations in the credit is not a right at all; on the contrary, it is a burden, a condition of entitlement to payment and, moreover, a condition the performance of which cannot, in a non-transferable credit, be delegated by B 1 [first beneficiary] to B 2 [second beneficiary]."

106. BGB § 267 reads: "(1) If a debtor does not have to perform in person, a third party may

it is suggested by Canaris that a person who acquires a contingent right is entitled to perform in his own name the act needed to render this right absolute.[107] On this basis, Canaris concludes that the assignee of the proceeds of the credit is entitled to tender documents furnished by the beneficiary in his own name.[108] Canaris asserts that, in view of section 267, the assignee does not require a power of attorney authorizing him to effect the tender.[109] The weakness of this argument is in its failure to take into account the exact scope of section 267 and the basic nature of the beneficiary's *Obliegenheit* to tender the documents. One limitation of section 267 is that it does not encompass cases in which the nature of the transaction or the agreement between the parties indicates that the obligee is expected to perform in person.[110] This is the very position of the beneficiary of a commercial credit. It is true that in a transaction involving the supply of goods, the German law of obligations usually does not prescribe that the obligee has to perform personally.[111] But the reverse is true where the contract between the parties is based on a mutual relationship of trust.[112] It is submitted that this is the case in respect of a non-transferable commercial credit.

Canaris argues that his analysis does not conflict with the basic principle under which the assignee is not entitled to present documents furnished by himself but only a set procured by the beneficiary.[113] It must be conceded that, on the basis of this argument and contrary to the view of the Commercial Court of Vienna,[114] it is possible to draw a distinction between the transfer of a credit and the assignment of its proceeds subject to tender, even if the assignee's right to present the documents in his own name is recognized. The argument against the recognition of the assignee's right to so present the documents rests on a different ground. It is submitted that in German law, it would be wrong to permit the beneficiary to assign the *Obliegenheit* to tender the documents since such an assignment purports to confer on the assignee the power to decide whether or not to realize the letter of credit. We believe that the beneficiary should not be permitted to free himself from this *Obliegenheit* by means of an assignment without obtaining the consent of all the parties to the transaction, especially the credit applicant.

In support of his view, Canaris argues that a doctrine precluding the beneficiary from assigning the *Obliegenheit* to tender the documents is contrary to the interests of commerce and trade.[115] The assignee, in Canaris'

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also make performance. The approval of the debtor is not necessary. (2) The creditor can refuse the performance if the debtor objects." I. FORRESTER, S. GOREN & H. ILGEN, *supra* note 53, at 44. *See* R. SCHMIDT, *supra* note 98, at annot. 9 before § 241; H. WASSERMANN, *supra* note 87, at 88.

107. C. CANARIS, BANKVERTRAGSRECHT, annot. 1033 (2d ed. 1981).

108. *Id.*

109. *Id.*

110. *Cf.* M. VOLLKOMMER in O. JAUERNIG, BÜRGERLICHES GESETZBUCH, § 267, at annot. 1 (2d ed. 1981).

111. H. HEINRICHS, *supra* note 98, § 267, at annot. 1.

112. L. ENNECCERUS & H. LEHMANN, RECHT DER SCHULDVERHÄLTNISSE 99 (15th ed. 1958).

113. C. CANARIS, *supra* note 52, at annot. 1033.

114. See text & notes 78-80 *supra*.

115. C. CANARIS, BANKVERTRAGSRECHT, annot. 1033 (2d ed. 1981).

view, cannot be expected to assume the risk that his position could be affected by a whimsical refusal by the beneficiary to tender the documents.[116] Such a doctrine would seriously impair the value of the assignment of the proceeds of a credit as a security. This is a forceful argument. But the undesirable result outlined by Canaris is neatly avoided if the assignee obtains from the beneficiary/assignor an irrevocable power of attorney to tender the documents in the beneficiary's name.[117] If this procedure is followed, the assignment of the credit subject to tender constitutes an adequate security for the advances made to the beneficiary. The dangers pointed out by Canaris are avoided.[118]

