

## Documents required under the credit

### Introduction

This article will consider the documents called for under the credit. These include the documents normally required under the CIF Contract, such as the bill of lading, policy of insurance and the invoice. The letter of credit may call along with the draft for other documents such as certificates of origin, or inspection, or quality. The purpose of this article is to deal with the legal and technical aspects of these documents in relation to letters of credit transactions. The seller beneficiary must satisfy the banker before demanding payment that the tendered documents are those called for under the credit. On the other hand, the banker must convince the account party that the tendered documents conform to the tenor of the letter of credit. The operation of commercial letters of credit could not be fully understood without the grasp of the technical terms involved in the shipping documents.

International trade usage is an important factor in this area of the law, that uniformity has been achieved to a large extent. The United Nations Commission on International Trade Law (UNCITRAL) has drafted the UN Convention on Contract for the International Sale of Goods (1980). The object of the convention is to establish uniformity in the interpretation of shipping documents and trade terms concerned with international customs usage<sup>1</sup>. The trend towards recognizing international custom and usage resulted in a similarity in the area of international trade law between the different legal systems. One commentator said "The evolution of an autonomous law of international trade founded on universally accepted standards of business conduct would be one of the most important developments of legal science in our time. It would constitute a common platform for commercial lawyers from all countries, those of planned and free market economy, those of Civil law and Common law, and those of purely developed and developing economy, which would enable them to co-operate in the perfection of the legal mechanism of international trade."<sup>1</sup>

This article will consider the topics involved under the following headings:

I - the Bill of lading.

(a) The clean bill of lading.

(b) Clauses which do not render the bill of lading dirty.

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<sup>1</sup> Cf. Sara G.zwart, "the new international law of sales - A marriage between socialist, third world, common and civil law principles" Vol.13 N.C.J. Int'l L & Comm..Reg. (1988) At P. 109, See also Joseph P.Griffin & Michael R. Calabresse, "The New Rules for International Contracts" Vol. 74 American Bar Association Journal, 62 (1988) where it is stated, "without a uniform framework of neutral laws, international sales contracts can be a drafting nightmare. Moreover, traders' uncertainty over which law a tribunal will apply to resolve a dispute arising from international contracts restricts the growth of trade. The convention is a significant step toward harmonizing laws and providing greater legal certainty" see also Honnold, "The New Uniform Law for International SALE AND UCC- A comparison" 18 Int'l Law, 21 (1984)  
1a see Clive M. Schmitthoff, "The Source of the Law of International Trade" ( London, Steve & Sons, 1964) at P.4

- (c) On board and received for shipment clauses.
  - (d) The freight paid clause.
  - (e) Stale documents.
  - (f) The Combined Transport document.
  - (g) Transshipment.
  - (h) Partial shipment and shipment by installment.
- II - Insurance documents.
- III - the invoice.
- IV - other documents.
- (a) Certificates.
  - (b) The draft.

V - Automated communication of documents.

VI - the linkage between the documents.

I. The Bill of Lading

The banker's documentary credit normally calls for a full set of two or more original parts of a bill of lading, having the same tenor, in the form "clean on board", to order and blank endorsed. It is the practice in credit transactions to call for negotiable bills of lading, as the applicant for the credit customarily pledges the bill as a collateral security to the issuing banker before the goods arrive. In the Sudan the seller under a CIF or FOB Contract, or any other similar term, must produce, unless otherwise agreed, an "on board", negotiable bill of lading; and tender a full set of it.

The bill of lading must be issued in the normal mercantile form. In Hassan v Hamel & Horley Ltd.<sup>2</sup> Lord Sumner said "When documents are to be taken, the buyer is entitled to documents which substantially confer protective rights throughout. He is not buying litigation. These documents have to be handled by banks, they have to be taken up or rejected promptly and without any opportunity for prolonged inquiry; they have to be such as can be re-tendered to sub-purchasers, and it is essential that they should so conform to the accustomed shipping documents as to be reasonably and readily fit to pass current in Commerce".<sup>3</sup> In Sanders v MacLean<sup>4</sup> the bill of lading was described as the key which permits the holder to "unlock the door of the warehouse fixed or floating in which goods may chance to be"<sup>5</sup>

(a) The clean bill of lading

Article 32 of the Uniform Customs and Practice (UCP) 1993 revision, defines a clean transport document as one "which bears no clause or notation which expressly declares a defective condition of the goods and/or the packaging." Accordingly, a bill of lading which displays a superimposed

Clause or notation expressly stating an imperfect condition of the goods or the packing would not pass the check.

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<sup>2</sup> (1922) 2.A.C at P.36

<sup>3</sup> *Ibid*; similarly in *National Bank of South Africa V Banco Italian di Sconto* ( 1922) 10Lloyd's Rep. 531 at P.536 *Bankes L.J*, stated that, " it appears to me that the bill of lading must be a bill of lading which would be in the form ordinarily current in the ordinarily course of business of the trade." Also, in *Standinaviska Kreditakiebolaget V Barclays Bank* (1922) 22 Lloyd's Rep. 523, a bill of lading was issued without indicating the shipper and contained an illegal endorsement. It was held that it was irregular and thus non- merchantable.

<sup>4</sup> ( 1883) 11 O.B. P.327

<sup>5</sup> *Ibid* at P 341

In British Imex Industries v Midland Bank,<sup>6</sup> Salmon J., said "a clean bill of lading has never been exhaustively defined, and certainly do not propose to attempt that task now. I incline to the view, however, that a clean bill of lading is one that does not contain any reservation as to the apparent good order or condition of the goods or packing."<sup>7</sup>

In Golodetz & Co. inc. v Czarinkow-Rionda Co. inc.<sup>8</sup>, the court was asked to decide when notation should be done on the bill of lading to render it unclean? In other words, whether notation should be done at the time of shipment or could it be done thereafter? The facts were as follows: a consignment of sugar, shipped from India, destined to Iran, was damaged by fire after shipment. Thereupon, a notation was added to the bill of lading, indicating the damaged state of the sugar. The Chase Manhattan Bank which had advised the credit by adding its Confirmation, refused to accept that bill. Donaldson J. (as he then was) pointed out that to determine whether a bill is clean or not, two tests should be examined, the practical and the legal test. The practical, commercial test does not require indication of the exact time upon which a notation must be effected to qualify a bill of lading as a dirty one. Notation may be recorded at the completion of shipment or thereafter. On the other hand, the legal test requires notation to be effected at the time of shipment. His Lordship rejected the commercial, practical test and ruled that the legal test for a clean bill of lading is to be judged at the completion of shipment. He said "However, I have no doubt that this is the position. The bill of lading with which I am concerned casts no doubt whatsoever on the condition of the goods at that time and does not assert that at that time the ship-owner had any claim whatsoever against the goods. It follows that in my judgment this bill of lading, unusual though it is, passes the legal test of cleanliness."<sup>9</sup>

Professor Schmitthoff rightly observed that this decision indicates that in deciding whether a bill of lading is a clean or a foul one, what matters is the legal, rather than the Commercial test.<sup>10</sup> It may be argued that the banker is not obliged to look beyond the form of a document to determine legal issues which do not fall within the banker's business. Moreover, efficiency of the letter of credit device depends on certainty and automaticity of payment as long as the documents conform to the tenor of the credit. The normal banking practice is to refuse to accept bills of lading which show any qualification as to the apparent good order, and condition of the goods. The rationale behind this position is that bankers are not deemed to know the particulars of each trade, that even if a bill of lading is acceptable in a particular trade, a banker is not bound to accept a dirty bill without prior authorization from his customer.

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<sup>6</sup> (1958) 1 Q.B at P. 542

<sup>7</sup> *Ibid* at P. 551, see also the American case *Ista de Panay*, 292 Fed, 723 (2d lik 1923) *aff'd* 267CI.5.260 (1925), discussed by Daniel C. Draper in, "What is a clean bill of lading" Vol. 37 Cornell L.Rev.57 (1951) where a clean bill of lading is described as "one which contains nothing in the margin qualifying the words in the bill of lading itself."