The preceding analysis demonstrates that in German law there is no room for the argument that in addition to the transfer of the credit and to the assignment of its proceeds, there is an intermediary arrangement involving the tender of the documents furnished by the beneficiary in the assignee's name. Although the tender of conforming documents does not constitute a "right" which has to be personally exercised by the beneficiary, it is an *Obliegenheit* which cannot be performed by a third party.[119]

ASSIGNMENT OF PROCEEDS IN COMMON LAW SYSTEMS

Dearth of authority suggests that the assignment of the proceeds of a credit is either uncommon or singularly successful in common law jurisdictions. This observation applies to assignments subject to tender. An assignment of accrued proceeds is usually not required because cash credits—whether the deferred payment or sight type—are used infrequently. The usual type of credit issued in the United Kingdom, the United States and most Commonwealth countries involves the drawing of a bill of exchange for the amount payable.[120] Regardless of whether the issuing bank's undertaking assumes the form of the acceptance or of the negotiation without recourse on this bill, the beneficiary can acquire an advance or even the full amount involved by negotiating the bill in the first instance with his own bank. The validity of such a transaction, which is akin to a discount, has never been doubted.

The bank which negotiates the beneficiary's bill of exchange acquires the documents to be tendered under the commercial credit.[121] Regardless

116. *Id.*

117. *See also* Liesecke, *Die neuere Rechtsprechung, insbesondere des Bundesgerichtshofes, zum Dokumenten-Akkreditiv*, WERTPAPIER-MITTEILUNGEN 458, 464 (1966).

118. In this connection, see also H. SCHÄRRER, DIE RECHTSSTELLUNG DES BEGÜNSTIGTEN IM DOKUMENTEN-AKKREDITIV 124 (1980).

119. This conclusion agrees with views expressed in Austrian and Swiss literature. *Cf.* 3 E. SCHINNERER & P. AVANCINI, *supra* note 32, at 103: "If sanctioned by local law (art. 47), it is possible to assign the contingent right for the proceeds of the credit so that, when the beneficiary or his agent tenders the documents, the accrued proceeds may be paid only to the assignee." *See id.*, at 140: "The subject matter of the assignment is solely the amount payable upon the tender of the documents. The right to perform this condition is not transferable." *See also* H. SCHÄRRER, *supra* note 118, at 124: "The assignment does not attach the credit as such as the documents have still to be tendered by the original beneficiary."

120. E. ELLINGER, DOCUMENTARY LETTERS OF CREDIT—A COMPARATIVE STUDY 15-16 (1970); B. KOZOLCHYK, *supra* note 16, at 9.

121. BENJAMIN'S SALE OF GOODS, *supra* note 9, at § 2157.

of whether the bank obtains these as a pledgee or as an owner,[122] it acquires a security over the goods.[123] Up to a point, the negotiating bank's rights against the issuing bank depend on whether the credit is of the "straight" or of the "negotiation" type.[124] In the former, the issuing bank's undertaking is directed or addressed solely to the beneficiary. He alone is the direct promisee.[125] In the latter type of credit, the issuing bank's undertaking is addressed to the drawer, indorsers and all bona fide holders of a bill of exchange conforming with the terms of the credit.[126] It is clear that a negotiating bank, which holds a bill drawn under a negotiation credit, is entitled to demand the payment of the amount of the credit in its own name.[127] It can enforce the letter of credit in its capacity as promisee and not as an assignee of the beneficiary's right to the proceeds.

Where the commercial credit is of the straight type, the negotiating bank is in the position of a holder of an unaccepted bill of exchange. But even in such a case the negotiating bank acquires some rights of its own against the issuing bank. This is demonstrated by cases in which documents that appear regular on their face are discovered to be tainted with fraud before the acceptance of the tender by the issuing bank. It has been held that while an injunction may be issued to restrain the fraudulent seller from reaping the benefit of his own wrongdoing, the courts will not enjoin payment where the bill of exchange and documents are presented by a bona fide holder for value of the bill.[128] This principle has become well entrenched and has been invoked even in cases of commercial credits