<sup>8</sup> (1980) 1 W.L.R. 495

<sup>9</sup> (1980) W.L.R at P. 510

<sup>10</sup> Clive M. Schmitthoff, "Discrepancy of Documents in Letters of Credit Transactions" in J.B.L 94 (1987)

In Canadian and Dominion Sugar Co. Ltd v Canadian National (West Indies) Steamships Ltd.<sup>11</sup>, a bill of lading included the words "signed under guarantee to produce ship's clean receipt" was held by the Privy Council to be unacceptable as it conveys to "any business man that if the ship's receipt was not clean, the statements in the bill of lading as to apparent good order and condition could not be taken to be unqualified."<sup>12</sup>

(b) Clauses which do not render the bill of lading dirty

Article 31 of the UCP states in pertinent part that "unless otherwise stipulated in the credit; banks will accept transport documents which bear a clause on the face thereof such as "shipper's load and Count" or "said by the shipper to contain" or words of similar effect." Carriers of containerized cargo, insist upon transport documents in the manner indicated in the article. From the practical standpoint a carrier of a containerized cargo, unlike the carrier in the case of break-bulk cargo, can not ascertain the number of the packages, particularly when he receives a sealed container. The article addresses this situation, though; it does not expressly restrict its application to containerized cargo. To clarify the situation, the ICC Banking Commission was requested to express an opinion as to whether Article 32 of 1983 revision which now stands for article 31 1993 revision applies to both break-bulk cargo and containerized loads. The Commission refused to express an opinion on the issue.<sup>13</sup>

If the Article 31 applies to break-bulk cargo, it seems possible to say that the said Article contradicts Article 32, citation of which was stated earlier.<sup>14</sup> Article 32 expressly indicates that a banker, unless the credit otherwise stipulates will only accept a clean transport document, which by definition, must not contain a notation showing a defective condition of the goods and/or the packaging. Hence, the issue on this point is: what kind of notation a banker will accept?

The reported cases show a divergence of opinion as to disclaimer clauses, relating to quality, quantity, value and identity of the goods. In a Scottish case, Craig & Rose v Delargy,<sup>15</sup> a consignment of casks of oil was shipped from Algeria to Leith, Scotland. The captain of the ship with full cognizance of the shipper noted on the bill a clause in the words "not responsible for weight, quality, leakage or breakage". In an action by the holders of the bill, Lord Shand in the Scottish Court of Session, ruled that the disclaimer clause was effective vis a vis the original shipper and that the endorsee of the bill should take the bill subject to equities. He said "The result therefore is that this bill of lading contained on its face notice to any endorsee taking it, sufficient to put him on guard. It was not a clean bill of lading, if thereby he meant a bill of lading that is free from all exception."<sup>16</sup>

A different position was taken in the American case Camp v Corn Exchange National Bank,<sup>17</sup> where a bill of lading contained, besides the printed terms, a notation in red ink to the effect that a steamer is not

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<sup>11</sup> ( 1947) A.C 46

<sup>12</sup> *Id* at P.54

<sup>13</sup> *Opinions (1975-1979) of ICC Banking Commission at P.37*

<sup>14</sup> *See Para (a) above.*

<sup>15</sup> (1879) 16 S.L.R., 750

<sup>16</sup> *Id* at P. 759

<sup>17</sup> *Discussed by Daniel C. Draper, supra note 7 at 66*

responsible for bursting of bags and loss of contents, or for liquefaction of sugar. The applicant for the credit instructed the issuing bank not to pay. Nonetheless, the bank paid and sued the applicant for the credit for reimbursement. The court held that stamped disclaimers customarily employed by carriers would not render a bill of lading foul; otherwise the flow of international commerce would be hampered. The Court said "The integrity of foreign drafts or like bills of exchange, accompanied by commercial bills of lading and other documents drawn against letters of credit, should not be embarrassed or made difficult through technical or inconsequential reasons raised against payment."<sup>18</sup> In Westminster Bank Ltd. v Banco Nazionale di Credito & others,<sup>19</sup> a bill of lading included words to the effect that wrappers of a consignment of meat were wet and blood-stained. It was held by Roche J., that these words indicated conditions detrimental to the price of meat.

It is submitted that disclaimer clauses relating to shippers weight, load, count and value unknown, do not render a bill of lading dirty and "should be considered as one of the words of similar effect as provided in paragraph (2) of Article 31."<sup>20</sup> The same applies to disclaimer as to packaging unless the disclaimer clearly relates to a defective condition of the goods and/or the packing."<sup>21</sup>

A similar interpretation holds to a bill of lading indicating reference that additional costs incurred in the process of loading, unloading or similar operations and attendant risk to be shouldered by the shipper. The exporter normally pays the sea freight and thereupon receives a pre-paid bill of lading. However, some other charges made to cover extra expenses, may still await collection at the port of destination such as local taxes. Under these circumstances, it is a normal commercial practice for an exporter to pay for the sea freight, leaving additional charges to be satisfied by the consignee. In conformity with UCP provisions banks will accept transport documents showing indication by stamp or otherwise to costs supplementary to freight charges, such as costs of, or disbursements sustained as a result of loading, unloading, or like processes, provided however that the terms and conditions of the credit do not specifically foreclose such actions.

The better view is that such customary carrier's disclaimer clauses and additional cost clauses should be accepted by banks whether the bill of lading is a maritime, combined transport or a multi-bill of lading<sup>22</sup> as long as the issuer is acting as a carrier, or as agent of a named carrier. This interpretation does not create a contradiction between Articles 31 and 32 of the UCP, insofar as the notation does not affect the merchantability of the goods.

(c) "On board" and received for shipment clauses.

Article 23 of the UCP 1993 Revision clearly prescribes that a bank would only accept an "on board" bill of lading unless otherwise stipulated in the credit.23a. In the event the credit requires a transport document such as

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<sup>18</sup> *ibid*

<sup>19</sup> [1928] 2 Lloyd's L.Rep. at P. 306

<sup>20</sup> Article 31 of UCP revision 1993.

<sup>21</sup> *Opinions (1975-1979) of ICC Banking Commission at P. 40*

<sup>22</sup> *A multi-bill of lading relates to shipment arranged in one or two containers by a merchant under multiple sets of bills of lading rather than one set.*

the billing of lading, the banker is envisaged to accept a bill of lading which must comply with the following conditions. First, it must appear on its face to have been issued by a named carrier or his agent. Second, it must clearly indicate that the goods have been loaded on board or shipped on a named vessel. Third, it must embrace the full set of originals issued to the consignor if issued in more than one original. Fourth, it must be in strict conformity as to other items clearly prescribed under the letter of credit. On account of the above, a credit calling for a shipped bill of lading would not be considered strictly or substantially complied with on tender of "a received for shipment" bill of lading, unless changed by notation, indicating "on board" shipment in accordance with Article 23 (2) of the UCP which unequivocally mandates that loading on board or shipment on a named vessel may be demonstrated by two alternatives. First, by a transport document bearing pre-printed words on the bill of lading indicating loading on board a named vessel or shipment on a named vessel. Second, if the bill of lading contains an indication such as "intended vessel" or "received for shipment" or another similar qualification, then loading on board a named vessel must be evidenced by an on board notation on the bill of lading, coupled by an indication of the date on which the goods have been loaded on board and the name of the vessel.

In Diamond Alkali Export Corporation v F.C. Bourgeois<sup>23</sup>, a bill of lading indicated "received in apparent good order and condition from D.H. Horan to be transported by S.S. Anglia now lying in the port of Philadelphia or failing shipment by said steamer in and upon a following steamer, 280 bags Dense Soda." The court was asked to decide whether such a bill of lading in such a tenor could be considered a proper document. It was held that the buyer was entitled to reject on the ground that the tenor of the said bill of lading falls short of the requisite documentary compliance, that a proper bill of lading must acknowledge shipment.

In Biddle brothers v E. Clemens Horst Company,<sup>24</sup> L.J. Hamilton stated that "the delivery of the goods provided they are in conformity with the contract shall be delivery on board ship at the port of shipment."<sup>25</sup> Again in Landauer & Co. v Craven,<sup>26</sup> L.J. Scrutton indicated that in a CIF contract, the contract of affreightment must be procured on shipment.

In an American case Marine Midland Grace Trust Co. v. Danco Del Pais, S.A.<sup>27</sup>, a letter of credit stipulated for a truck bill of lading "on board and stamped". The beneficiary failed to adduce the required bill of lading due to

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*23 a article 23 of UCP 1993 revision reads pertinent as follows: If a credit calls for bill of lading covering a port-to port shipment, banks will, unless otherwise stipulated in the credit, accept a document, however named, which:*

*1. Appears on its face to indicate that the name of the carrier and to have been signed or otherwise authenticated by the carrier or a named agent for or on behalf of the carrier or the master or a named agent for or on behalf of the master.*

*Any signature or authentication of the carrier or the master must be identified as carrier or master, as the case may be. An agent signing or authenticating for the carrier or master must also indicate the name and the capacity of the party i.e. carrier or master, on whose behalf that agent is acting, and*

*2. Indicates that the goods have been loaded on board, or shipped on a named vessel.*

<sup>23</sup> {1971} 3. K.B. 443

<sup>24</sup> {1911} K.B 214

<sup>25</sup> *Id* at PP. 220-221

<sup>26</sup> {1912} 2 K.B 47

<sup>27</sup> 261 F. Supp.884 ( S.D.N.Y. 1966) discussed by John F. Dolan , " the law of letters of credits" Warren Corham & Lamont, Boston, New York at 6-14 1984 edition.

the fact that the Mexican Trucking Industry did not issue bills of lading in the form called for by the credit. The court ruled that the beneficiary failed to comply with the tenor of the credit. This case indicates that the mandate of the credit is overriding as to the industry practices out of which the underlying contract was concluded.