122. The exact nature of the title of the negotiating bank over the documents depends on the nature of its arrangement with the beneficiary. E. ELLINGER, *supra* note 120, at 171-74, 261-64; H. HARFIELD, *supra* note 35, at Chapter 6; BENJAMIN'S SALE OF GOODS, *supra* note 9, at § 2198 *et seq.*

123. The security usually is acquired by means of the bill of lading or other document of title comprised in the tender.

124. *See generally* E. ELLINGER, *supra* note 120, at 16-17; BENJAMIN'S SALE OF GOODS, *supra* note 9, at §§ 2148-49. For the distinction between the two types in the United States, see Banco Nacional Ultramarino v. First Nat'l Bank, 289 F. 169, 173-74 (D. Mass 1923); Fletcher Guano Co. v. Burnside, 142 Ga. 803, 83 S.E. 935 (1914); Lyon v. Van Raden, 126 Mich. 259, 85 N.W. 727 (1901); Courteen Seed Co. v. Hong Kong & Shanghai Banking Corp, 216 A.D. 495, 215 N.Y.S. 525, 529 (1926), *aff'd.* 245 N.Y. 377, 157 N.E. 272 (1927). In the United Kingdom, see (M.A.) Sassoon & Sons Ltd. v. International Banking Corp. [1927] A.C. 711, 722, 724.

125. *See* Banco Nacional Ultramarino v. First Nat'l Bank, 289 F.169, 173-74 (D. Mass. 1923); (M.A.) Sassoon & Sons Ltd. v. International Banking Corp. [1927] A.C. 711, 722, 724. Note that in Eriksson v. Refiners Export Co. Inc., 264 A.D. 525, 35 N.Y.S.2d 829 (1942) doubts were expressed about the validity of the negotiation of drafts drawn under a non-assignable credit. The position has been clarified by U.C.C. § 5-116(3). *See also* Shaffer v. Brooklyn Park Garden Apartments, 311 Minn. 452, 250 N.W.2d 172 (1977).

126. E. ELLINGER, *supra* note 120, at 16-17; BENJAMIN'S SALE OF GOODS, *supra* note 9, at §§ 2148-49.

127. *See* analysis in Second Nat'l Bank v. M. Samuel & Sons Inc., 12 F.2d 963, 965, 967 (2d Cir. 1929); Scanlon v. First Nat'l Bank, 249 N.Y. 9, 13, 162 N.E. 567, 568 (1928); Courteen Seed Co. v. Hong Kong & Shanghai Banking Corp., 216 A.D. 495, 499, 215 N.Y.S. 525, 529 (1926), *aff'd.* 245 N.Y. 377, 378, 157 N.E. 272, 273 (1927);. In the United Kingdom, see (M.A.) Sassoon & Sons Ltd. v. International Banking Corp., [1927] A.C. 711, 722, 724.

128. The point emerges from the very first—now classic—case in point: Sztejn v. J. Henry Schroder Banking Corp., 17 Misc. 719, 721-22, 31 N.Y.S.2d 631, 634 (1941). For a recent discussion—referring to relevant authorities—see United Bank Ltd. v. Cambridge Sporting Goods Corp., 41 N.Y.2d 254, 259-60, 392 N.Y.S.2d 265, 270-71 (1976). In the United Kingdom, see Discount Records Ltd. v. Barclays Bank Ltd. [1975] 1 W.L.R. 315.

of the straight type.[129] It derives support from section 5-114(2)(a) of the U.C.C., under which "the issuer must honor the draft or demand for payment if honor is demanded by a negotiating bank or other holder of the draft or demand which has taken the draft or demand under circumstances which would make it a holder in due course," even though the documents are forged or effected with fraud.

This provision and Anglo-American case law indicate that even in the case of a straight credit, the negotiating bank obtains a right to present the bill of exchange in its own name accompanied by the stipulated documents.[130] Otherwise, there would be no basis for treating such a negotiating bank as being in a position superior to that of the beneficiary in instances of fraud.[131] Presumably, these cases are meant to give effect to a need of trade since the negotiation of documentary bills, drawn under commercial credits, is a widely accepted practice. This further explains the special savings of section 5-116(3) of the U.C.C.: "[e]xcept where the beneficiary has effectively assigned his right to draw or his right to proceeds, nothing [in section 116] limits his right to transfer or negotiate drafts or demands drawn under his credit."