In Westpac Banking Corporation v South Carolina National Bank,<sup>28</sup> in pursuance of a sale of truck by an Australian Company to an American buyer, the credit stipulated tender of a shipped bill of lading. The bill of lading tendered to the advising bank stated, "Received for shipment", however, it also contained that the goods were "shipped on board, freight prepaid". The issuing bank rejected the documents on the ground that the bill of lading was a claused or a noted one. In this case Lord Goff, in the Privy Council, looked to the substance of the bill rather than its commercial form. His Lordship said "True, this bill of lading was, in form, a received for shipment bill, but with the words shipped on board, forming part of the stenciled wording inserted in the bill and present at the time of its signature and issue. It was plain on the face of the bill that the goods had at that time been shipped on board the intended ship Columbus America." <sup>29</sup>

It is respectfully submitted that there is no reason why a banker should not reject a bill of lading in the form received for shipment, insofar as his mandate falls within the ambit of scrutinizing tendered documents to see whether they conform to the credit terms or not. Pursuant to article 23(2) of the UCP, loading on board a named vessel may be substantiated either by a bill of lading expressly incorporates wording showing that loading on board a named vessel has been effected, or alternatively by way of a notation to that end on the bill of lading signed or initialed and dated by the carrier or his agent. In the event, a credit explicitly provides that loading on board has to be affirmed by a stamp as well to a pre-printed statement to that end, the banker is bound to check the B/L presented and ascertain strict conformity to the requirements called for under the letter of credit, even though such a requirement is redundant " <sup>30</sup>

A mate's receipt or a delivery order does not meet the requirement of an "on board" shipment. When goods are delivered to the ship-owner, the shipper normally receives a document called a mate receipt, showing particulars as to the goods such as the date of loading, identification marks, weight or measurement besides any recorded defect. If the mate receipt is a qualified one, it is called a claused receipt; otherwise it is called a clean receipt. Any recorded qualification on the mate receipt will be later included in the bill of lading to the effect of rendering it either a clean bill of lading or a foul one.

In Kum and another v Wah Bank Ltd. and another,<sup>31</sup> the issue raised before the court was whether a mate receipt is equivalent to a bill of lading for the purposes of documentary compliance. Lord Devlin stated that "if a mate receipt has been a bill of lading, the legal position would be beyond dispute. Not only is a bill of lading a document of title, but delivery of it is symbolic delivery of the goods. But the mate receipt is not ordinarily anything more

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<sup>28</sup> { 1986} I. Lloyd's Rep. 311

<sup>29</sup> *Id* at P.316

<sup>30</sup> *Opinions (1984-1986) of the ICC Banking Commission at P. 45*

<sup>31</sup> (1971) Lloyds L.Rep. 439

than evidence that the goods have been received on board." <sup>32</sup> However, if in a certain locality a mate receipt is intended and taken to be equivalent to a bill of lading, then the law indorses the intention of commercial men in this respect, as Lord Devlin observed that "their Lordships can see nothing unreasonable in using the mate receipt in this case as a document of title."<sup>33</sup>

On the other hand a delivery order is in effect a splitting of a consignment shipped under a bill of lading into smaller parcels sold to different buyers. A delivery order may be directed to an agent of the seller, or it may be delivered to the carrier, in the latter case, it is called a ship's delivery order. <sup>34</sup> It is normal banking practice that a banker may refuse a bill of lading indicating that the goods are loaded on deck as provided for by Article 31 of the UCP 1993 Revision (35)a. The rationale behind such refusal is that deck shipment may expose the goods to deterioration or loss. Hence, if a credit stipulates shipment under deck, a bill of lading indicating shipment on deck is deemed to be a bad tender. The practice in the Sudan does not differ in any respect from international usage. Trade usage is not only observed because it sets the pattern which commercial practice necessitates, but also because it is indispensable in resolving disputes that may arise in the course of trade.

(d) The freight paid clause

The issue of freight is dealt with by Article 32 of the UCP 1993 Revision. It reads as follows: -

"(a) unless otherwise stipulated in the credit, or inconsistent with any of the documents presented under the credit, banks will accept transport documents stating that freight or transportation charges (hereinafter referred to as freight) have still to be paid,

(b) if a credit stipulates that the transport document has to indicate that freight has been paid or prepaid, banks will accept a transport document on which words clearly indicating payment or prepayment of freight appear by stamp or otherwise, or on which payment of freight is indicated by other means.

(c) The words "freight prepayable" or "freight to be prepaid" or words of similar effect, if appearing on transport document, will not be accepted as constituting evidence of the payment of freight."

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<sup>32</sup> *Id* at P.444

<sup>33</sup> *ibid*

<sup>34</sup> Cf. *Cutteridge & Megrah* at P.133, see also *Schmithoff* " *Export Trade*", *Stevens and Son, London*, (1990) at P.581

35a article 31 reads as follows:

*Unless otherwise stipulated in the Credit, banks will accept a transport document which:*

1. *Does not indicate, in the case of carriage by sea or by more than one means of conveyance including carriage by sea, that the goods are will be loaded on deck. Nethertheless, banks will accept a transport document which contains a provision that the goods may be carried on deck, provided that it does not specifically state that they are or will be loaded on deck, and or*
2. *Bears a clause on the face thereof such as "shipper's load and count" or words of similar effect. and/or*
3. *Indicate as the consignor of the goods a party other than the Beneficiary of the Credit.*

- (d) Banks will accept transport documents bearing reference by stamp or otherwise to costs additional to the freight, such as costs of, or disbursements incurred in connection with loading, unloading or similar operations, unless the conditions of the Credit specifically prohibits such reference.

It is an established legal principle that in a CIF Contract, the seller is bound to procure a Contract of affreightment.<sup>35</sup> Then, what is the position if a credit provided for a FOB shipment, and the tendered bill of lading was marked freight paid? Some banks reject such a tender on the ground that if a credit stipulates shipment on FOB terms, this might show that the buyer had to pay freight in the importing country. However, in normal commercial practice a FOB seller pays freight charges on behalf of the consignee. Insofar, as the credit is independent from the underlying transaction as provided for in Article 3<sup>36</sup> of the UCP 1993 Revision, banks are not bound to look beyond the documentary issue, with a view to scrutinizing payment terms.

Accordingly, the ICC Banking Commission ruled that "in a credit which indicated that the goods were to be delivered on FOB terms, "freight paid" bill of lading or other "freight paid" transport document was acceptable unless the credit terms specifically provided to the contrary."<sup>37</sup> On the other hand, if the credit stipulates a CIF term, the normal practice is that the commercial invoice and the transport document must show a "freight paid" clause, on the ground that the CIF in this context, also reflects the price terms for documentary compliance purposes.

(e) Stale documents

A stale bill of lading is an expression employed in banking practice to denote a late presentation of a bill of lading. Article 43 of the UCP 1993 Revision provides that a bank will decline to accept any shipping document not presented within the time span stipulated in the credit. However, if no period of time is prescribed, the period is automatically set at 21 days. Failure of a beneficiary to effect shipment at the specified date, entitles the issuing banker to reject the tendered documents. Article 43 enacts as follows:

"(a) in addition to stipulating an expiry date for presentation of document(s), every credit which calls for transport documents should also stipulate a specified period of time after the date of shipment during which presentation must be made in compliance with the terms and conditions of the Credit. If no such period of time is stipulated banks will refuse documents presented to them later than 21 days after the date of shipment. In any event, documents must be presented not later than the expiry date of the credit."

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<sup>35</sup> Cf. *Soproma S.P.A V Marine and Animal By-products' Corp.* {1966} *Lloyd's Rep.* 367

<sup>36</sup> Article 3 of UCP 1993 Revision reads as follows: *Credits, by their nature, are separate transactions from the sale or other contract (s) on which they may be based and banks are in no way concerned with or bound by such contract(s), even if any reference whatsoever to such contract(s) is included in the Credit. Consequently, the undertaking of a bank to pay, accept and pay Draft(s) or negotiate and/or to fulfill any other obligation under the Credit, is not subject to claims or defenses by the Applicant resulting from his relationship with the issuing Bank or the Beneficiary.*

<sup>37</sup> *Opinions (1975-1979)*

In Stein v Hambros Bank,<sup>38</sup> a credit stipulated that shipment was to be made by Cabato Steamer, departing from Calcutta in the middle of January. Due to strikes, the vessel failed to depart on the agreed date, but instead sailed in February. The banker refused to pay on the basis of documentary non-compliance. The Court of Appeal held that the banker was entitled to reject the tendered documents on the ground that the stipulated time of departure was a condition of the credit.