Of course, the assignment of the proceeds of the credit may take place long before the beneficiary acquires the stipulated documents. Article 47 of the U.C.P. seems to have removed any doubts as regards the availability of such an assignment in common law jurisdictions. It achieved this by declaring that article 46 does not restrict the availability of an assignment of the proceeds. In English law such an assignment can assume the statutory form if it is to be absolute.[132] A charge over the proceeds can be effected by means of an equitable assignment.[133] To be effective, an assignment of both types has to be notified to the issuing bank.[134] The latter's consent is, however, not required.[135] The validity of an assignment of the proceeds of the credit cannot be assailed on the ground that the bank's undertaking to perform is of a strictly personal nature. In the absence of special circumstances, a promise to pay money does not confer a

129. *See, e.g.*, Discount Records Ltd. v. Barclays Bank Ltd., [1975] 1 W.L.R. 315. For criticism, see E. Ellinger, *Fraud in Documentary Credit Transactions*, 1981 J. BUS. L. 258.

130. *See* cases cited in note 128 *supra*.

131. For a clear distinction between negotiation, assignment and transfer of a documentary credit, see H. HARFIELD, LETTERS OF CREDIT 96-97 (1979).

132. *See* authorities cited in note 6 *supra*.

133. For the distinction between an equitable and a statutory assignment in English law, see G. TREITEL, *supra* note 2, at 453 *et seq.* That the proceeds of a credit are assignable is now accepted by H. GUTTERIDGE & M. MEGRAH, THE LAW OF BANKERS' COMMERCIAL CREDITS, 177 *et seq.* (6th ed. 1979).

134. Section 136(1) of the Law of Property Act, 1925 explicitly requires notification of the assignment to the debtor. Notice may, however, be given by the assignee if not effected by the assignor. Walker v. Bradford Old Bank, 12 Q.B.D. 511 (1884); Holt v. Heatherfield Trust Ltd. [1942] 2 K.B. 1. Notice is not needed to complete an equitable assignment, Corringe v. Irwell India Rubber, 34 Ch.D. 128 (1886); Re Trytel [1952] 2 T.L.R. 32; but in the case of successive equitable assignments, priority is attained by the assignee who is the first to notify the debtor. Dearle v. Hall, 38 Eng. Rep. 475 (1828). From a practical point of view it is therefore essential to notify the debtor of an equitable assignment.

135. This is clear from the language of § 136(1) of the Law of Property Act, 1925; *see also* G. TREITEL, *supra* note 2, at 453 *et seq.*

strictly personal right on the promisee.[136]

This position would appear to be just as clear under the U.C.C. Section 5-116(2) of the U.C.C. reads:

> Even though the credit specifically states that it is non-transferable or nonassignable the beneficiary may before performance of the conditions of the credit assign his right to proceeds. Such an assignment is an assignment of an account under Article 9 on Secured Transactions and is governed by that Article except that
>
> (a) the assignment is ineffective until the letter of credit or advice of credit is delivered to the assignee which delivery constitutes perfection of the security interest under Article 9; and
>
> (b) the issuer may honor drafts or demands for payment drawn under the credit until it receives a notification of the assignment signed by the beneficiary which reasonably identifies the credit involved in the assignment and contains a request to pay the assignee; and
>
> (c) after what reasonably appears to be such a notification has been received the issuer may without dishonor refuse to accept or pay even to a person otherwise entitled to honor until the letter of credit or advice of credit is exhibited to the issuer.[137]

This section has four salient provisions.[138] First, any assignment of the proceeds of the credit is deemed a secured transaction within the meaning of article 9. This is in keeping with the basic philosophy of the U.C.C., which treats any assignment of accounts receivable in this way.[139] Second, the assignment is ineffective unless the letter of credit is delivered to the assignee. The object of this provision is to preclude the beneficiary from assigning the proceeds more than once. Third, the issuing bank has to be notified of the assignment. Until the bank receives such notification it is entitled to pay a bill of exchange drawn under the credit to any holder thereof. Fourth, the issuing bank is entitled to refuse to pay the amount of a credit, of which assignment it has received notice, unless the letter of credit is produced by the person who makes the demand. It appears that the last two principles have the object of saving the bank from getting embroiled in a situation involving conflicting claims.