It is worth reiterating that the stipulated latest time for shipment would remain unchanged, even if the validity of the credit was extended. On the other hand if presentation of the shipping documents was effected after the credit expiry, though not later than 21 days after the date of issuance, still the tender would be regarded a bad one, unless otherwise stipulated in the credit. The ICC Banking Commission decided that "if the credit does not stipulate a period of time, documents will be refused if they are presented later than 21 days after the date of issuance of the shipping documents or, of course, if the credit expires during such period of 21 days, if they are presented after the expiry date of the credit. In general, in the absence of a stipulated period in the credit, documents presented within this period of 21 days will be accepted, even though they cover a short sea voyage."<sup>39</sup>

The extension of the credit as provided for by Article 44(a) does not contradict Article 43 (a). Article 44 (a) runs as follows: if the expiry date of the credit and/or the last day of the period of time for presentation of documents stipulated by the Credit or applicable by virtue of Article 43 falls on a day on which the bank to which presentation has to be made is closed for reasons other than those referred to in Article 17<sup>40</sup> the stipulated expiry date and/or the last day of the period of time after the date of shipment or presentation of documents as the case may be, shall be extended to the first following business day on which such bank is open."

This Article deals with the extension of credit validity as to time of payment, acceptance or negotiation, whilst Article 43 deals with the period within which shipping documents should be presented. In effect a good tender of a shipping document must satisfy two conditions. First, it must be presented within the prescribed time stated in Article 43. Second, it must be presented within the credit validity period. However, the date of issuance of shipping document depends on whether it is an "on board" document, or "a received for shipment" document. In the event of the former, the time computation starts from the date of insertion into the bill, by the Carrier or his agent, of the phrase "on board" or a notation to that end. In the case of the latter, computation starts on the date of receipt as shown on the body of the bill.<sup>41</sup>

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<sup>38</sup> (1922) 10 Lloyd's Rep. 529

<sup>39</sup> *Opinions (1975-1979) of the ICC Banking Commission at P. 82*

<sup>40</sup> Article 17 reads as follows: banks assume no liability or responsibility for the consequences arising out of the interruption of their business by Acts of God, riot, civil commotions, insurrections, wars or any other causes beyond their control, or any strikes or lockouts. Unless specifically authorized, banks will not, upon resumption of their business, pay, incur a deferred payment undertaking, accept drafts or negotiate under credits which expired during such interruption of their business.

<sup>41</sup> *Opinions (1975-1979) of the ICC Banking Commission at PP. 85-86*

It seems inappropriate to deal with validity of the credit as separate from the date of presentation of shipping documents. It also seems implausible to demarcate between documents in terms of time of tender, in a device basically structured on documents. It is submitted, that the prescribed maximum 21 days was due to exchange control considerations prevailing in the United Kingdom. With a view to ameliorating this difficult situation, banks in other jurisdictions, carved out a clause in credits, to the effect that "stale documents are acceptable", which in the end, means that all documents tendered during the credit period of validity would be accepted as good tender. The banking practice in the Sudan is in accord with this stance, insofar, as the documents were tendered during the validity of the credit.<sup>42</sup>

(f).The Combined Transport document (CTD)

The Combined transport is a shipping document covering the whole journey on the basis of a start to finish liability, using a multi-modal transport system, issued at the time the goods were received by one carrier called the Combined Transport operator. This document came into being as a consequence of the changes introduced in the international transport of goods, utilizing technical innovations, in the process of cargo handling. An important factor which contributed to its emergence is the increased utilization of containerization to the extent that the containerized door-to-door carriage on the basis of a multi-modal transport system constitutes acute competition to the traditional single-mode transport system, in which a cargo is loaded on a break-bulk basis.

The multi-modal transport system is conducted by individual major combined transport operators, formed by consortia of shipping bodies, though not technically shipping companies, such as forwarding agents. The combined transport system is not yet regulated by an international convention; however, the ICC has drawn up rules entitled "Uniform Rules for a Combined Transport Document."<sup>43</sup> the most important two international bodies issuing the C.T.D. are the International Federation of Forwarding Agents Association (FIATA) and the Baltic and International Maritime Committee (BIMCO).

Two types of the C.T.D. are now in commercial practice. One is the C.T.D. which is not in the nature of a marine bill of lading, known as a house bill. It is a document issued by a freight forwarder, combining different cargoes in one consignment. Moreover, it indicates some or all of the conditions of carriage by reference to a groupage bill of lading, issued by a carrier to the forwarder. This type is dealt with by Article 26 of the UCP Revision 1993. Banks will accept multimodal transport documents provided however such documents must satisfy particular conditions as specified in the aforesaid article. First, the multimodal transport document must indicate the name of the carrier or multimodal transport operator. Second, it must be signed or otherwise authenticated by the carrier or the multimodal transport operator or the master or signed by a duly authorized agent for the carrier or multimodal transport operator or the master. Third, it must indicate that the goods have been dispatched, taken in charge or loaded on board. Fourth, it must indicate the place of taking in charge as stipulated in the credit which may be different from the port, airport, or place of loading. Fifth, it must indicate the place of

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<sup>42</sup> *Ibid* at P.88 (Ref.54)

<sup>43</sup> *Brochure No. 298*

destination stipulated in the credit which may be different from the port, airport or place of discharge. Sixth, it must contain the indication "intended" or similar qualification in relation to the vessel or the port of loading or the port of discharge. Seventh, it must consist of the full set of the multi modal transport document if issued in more than one original document. Eighth, reference must be made to the terms and conditions of the carriage. Ninth, the multi-transport document must not contain a provision indicating subject to a charter party or an indication that the carrying vessel is propelled by sail only. Tenth, the multi-transport document must strictly conform the terms and conditions as stipulated under the letter of credit.

Banks normally do not accept a house bill of lading unless the credit otherwise stipulates. However, a Combined Transport Bill of Lading is acceptable insofar as it was issued by forwarder acting as a carrier or as an agent of a named carrier. The C.T. Bill of Lading differs from a through bill of lading in terms of risk, that although both relate to a through journey involving both sea and land transport, however, in the case of the former, the Combined Transport Operator undertakes liability vis a vis the shipper, for loss or damage incurred with respect to both sea and land voyages, whilst in a through bill of lading, the carrier undertakes liability for loss or damage incurred for the sea-leg only. Indeed, the C.T. B/L furnishes a more definite guarantee than the traditional marine bill of lading. The practical problem is: what is the position if a bank demanded a through bill of lading, but instead a C.T. B/L was tendered?

Normally banks reject such a tender, due to the fact that most banks demand a tender of a marine/ocean bill of lading, indicating an "on board notation besides the name of the ship". With regard to a FIATA F. B/L, the practice was to indicate an "on board" notation on C.T.D., without mentioning the name of the ship. Under the circumstances, the C.T.D. would not qualify as a marine bill of lading as per Article 23 (a)(ii)<sup>44</sup> which stipulates that the bill of lading must indicate besides an "on board" notation, that the goods were shipped on a named vessel. Accordingly, it may be said that "The FIATA F. B/L was a carrier's document which may be acceptable as a marine bill of lading, provided however, that it must satisfy all the requirements as spelled out in Article 23 of the UCP.<sup>45</sup> Again, it may be said that the FIATA F. B/L is acceptable with regard to a single mode of transport under Article 23(c) subject to satisfaction of the conditions as stipulated in Article 23 of the UCP<sup>46</sup> The crux of the matter is that, an acceptable FIATA F. B/L must answer for the requirements of the traditional bill of lading, if the credit called for a marine bill of lading.

#### (g) Transshipment

A proper bill of lading must not include a transshipment clause, that is to say it must deal with the whole journey. However, a thorough bill of lading may include a provision for transshipment at an intermediate port from a local to an ocean steamer not in the same ownership. In Hassan v Hamel & Horley,

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<sup>44</sup> Article 23 (a) paragraph 2 clearly stipulates that an indication on the face of the bill of lading must show the goods have been loaded on board, or shipped on a named vessel

<sup>45</sup> Opinions (1984-1986) of the ICC Banking Commission at P. 40 (Ref. 120)

<sup>46</sup> Ibid at p.41

Ltd.,<sup>47</sup> a Swedish merchant sold to English Company, guano in bags CIF Norway, destined to Yokohama. To transport the goods, the Swedish seller agreed with an agent of Japanese Company at Hamburg, which conducted a line of steamers from Hamburg to Japan, but ran no steamer from Norway. The terms of the agreement were to transport the guano from Hamburg to Japan and to this end the agent had to sign a through bill of lading indicating when the goods were received by him. The agent upon receipt of the goods issued a through bill of lading dated 5th May, although it indicated on the margin "shipped from Braatvag according to the bill of lading on 22nd April, 1920". The buyer rejected the documents and claimed the price of the goods. Judgment was entered for the buyer. Lord Sumner was reported to have said "and I am quite sure that a bill of lading only issued thirteen days after the original shipment, at another port, in another country many hundreds of miles away, is not duly procured "on shipment", instead the ocean bill of lading was not procured as a part of this CF&I shipment at all, and "on shipment" does not at any rate mean on re-shipment or on transshipment." <sup>48</sup>

Article 23(c) of the UCP 1993 Revision states that "unless transshipment is prohibited by the terms of the credit, banks will accept a bill of lading which indicates that the goods will be transshipped, provided that the entire ocean carriage is covered by one and the same bill of lading " However, transshipment is acceptable even if the credit provides otherwise, in particular cases enumerated by Article 23(d), provided that the whole voyage was covered by one bill of lading. This Article reads in paragraph (d) as follows: -

"(d) Even if the credit prohibits transshipment banks will accept a bill of lading which: -

- (i) indicate that transshipment will take place as long as the relevant cargo is shipped in Container(s) , Trailer(s) and/or LASH barge(s) as evidenced by the bill of lading, provided that the entire open ocean carriage is covered by one and the same bill of lading, and or
- (ii) Incorporate clauses stating that the carrier reserves the right to transship .