From a practical point of view, section 5-116(2) eliminates most possible conflicts between an assignee of the proceeds of the credit and a bank

136. Fitzroy v. Cave, [1905] 2 K.B. 364; *see also* I CHITTY ON CONTRACTS § 1175 (24th ed. 1977). For a direct American authority in point, see Old Colony Trust Co. v. Continental Bank, 288 F. 979, 981 (S.D.N.Y 1921), observing that the bank's undertaking in a commercial credit "is not of a personal character."

137. For the legislative history of U.C.C. § 5-116(2), see Pastor v. National Republic Bank, 56 Ill. App. 3d 421, 424, 371 N.E.2d 1127, 1129 (1977). *See also* B. KOZOLCHYK, *supra* note 16, at 491 *et seq.*; Harfield, *Code Treatment of Letters of Credit*, 48 CORNELL L.Q. 92 (1962); Ufford, note 35 *supra*.

138. It was held, in reliance on this provision, that the proceeds of a credit could be assigned even if the credit was of the non-transferable type. Shaffer v. Brooklyn Park Garden Apartments, 311 Minn. 452, 250 N.W.2d 172 (1977).

139. U.C.C. § 9-102(1)(b).

that negotiates the draft. Unless the assignee obtains the possession of the commercial credit in its original, his rights are ineffective.[140] If he obtains delivery of this document, his rights over the proceeds override those of a negotiating bank.[141] In point of fact, this type of clash of interests is unlikely to arise when the letter of credit is delivered to the assignee. Usually, a bank that is asked to handle a set of documents is unlikely to agree to negotiate them or to make an advance against them without perusing the letter of credit under which they are to be tendered. In an exceptional case, if the bank agrees to do so without inspecting the letter of credit the conflict between an assignee of the credit and a negotiating bank is not easily resolved. While the assignee has his priority over the proceeds, the negotiating bank has a security over the documents and the goods.[142] The bank would, of course, refuse to surrender the documents without obtaining payment. Obviously, the issuing bank in turn would refuse to perform its undertaking under the commercial credit without acquiring the documents. The notification of the assignment would, however, preclude the issuing bank from paying the proceeds to the negotiating bank or to any person other than the assignee. The result would therefore be a stalemate.

Apart from this esoteric type of case, section 5-116(2) appears to offer a safe machinery for the assignment of the proceeds of a credit subject to tender. It is applicable even in jurisdictions which have adopted the "New York amendment" under which article 5 of the U.C.C. does not apply to commercial credits governed by the U.C.P.[143] Admittedly, section 5-116(2) would not apply to such credits by reason of its being a provision of article 5, which is, of course, displaced in toto. Rather, article 47 of the U.C.P., under which an assignment of proceeds is to be governed by the "applicable law," brings this specific provision back into operation. This is true because section 5-116(2) does not stand in isolation but renders the assignment of the proceeds of a credit subject to the provisions of article 9 on secured transactions. Section 5-116(2) may therefore be regarded as declaratory of the applicable local law in point. The same proposition may be put differently. Section 5-116(2) is not displaced by the New York amendment, as this section constitutes a specific provision of article 9 on secured transactions just as it forms part of article 5. Article 9 is not displaced by the New York amendment. An alternative argument for the same view construes the New York amendment as excluding the application of article 5 in respect of commercial credits incorporating the U.C.P. only in so far as there is a conflict between the two sources.[144]

140. This follows from the language of U.C.C. §§ 5-116(2)(a), -(b).

141. This follows from U.C.C. §§ 5-116(2)(b), -(c) when read in conjunction with clause (a) of this provision. The possession of the credit enables the assignee to exhibit it to the issuer as required in clause (c).

142. The security usually is acquired by means of the bill of lading or other document of title.

143. This amendment is applicable in Alabama, Missouri and New York. 24 UNIFORM LAWS ANNOTATED—UNIFORM COMMERCIAL CODE 226 (Master ed. 1977). *See also* Shanghai Commercial Bank Ltd. v. Bank of Boston Int'l, 53 A.D. 2d 830, 385 N.Y.S.2d 548 (1976).