(h) Partial shipment and shipment by installment

Partial shipments arise in a situation whereby the exporter due to different sources of supply as to the goods, arranges to ship the consignment into two parts or more, utilizing different ships and shipping documents with regard to each consignment. However, partial shipment is acceptable in a situation where it was made on the same vessel, covering the same voyage, irrespective of the date of issuance of the transport documents and the feeder services utilized to that end. Article 40 of the UCP revision 1993, deals with this situation. It provides as follows:

- a. Partial drawings and/or shipments are allowed, unless the Credit stipulates otherwise.

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<sup>47</sup> (1922) 2 A.C.36, ( 1922) 10 Lloyd's Rep. at 507

<sup>48</sup> Ibid at p.47

- b. Transport documents which appear on their face to indicate that shipment has been made on the same means of conveyance and or the same journey, provided they indicate the destination, will not be regarded as covering partial shipments, even if the transport documents indicate different dates of shipment and/or different ports of loading, places of taking in charge, or dispatch.
- c. Shipments made by post or by courier will not be regarded as partial shipments if the post receipts or certificates of posting courier receipts or dispatch notes appear to have been stamped, signed or otherwise authenticated in the place from which the Credit stipulates the goods are to be dispatched, and on the same date.

Article 40 clearly shows that shipments made by sea, however it utilizes different other mode of transport on the same vessel for the same voyage, will not be considered as partial shipment, even if the transport documents evidencing loading on board indicate different dates of issuance of transport documents or indicate different ports of loading on board.

In Rosenthal v Esmail<sup>49</sup> a shipper divided the goods into two consignments under two bills of lading with their ancillary documents, although employing the same ship for the same voyage. The question at issue was whether the two consignments were severable by virtue of Article 11(l) (c) of the Sale of Goods Act 1893? The House of Lords ruled that since there was one shipment, there was only one entire contract. Lord Upjohn said "On the particular facts of this case I am of the opinion that there was only one shipment, and therefore only one entire contract."<sup>50</sup>

A practical issue arises when a credit authorizes shipment by installments at different stipulated periods. In such a case, failure to deliver one installment at the specified time ends the obligation of the banker to pay for next installments, even if delivered within the prescribed time. Article 41 of the UCP revision 1993 tackles the issue. It reads as follows: "if drawings, and/or shipments by installments within given periods are stipulated in the

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<sup>49</sup> { 1965 } IW.L.R at p.1117

<sup>50</sup> Ibid at p.1123

51a article 34 reads as follows;

- a. *Insurance documents must appear on their face to be issued and signed by insurance companies or underwriters or their agents.*
- b. *If the insurance document indicates that it has been issued in more than one original copy, all the original must be presented unless otherwise authorized in the Credit.*
- c. *Cover notes issued by brokers will not be accepted, unless specifically authorized in the Credit.*
- d. *Unless otherwise stipulated in the Credit, banks will accept an insurance certificate or a declaration under an open cover pre-signed by insurance companies or underwriters or their agents. If a Credit specifically calls for an insurance certificate or a declaration under an open cover, banks will accept, in lieu thereof, an insurance policy.*
- e. *Unless otherwise stipulated in the Credit, or unless it appears from the insurance document that the cover is effective at the latest from the date of loading on board or dispatch or taking in charge of the goods, banks will not accept an insurance document which bears a date of issuance later than the date of loading on board or dispatch or taking in charge as indicated in such transport document.*
- f. *Unless otherwise stipulated in the Credit, or unless it appears from the insurance document that the cover is effective at the latest from the date of loading on board or dispatch or taking in charge of the goods, banks will not accept an insurance document which bears a date of issuance later than the date of loading on board or dispatch or taking in charge as indicated in such transport document.*

credit and any installment is not drawn and/or shipped within the period allowed for that installment, the credit ceases to be available for that and any subsequent installment unless otherwise stipulated in the credit."

## II. Insurance Documents

It is the practice in documentary credit transactions to require the beneficiary under the credit to arrange for the benefit of the account party, an insurance cover upon terms current in the trade. The position in this respect is similar to that of a CIF Contract. Article 34 (51a) of the UCP 1993 revision provides that insurance documents stipulated in the credit must be issued or signed by insurance companies or underwriters or their agents. In international sales contracts it is invariably the practice, that insurance documents are stipulated in the credit with a provision that such insurance documents must be issued and/or signed by insurance companies or underwriters or their agents. Again, cover notes issued by brokers will not be accepted, unless specifically authorized by the credit."

Cover notes and certificates of insurance are not proper insurance documents though in practice they were extensively used in international commercial transactions. In Wilson, Holgate & Co. v Belgian Grain and Product Co.,<sup>51</sup> Bailhache J., explained the practical considerations for utilization of certificates of insurance. The learned judge said that "The preparation of a policy of insurance takes some little time, particularly if there are a number of underwriters or several insurance companies, and when documents require to be tendered with promptness on the arrival of a steamer in order that expense may not be incurred through delay in unloading, or through the buyer not being ready to take delivery, it is not always practicable to obtain actual policies of insurance. In order to facilitate business in circumstances such as these, buyers are, accordingly in the habit of accepting brokers' cover notes and certificates of insurance instead of insisting on policies."<sup>52</sup> It is the normal practice in the insurance industry that an insurance company issues a certificate of insurance bearing a pre-printed signature of the company or its agent. This certificate becomes valid on being countersigned by the insured.<sup>53</sup> It is submitted that if a credit stipulates for a policy of insurance, tender of a certificate will not do. In the above cited case,<sup>54</sup> Bailhache J., said "He, the buyer, can not be compelled to take a document which is something like that which he has agreed to take. He is entitled to have a document of the very kind which he has agreed to take, or at least one which does not differ from it in any material respect."<sup>55</sup>

Again, in Diamond Alkali Export Corporation v Bourgeois,<sup>56</sup> McCardie J. expressed the view that "a certificate, however, is an ambiguous thing, it is unclassified and undefined by law, it is not even mentioned in Arnold on Marine Insurance. No rules have been laid upon it. Would the buyer sue upon the certificate or upon the original policy plus the certificate? If he sued

<sup>51</sup> (1920) 2 K.B at p.1

<sup>52</sup> *Ibid* at p.8

<sup>53</sup> *Opinions (1975-1997) of ICC Banking Commission* at p. 69

<sup>54</sup> *Op cit supra* note 52

<sup>55</sup> *Ibid* at p.9

<sup>56</sup> (1921) 2K.B at p.443

simply on the certificate he could put in a part only of the contract, for the other terms of the contract, namely the conditions of the actual policy, would be contained in a document not in his control and to the possession of which he is not entitled. Thirdly, I point out that before the buyer could sue at all he would have to show that he was the assignee of the certificate." <sup>57</sup>

In Scott v Barclay's Bank Ltd., <sup>58</sup> a letter of credit called for "an approved insurance policy", however, the beneficiary drew a draft accompanied with a certificate issued by an American Company showing that a policy was issued without indicating the contents of that policy. The bank refused to honor the beneficiary's draft. Hence the action. Rendering judgment in favor of the bank, Scrutton J., was reported to have said "in my view they have a right to see a document or documents which contain the terms of the insurance which is offered to them as security for the loss of the goods, and if the document tendered to them does not show them what the terms of that insurance, they are, from a commercial point of view, reasonable in refusing to approve it or accept it as a policy." <sup>59</sup>

In practice merchants engaged in recurrent acts of shipment find it difficult to wait till a policy was issued for each instance of shipment. On this account they eventually resort to the certificate service. Nonetheless, Lloyds and the Institute of London Underwriter's certificates are accepted by London bankers on the ground that all the terms of the genuine policy are incorporated thereto.<sup>60</sup> The American legal position as to a certificate of insurance differs from the English practice. With regard to the American practice a certificate stands in the same legal position as a policy. Professor Schmitthoff recommends acceptance of a certificate in lieu of a policy on the ground that a certificate implies issuance of a formal policy. He said "However, it is thought that in modern English practice an insurance certificate or other document entitling the insured (or transferee) to demand the issue of a policy is regarded as equivalent to a formal policy, by implied agreement of the parties, unless their contract stipulates that the seller shall tender a formal policy. The decisive criterion is that the document tendered entitles the holder at any time to demand the issue of a formal policy. A cover note which does not have this quality need not be accepted by the buyer unless he has so agreed or there is a course of dealing or custom of the trade which otherwise provides." <sup>61</sup>

A banker is obliged to see that the insurance document covers the merchandise at the latest from the date of shipment as prescribed by Article 34 (e) of the UCP, 1993 Revision. This article reads as follows: - "Unless otherwise stipulated in the credit, or unless it appears from the insurance document(s) that the cover is effective at the latest from the date of loading on board or dispatch or taking in charge of the goods, banks will not accept insurance documents which bear a date of issuance later than the date of loading on board or dispatch or taking in charge of the goods as indicated in such transport document."