144. See H. HARFIELD, *supra* note 131, at 103, who rightly points out that this approach is supported by United Bank Ltd. v. Cambridge Sporting Goods Corp., 41 N.Y.2d 254, 258, 392

Section 5-116(2) and, likewise, the statutory and equitable assignment available in English law provide a suitable method for the assignment of the proceeds of a commercial credit subject to tender. In practice, conflicts between competing claims are obviated by the insistence of the assignee that the letter of credit be surrendered to him. Further, it is common practice for banks which advance funds against the assignment of a commercial credit to notify the issuing bank thereof in writing. Indeed, this course was adopted by the plaintiff—a British bank—in the *Creditanstalt-Bankverein* case discussed above.[145] It is noteworthy that the main issue in this case would probably have arisen even if the applicable law were that of England or the United States. The issue was defined as follows: Having obtained the document of assignment and having notified the issuing bank thereof, were the plaintiffs, the assignees, entitled to tender the documents furnished by the beneficiary in their own name? The answer, it must be conceded, seems uncertain. There is no English or American authority in point and the provisions of section 5-116(2) are singularly unhelpful in this regard. Indeed, it seems clear that this question had not occurred to the draftsmen of the U.C.C.

Difficulty arises from the fact that the right to the proceeds of the credit is to be separated from the tender of the documents. There can be no doubt that the assignee is entitled to demand the proceeds in his own right.[146] But can he, equally, tender the documents as a principal or "in his own name"? It seems self-evident that to deny him such a right introduces an element of ambiguity into the transaction. It appears artificial to expect the assignee to have the intention of tendering the documents in the beneficiary's name while claiming the proceeds for himself.[147] But hair-splitting subtleties are not unknown to the common law.

In Germany, the key to the answer was the correct definition of the "tender of the documents."[148] Once it was classified as an *Obliegenheit*, the road was paved for a correct analysis. The difficulty in common law systems is that the classification of rights and of duties is less elaborate than in German law, and consequently, less likely to furnish a suitable guide to a solution.

Common law systems do not have concepts such as *Obliegenheiten* and *Gestaltungsrechte*. The tendency is simply to draw a distinction between rights and duties. Which of these two categories encompasses the "tender of documents" under a commercial credit? If tender were regarded a duty, its assignment probably would be ineffective. Usually, contractual duties are not assignable in the sense of enabling the obligor to substitute another person as the one charged with performance.[149] This

N.Y.S.2d 265, 269 (1976); Foreign Venture Ltd. v. Chemical Bank, 59 A.D.2d 352, 399 N.Y.S.2d 114 (1977).

145. See text & note 65.

146. G. TREITEL, *supra* note 2, at 453-54; S. WILLISTON, WILLISTON ON CONTRACTS § 446 (3d ed. 1960).

147. For an analysis in this spirit, see Old Colony Trust Co. v. Continental Bank, 288 F. 979, 981 (1921).

148. See text & notes 104-19 *supra*.

149. A. GUEST, ANSON'S LAW OF CONTRACT 440-41 (25th ed. 1979); S. WILLISTON, *supra* note

does not mean that a person has to perform by himself each and every contractual obligation undertaken by him. He may, for example, employ a sub-contractor or an agent charged with the shipment of goods. But such a person performs the contract on behalf of his employer. The latter remains answerable to the promisee if the performance turns out to be defective.[150]

On the other hand, "rights" are frequently assignable. Thus, even the somewhat narrow statutory assignment of English law applies not only to debts but also to other choses in action which could have been assigned in equity.[151] A right may not, however, be assigned either in equity or under section 136(1) of the Property Law Act, 1925 if it is of a strictly personal nature.[152] This is significant as regards the "tender of documents" because one of the original objections to the assignment of the proceeds of a commercial credit was the alleged personal nature of the contractual relationship between the issuing bank and the beneficiary.[153] It is arguable that if the tender of the documents under a commercial credit constitutes a right, it ought to be regarded as one conferred strictly personally on the beneficiary.