<sup>57</sup> *Ibid* at p.456

<sup>58</sup> [1923]2 K.B at p.1

<sup>59</sup> *Ibid* at p. 15

<sup>60</sup> See *Cuteridge & Megrah*, "The Law of Bankers' Commercial Credits" (Europa Publications limited, London, 127, 1979 ed.)

<sup>61</sup> Cf. Schmitthoff's "Export Trade" (Stevenson and Sons, 8 Ed. 35 (1986))

The question which arises in this context is: what is the position as to the currently, worldwide used, warehouse to warehouse clause? The warehouse to warehouse is a clause in the category known as Institute Cargo Clauses, introduced in 1982 by the Technical Clauses Committee of the Institute of London Underwriters. This Clause as the name indicates, deals with a space dimension, whilst Article 34 deals with a time dimension to the effect that the insurance cover should be made at the latest by the date of shipment. Normally, an insurance document shows the date on which the goods were taken on board, or taken in charge. On the other hand this clause normally takes a date later than the date of shipment. The British bankers showed their misgivings that a warehouse to warehouse clause would not establish the time dimension prescribed under Article 34 of the UCP. The ICC Banking Commission on one occasion decided that "given the uncertainty found as to the meaning of warehouse to warehouse", this clause did not have to be generally accepted, but that, in light of the indications given during the discussion, it should be accepted when used in the context of the "Institute Cargo Clauses".<sup>62</sup>

The decision shows a hesitant approach, and when subjected to criticism by bankers, *inter alia*, Japanese and Belgian, the Commission later backed down, and decided at its meeting of October 28, 1986 that its previous decision should be considered null and void.<sup>63</sup> In my view bankers are not at all obliged to interpret a clause which falls within the discipline of insurance. Moreover, it does not seem convincing to reject such a clause, though; it furnishes a cover which starts from the warehouse of origin throughout the journey till the contemplated final warehouse at destination. Put in this context, the clause satisfies both the space and the time dimension, albeit, what is required is the latter. As there is no authority to serve as a guide in such a close situation, interpretation of the clause in connection with Article 36 of the UCP, still remains to be seen.

Article 35 (e) of the UCP revision 1993 indicates that the type of risk must clearly be shown in the credit. This Article runs as follows: - "Credits should stipulate the type of insurance required and, if any, the additional risks which are to be covered. Imprecise terms such as "usual risks" or "customary risk" should not be used; if they are used, banks will accept insurance documents as presented, without responsibility for any risks not being covered."

The position as to all risk insurance is tackled by Article 36 of the UCP 1993. It enacts as follows:- "Where a credit stipulates "insurance against all risks", banks will accept an insurance document which contains any "all risks" notation or clause, whether or not bearing the heading "all risks", even if indicating that certain risks are excluded, without responsibility for any risk(s) not being covered." However, an all risk clause does not mean any risk whatsoever, but must be construed in light of the particular trade involved. The rationale behind this is that, the latitude of risks could not be controlled such as a market fall, currency fluctuations, and government interferences rendering a loss inevitable, buyer's bankruptcy and a host of other instances.

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<sup>62</sup> *Opinions (1975-1979) at p.73 (Ref.39)*

<sup>63</sup> *Opinions (1984-1986) at p.53 (Ref.131)*

In Yuiu v Scott Robson <sup>64</sup> a Buenos Ayres merchant sold on CIF terms, cattle to a purchaser at Durham. Payment was against documents. It was stipulated that the seller had to procure insurance "against all risks". Thereupon, the seller procured a policy against capture, seizure and detention, and consequences thereof". Afterwards the cattle contracted disease on the voyage that on arrival the authorities decided to destroy the cattle. Hence, the buyer raised a suit against the seller for failure to procure the requisite insurance cover against all risks. Judgment was entered for the buyer on the ground that the risk of the disease which broke among the cattle was an obvious one, within the contemplation of the parties at the time of contracting. The practical difficulty of such a clause was explained by Cutteridge & Megrah that "the lack of a universal meaning to such a term has at times resulted in buyers of some countries demanding cover against a string of specified risks. Unless there is a universally accepted meaning to "all risks" the expression means what its user intends it to mean, which can be anything between every risk of whatever nature on the one hand and every risk normally insured against in the particular trade on the other." <sup>65</sup>

In British & Foreign Marine Insurance Co. Ltd. v Gaunt,<sup>66</sup> Lord Summer was reported to have said "There are of course limits to "all risks". They are risks and risks insured against. Accordingly the expression does not cover inherent vice or mere wear and tear or BRITISH capture. It covers a risk, not a certainty; it is something which happens to the subject matter from without, not the natural behavior of that subject matter being what it is in the circumstances under which it is carried. Nor is it a loss which the assured brings about by his own act, for then he has not merely exposed the goods to the chance of injury, he has injured them himself." <sup>67</sup> The policy must cover the whole voyage, <sup>68</sup> and should be issued in the same currency of the credit, indicating an amount not less than the price of the goods.

Article 34 f (1) of the UCP 1983 reads as follows: - "unless otherwise stipulated in the credit, the insurance document must be expressed in the same currency as the credit. In connection with the amount required it provides in 34 f (11) as follows: Unless otherwise expressed in the credit, the minimum amount for which the insurance document must indicate the insurance cover to have been effected is the CIF (Cost, insurance and freight - "named port of destination") or CIP (carriage and insurance paid to (named place of destination) value of the goods, as the case may be, plus 10%, but only when the CIF or CIP value can be determined from the documents on their face. Otherwise, banks will accept as such minimum amount 110% of the amount for which payment, acceptance or negotiation is requested under the credit, or 110% of the gross amount of the invoice, whichever is the greater.

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<sup>64</sup> {1908} I K.B 270

<sup>65</sup> Cf. *Cutteridge & Megrah Op Cit, supra note 61 at p131*

<sup>66</sup> {1921} 8 Lloyd's L.R.15

<sup>67</sup> *Id at p.57*

<sup>68</sup> *In Orient Company Ltd.V Brekke & Howlid (1913) I K.B, 531 at P.537 Mr. Justice Lush in indicating the buyer's right said, " he is entitled to say that he will not pay the price unless a policy of insurance is handed to him along with it so that if anything has gone wrong with the goods he may acquire the right under the policy in lieu of the goods themselves. Even if it could be made out he had waived the actual tender of a policy, that alone would not help the seller, what has to be shown is that he waived the insurance itself."*

The insurance policy though constitutes part of the shipping documents, but, unlike the case of a bill of lading, the insurance document may be tendered during the credit's extended period.<sup>69</sup>

### III. The Invoice

The commercial invoice is a brief description of the goods made by the exporter, representing the state of the goods shipped or to be shipped. Article 37 of the UCP 1993 Revision stipulates that the invoice must describe the goods, in terms corresponding with their description in the credit. In other documents, description of the goods need not fully coincide in verbatim with that indicated in the credit and the invoice. Article 37 c reads as follows:

"The description of the goods in the commercial invoice must correspond with the description in credit. In all other documents, the goods may be described in general terms not inconsistent with the description of the goods in the credit." In Keydon Compania Naviera S.A. v National Westminster Bank Ltd. and others<sup>70</sup>, a letter of credit was issued in favor of a seller of a ship, stipulating that payment shall be made on presentation of specified documents, including an invoice. The tendered invoice contained a description of the vessel contrary to that which was indicated in the credit, though a tendered certificate tallied with the description of the credit. The court held that the bank was entitled to reject the documents. Mr. Justice Parker was reported to have said "if specific items of description are included in the credit they must also be included in the invoice. The certification may no doubt incorporate this and a lot more details besides, but all of these are nothing to do with the bank".<sup>71</sup>

In an American case Oriental Pacific inc. v Toronto Dominion Bank,<sup>72</sup> a beneficiary tendered a draft accompanied with an invoice indicating the amount \$39,206.26, whilst the amount available by virtue of the credit was \$37,919.41. Although the draft indicated the correct amount, the bank refused to honor the draft, on the ground that the invoice was improper. The court upheld the bank's refusal. Again in Key Appliance inc. v First National City Bank,<sup>73</sup> the credit stipulated that the beneficiary's invoice must be countersigned by the buyer. The court upheld the bank's refusal to accept the beneficiary's draft as the invoice did not accord with the tenor of the credit.