If this analysis is accepted, then the "tender of documents" has to be made in the name of the beneficiary even in common law jurisdictions. Indeed, this would be the case regardless of whether the "tender of documents" was considered the beneficiary's "right" or "duty." The assignee would have to tender the documents on behalf of the beneficiary but thereupon be entitled to demand payment in his own name. This artificial result can, however, be avoided if the orientation of the analysis is shifted. An entirely new perspective emerges if, instead of focusing on the "tender of documents" from the beneficiary's viewpoint, one examines it in the light of the contractual relationships of the commercial credit transaction. Seen in this way, the "tender of documents" constitutes neither a right nor a duty of the beneficiary. It is, rather, the contingency upon which the proceeds of the credit become absolutely payable. Seen in terms of common law principles, the "tender of documents" is therefore to be regarded as a condition precedent. If it is performed, the bank is obligated to pay the amount of the credit. If regular documents are not tendered on time, the commercial credit expires and the bank is discharged.[154]

146, at §§ 411, 431 (3d ed. 1960); *see also* Crane Ice Cream Co. v. Terminal Freezing & Heating Co., 128 A. 280 (Md. App. 1925); Eastern Advertising Co. v. McGaw, 42 A. 923 (Md. App. 1899).

150. A. GUEST, note 149 *supra*; S. WILLISTON, *supra* note 146, at § 411 (referred to as a "right to delegate").

151. This is clear from the language of § 136(1) of the Law of Property Act, 1925; *see also* Torkington v. Magee, [1902] 2 K.B. 427, 430, *rev'd. on other grounds*, [1903] 1 K.B. 644; G. TREITEL, *supra* note 2, at 456-57.

152. G. TREITEL, *supra* note 2, at 472-73. Note that this very point was at one stage raised as regards the assignment of the proceeds of the credit. See note 19 *supra*. The doubts as regards the assignment of proceeds were removed by Old Colony Trust Co. v. Continental Bank, 288 F. 979, 981 (S.D.N.Y. 1921).

153. See note 19 *supra*.

154. This analysis derives support from the very definition of a letter of credit in U.C.C. § 5-103(1)(a), according to which a letter of credit involves the honor of the draft or other demand for payment "upon compliance with the conditions specified in the credit." *See also* U.C.P., *supra* note 9, at General Provision b (defining a credit) & art. 3.

This shift in orientation throws new light on the problem. The issue ceases to be the assignability of a "right" or "duty" to tender the documents. Placed in its new context, the question is whether the tender of the documents, which constitutes a condition precedent to the bank's duty to pay, has to be performed by the beneficiary in person or whether some intermediary, such as the assignee of the proceeds, can be charged therewith. The answer to this redefined question is self-evident. If the documents tendered are those stipulated in the commercial credit and emanate from the beneficiary, it is irrelevant "in whose name" they are being presented by the assignee. It is sufficient that the beneficiary has taken all the steps needed to perform the condition precedent set out in the commercial credit. There has, of course, never been a suggestion that the tender of the documents has to be physically effected by the beneficiary in person. Indeed, if this were required it would have been impossible to negotiate a documentary bill of exchange drawn under a commercial credit without running the risk of non-compliance with the requisite of the "personal" tender of the documents.

The advantage of this proposed analysis is that it regards the tender of documents as a matter ancillary to the demand for payment. When the tender of the documents removes the contingent element from the bank's undertaking in the commercial credit, the assignee has the indisputable right to demand payment in his own name. He need not form any "intention" regarding the capacity in which he effects the tender.

If this analysis were adopted, then the question which turned to be the ratio of the *Creditanstalt-Bankverein* case would cease to be an issue. Indeed, the plaintiff's answer in that case would become acceptable since it would then have to be construed as meaning that the plaintiff was acting in its own behalf by presenting the documents for the purpose of obtaining payment in its own name.[155]

It is hoped that subsequent authority will show which of the two views—that of the Commercial Court of Vienna and of the German law or the one here proposed in respect of common law systems—is to prevail.

155. The plaintiff's answer in that case, to the effect that the documents were presented in its own name, could have been intended to convey this message.