One might argue, that an invoice indicating an amount less than the credit may be acceptable, subject to rectification, as neither the position of the issuing bank, nor the account party would be financially impaired, yet the ICC Banking Commission, inclined to preserve the rigor of the rule, and decided that "if the amount indicated in the credit was not preceded by "up to" or words of similar meaning, a commercial invoice for a smaller amount could not be accepted."<sup>74</sup> However, banks were not required to revise the calculations entered into an invoice; nonetheless, a banker may be responsible for conspicuously discernable errors.

<sup>69</sup> See article 44 of UCP.

<sup>70</sup> {1981} 1 Lloyd's L.R.68

<sup>71</sup> Id at p.76

<sup>72</sup> 78 Misc. 2d 819 N.Y.S.2d 957 (sup ct 1974) discussed by Dolan supra note 28 at 6-12

<sup>73</sup> 46 A.D.2d 622, 359 N.Y. S 2d 886 {1974} discussed by Dolan Op cit at 6-12

<sup>74</sup> Opinion (1974-1979) of ICC Banking Commission at p. 77 ( Ref.44)

#### IV. Other documents

##### (a) Certificates:

At the request of the applicant for the credit, a banker may demand that documents other than shipping documents should be tendered by the beneficiary under the credit, such as certificates of origin or, inspection, or quality. The basic rule as enunciated in Article 21 of the UCP revision 1993 is that, a document called for under a letter of credit, must indicate by whom such a document is to be issued, besides its wording or data content. The said Article reads as follows:- "When documents other than transport documents, insurance documents and commercial invoices are called for, the credit should stipulate by whom such documents are to be issued and their wording or data content. If the credit does not so stipulate, banks will accept such documents as presented, provided that their data content is not inconsistent with any other stipulated document presented." The tendered document must convey the information asked for; otherwise the banker is not bound to accept it.

In Equitable Trust Co. of New York v Dawson & Partners,<sup>75</sup> the letter of credit called for a certificate of quality to be issued by the Dutch Government and to be signed by the Chamber of Commerce of Batavia. The said Government normally did not issue certificates of that description. Thus, in lieu of it, a certificate of quality signed by experts was called for. Moreover, there was no Chamber of Commerce in Batavia, however, a similar functioning body under the name "Commercial Association of Batavia" was available. The beneficiary tendered a certificate of quality signed by one expert and countersigned by the Commercial Association of Batavia. The applicant for the credit refused to reimburse the issuing banker and contended that the banker breached his mandate. It was held that the bank was not entitled to be reimbursed on the ground that a certificate signed by one expert was a bad tender.

In Eximetals Corp. v Pinheiro Guinmaro, S.A.,<sup>76</sup> an American case, a letter of credit called for an inspection certificate to be countersigned by the buyer and to be accompanied with a description as to the quality of units of "Ribbet Flang". The tendered certificate did not comply with the letter of credit requirements, but did indicate that the material conformed to the seller's "proforma invoice". The court upheld the banker's refusal to accept the tendered documents on the ground that the role of the issuing bank is a "ministerial" one, and it is beyond the domain of the role of the issuing banker to judge whether the proforma invoice was sufficient for that end or not.

Again, in Far Eastern Textile, Ltd. v City Nat'l Bank & Trust Co., the credit stipulated tender of a purchase order signed by one called "Larry Fanin".<sup>77</sup> The beneficiary submitted a purchase order, but signed in a manner different from that of the credit's requirement. The tendered signature was in the form "Larry Fanin by Paul Thomas". The issuing banker refused to accept the documents, and the court upheld the position of the banker on the ground that the issuing banker was not bound to inquire on the status of "Paul

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<sup>75</sup> { 1927} 27 Lloyd's L.R 49

<sup>76</sup> 73 A.D.2d 526, 422 N.Y.S.2d 684 {1979} aff'd 51 N.Y 2d 865, discussed by Dolan, *op cit*, supra note 28 at pp. 6-16

<sup>77</sup> 430 F.Supp.193 (S.D. Ohio 1977) discussed by Dolan, *op cit*, supra note 28 6-16

Thomas". In Commercial Banking Company of Sydney Ltd. v Jalsard Pty. Ltd.,<sup>78</sup> the appellant at the request of the respondent issued a confirmed irrevocable letter of credit in favor of a Taiwan seller in a respect of a shipment of two consignments of decorative battery-operated Christmas lights. The letter of credit called, inter alia, for a certificate of inspection. The documents were tendered by the seller, and ultimately given by the banker to the buyer against reimbursement of the purchase price of the goods. The certificate of inspection was furnished by two firms of surveyors in Taiwan, who supervised the packing as to quantity and condition of contents. On arrival of the goods to Sydney they were found to be of poor quality and substantially unsaleable. It was proved that the defects could not be ascertained by mere visual inspection. That to ascertain the defects, physical testing must be conducted. In an action for breach of contract, the Supreme Court of New South Wales entered judgment for the respondent buyer. On appeal the Judicial Committee, reversed the said decision.

In explaining the legal nature of a certificate of inspection and the responsibility of the banker thereof, Lord Diplock said "Certificate of inspection" is a term capable of covering documents which contain a wide variety of information as to the nature and the results of the inspection which had been undertaken. The minimum requirement implicit in the ordinary meaning of the words is that the goods, the subject matter of the inspection have been inspected, at any rate visually, by the person issuing the certificate. If it is intended that a particular method of inspection should be adopted or that particular information as to result of the inspection should be recorded, this, in their Lordship's view, would not be implicit in the words "Certificate of inspection", by themselves, but would need to be expressly stated."<sup>79</sup>

It is arguable that the reason behind demanding a certificate of inspection is to guarantee that a test, as to merchantability, had been made on a sample of the goods. The banker, in this context, must act reasonably to protect the interest of his customer by giving clear instructions to the effect of undertaking an inspection as to the satisfactory state of the goods. A customer may require a document to be tendered, irrespective of its legal value, but this does not mean that the document may well have no commercial value.

(b) The draft

The draft must comply with the tenor of the credit, and must be presented at the time and place stipulated for in the credit. It must also indicate the transaction under which it is drawn, bearing the signature of the beneficiary, or drawer. In the case no specific date is prescribed, it must be drawn within a reasonable time. Drafts must be drawn in the currency of the credit showing an amount neither more nor less. In Chase Manhattan Bank v Equi-bank,<sup>80</sup> it was held that a telex in the tenor "please remit" was a complying tender on the ground that a draft is in essence an order and the phrase "please remit" although it denotes a polite language is still an order the

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<sup>78</sup> { 973 } A.C 279 {1972} 2 Lloyd's Rep. 529

<sup>79</sup> Id at 285

<sup>80</sup> 394 F.supp.352 ( W.D.pa 1975) discussed by Dolan supra note 28 at 6-12

same as a sight draft. In Bounty Trading Corp. v S.E.K. Sportswear Ltd.,<sup>81</sup> the beneficiary, in lieu of a draft, tendered a collection letter. It was held that a collection letter was a bad tender.

#### Automated Communication of documents

Article 11 of UCP 1993 revision deals with Teletransmitted and Pre- Advised Credits reads as follows: "When an issuing Bank instructs an Advising Bank by an authenticated teletransmission to advise a Credit or an amendment to a Credit, the teletransmission will be deemed to be the operative Credit Instrument or the operative amendment, and no mail confirmation should be sent. Should a mail confirmation nevertheless be sent, it will have no effect and the Advising Bank will have no obligation to check such mail confirmation against the operative Credit instrument or the operative amendment received by teletransmission. if the teletransmission states " full details to follow " ( or words of similar effect) or states that the mail confirmation is to be the operative Credit instrument or operative amendment, then the teletransmission will not be deemed to be the operative Credit Instrument or the operative amendment. The issuing bank must forward the operative credit instrument or the operative amendment to such Advising Bank without delay. "

Automated documents are documents issued by modern processing techniques utilizing a computer telecommunication network or other electronic means. This technique is utilized to speed up arrival of documents from the initiator to the recipient. It also helps to avoid fraudulent issuance of documents. The said provisions authorize banks to accept automated documents. Reprographic means and automated or computerized systems are utilized extensively by shipping companies. The impact of this innovation for shipping companies was described by Professor Boris Kozolchik: - "since the 1960's, shipping companies and consignees have realized that the congestion of container shipments in destination terminals was in large measure due to delay in arrival of bills of lading airmailed by the shipper consignor or by the paying or negotiating bank either to the buyer-importer or to his issuing bank.

By introducing a computerized system of storage and transmittal of transport documents (the so-called Data Freight Receipt System) shipping companies can now issue notices of arrival which inform the consignee at approximately what time the goods will be available for pick up." <sup>82</sup> As to the effect of current SWIFT (83a) messages the ICC Banking Commission expressed the opinion that "the Commission considered that banks advising credits issued through SWIFT should ensure in accordance with SWIFT rules that the appropriate UCP incorporation clause was included in the credit advice sent to the beneficiary." <sup>83</sup>

A number of banks refuse to accept documents produced by mechanical reproduction, as they do not bear a manual signature. Presentation of simple photocopies of original documents should not be acceptable. However, original documents produced by photocopying utilizing

<sup>81</sup> 48. AD.sd 811, 370 N.Y 2d (1975) discussed by Dolan op cit at 6-12

<sup>82</sup> Cf. Boris Kozolochk, " is present letter of credit law up to its task"? Vol. 8 GMU L.Rev. 286 {1986} at p. 299

<sup>83a</sup> SWIFT is short for Society for Worldwide Interbank Financial Telecommunications. It is stationed in Brussels with regional offices in Belgium, Netherlands and the U.S.A

<sup>83</sup> Opinions ( 1984-1986) p.21 ( Ref. 101}

modern reprographic systems, should be accepted.<sup>84</sup> However, documents normally required to be issued or authenticated by traditional techniques must still bear the liability that would justify interpleader.

Original signature.

By virtue of Article 16 of the UCP 1993 revision banks assume no liability or responsibility for errors arising in the process of utilizing any telecommunication means. This article reads as follows:- "Banks assume no liability or responsibility for the consequences arising out of delay and/or loss in transit of any message(s), letter(s) or document(s), or for delay, mutilation or other errors arising in the transmission of any telecommunication. Banks assume no liability or responsibility for errors in translation or interpretation of technical terms, and reserve the right to transmit credit terms without translating them." This Article does not qualify the protection it affords to banks. What is the position if the banker out of negligence committed a transmission error? It seems implausible that bankers could be protected even in cases of outright negligence, as this runs contrary to the notion of public policy recognized by systems of all nations. Also the Article does not address the situation, whereby, the error in transmission or reception of a message was committed by banker *vis-à-vis* his fellow banker? It is respectfully thought that the general principles of the law of negligence must be invoked, in such situations, to resolve any dispute that might arise.

#### VI. The Linkage between the documents

The rule of linkage of documents signifies that each document must refer unequivocally to the goods subject of the credit. However description of the goods in each document must not contradict that of the credit. Thus, the rule of linkage of documents serves to identify the goods and to secure consistency of the documents. Article 37 C of the UCP clearly indicates that description of the goods in documents other than the invoice must relate to the credit in general terms, and not be inconsistent with the description of the goods in the credit.<sup>85</sup>

In Reinhold & Co. v Hansloh,<sup>86</sup> a CIF Contract called for a "legalized Chamber of Commerce Certificate as to shipment". This certificate was tendered, but it was inconsistent with the bill of lading. The buyer rejected the goods and the court ruled that he was justified in his rejection of the goods. In Midland Bank Ltd. v Seymour,<sup>87</sup> Devlin J. (as he then was) was reported to have said "It is sufficient that the description should be contained in the set of documents as a whole and that the documents should each one be valid in itself and each be consistent with the other, and accordingly, it would not matter for this purpose whether the description in the bill of lading is or not negated by the clause in the bill of lading, since the description is sufficiently contained in the invoice, which is one of the documents."<sup>88</sup>

<sup>84</sup> Ibid at p.27

<sup>85</sup> Citation of Article 41 was already made.

<sup>86</sup> (1896) 12 T.L.R 422

<sup>87</sup> (1955) 2 Lloyd's Rep. 147

<sup>88</sup> Ibid at p155

Again in Banque de L'indochine et de Suez S.A. v J.H. Rayner (Mincining Lane) Ltd.,<sup>89</sup> the bill of lading indicated that shipment was made in the vessel Markhor, however the certificate of origin indicated that the goods were shipped in "M.V. Markhor or substitute". The Court of Appeal held that, under the circumstances, the linkage between the bill of lading and the certificate of origin was not established. In the words of Sir John Donaldson M.R. "clearly this [M.V. Markhor or substitute] could be a different vessel and accordingly refer to a different parcel of sugar".<sup>90</sup> To ensure that the documents are consistent and linked together, the banker's obligation is to conduct a reasonable examination of the documents without delay. Slackness of the banker in deciding whether the tendered documents serve to identify the goods may result in breach of contract vis a vis the account party or the beneficiary. Thus, if the bank is faced with an ambiguity as to documents, though it is obliged to take an action without delay, it is "entitled to put a reasonable construction upon any ambiguity in its mandate."<sup>91</sup>

In Commercial Banking Co. of Sydney Ltd. v Jalsard Pty. Ltd.,<sup>92</sup> Lord Diplock explained the issue on this point by saying "Delay in deciding may in itself result in a breach of his contractual obligation to the buyer or the seller. This is the reason for the rule that where the banker's instructions from his customer are ambiguous or unclear he commits no breach of his contract with the buyer if he has construed them in a reasonable sense, even though upon the closer consideration which can be given to questions of construction in an action in a court of law, it is possible to say that some other meaning is to be preferred".<sup>93</sup>

In the American Case Dallas Bank & Trust v Commonwealth Dev. Corp.<sup>94</sup> the plaintiff bank established a standby letter of credit in favor of a beneficiary. The credit stipulated that in case the account party defaults, the beneficiary should furnish the plaintiff, issuing bank, with ten days prior notice. Thereafter, the beneficiary alleged default of the account party, and thereupon presented his draft along with the requisite documents, demanding payment after ten days. On the other hand, the account party instructed the plaintiff bank not to pay on the ground that the demand was unjustifiable as no default was recorded from his part, and that the documents were not in conformity. The plaintiff bank found was placed in a situation unable to decide. Therefore, it raised an interpleader action, alleging that it was an innocent stakeholder, as it was unable to decide which of the divergent claims was correct. The Texas Court of Appeals ruled that an interpleader procedure absolves an innocent stakeholder of the risk of multiple liabilities, but this could not be invoked by an issuing banker in such a situation of ambiguity. The plaintiff bank obligation was to see whether the documents conform to the tenor of the credit or not. The Obligation of the banker as to reasonable examination of the documents could not be transferred to the courts. The court also ruled that even if the issuing banker wrongfully effected payment to

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<sup>89</sup> {1983} ALL.E.R. 1137 {1983} Q.B 711

<sup>90</sup> Ibid at 1143

<sup>91</sup> Ibid at 1141

<sup>92</sup> {1973} A.C. 279

<sup>93</sup> Ibid at p.286

<sup>94</sup> 686 SW.2D 226 (Tex. CT App.1984, discussed by Stanley F. Farrar and Henry Landau, "Letters of Credit" Vol. 41.The business lawyer, 1435 {1986}

his detriment of losing the right of being reimbursed, such payment would not expose the bank to the situation of multiple liabilities that would justify interpleader.

### Conclusion

Efforts have been made by the ICC banking commission to secure uniformity and standardization as to documents required to be tendered under the credit. These efforts resulted in a better understanding by both lawyers and businessmen as to the operation of the letter of credit device. It is expected that the United Nations Commission on International Trade Law (UNCITRAL) rather than the ICC banking commission may continue these efforts to establish uniformity in the interpretation of shipping and trade terms in the area of international trade law.

This article argues that, with regard to notation on the bill of lading, it is in accord with the objectives of the letter of credit device to apply the commercial rather than the legal test. What matters for the banker is the state of affairs at the time of tender rather than at the time of shipment.

Bankers should not reject documents including customary disclaimers and additional cost clauses, whether the bill of lading is a maritime or a Combined Transport Document, insofar as the issuer acts in the capacity of a carrier or his agent, and that the notation does not relate to the merchantability of the goods. As a practical matter, however, a carrier who receives a sealed container, unlike that of a break-bulk cargo, is not in a position to identify the number of packages.

This article makes the point that shipping documents presented during the credit validity should be accepted, even if, presented after 21 days of their issuance contrary to the provisions of Article 43 of the UCP. There are no practical or logical reasons for such an arbitrary time span. Moreover, in a device structured on tender of documents, it seems illogical, for the purposes of tender, to differentiate between shipping documents and other required documents. If there are policy considerations in a country as to tender of particular documents, the letter of credit may include a proviso to that end. It is hoped that the ICC banking commission will amend the said article. This article contends that, unless the credit otherwise provides, a certificate of Insurance, insofar as it implies issuance of a formal policy should not be rejected by bankers. This opinion accords with the American practice which places a certificate of Insurance in the same legal position of a policy. Similarly, it seems unpersuasive to reject a warehouse to warehouse clause, insofar as it provides an Insurance cover from the warehouse of origin throughout the journey till the final warehouse at destination.

This article suggests that an invoice indicating an amount less than that of the credit should be accepted as the amount is subject to rectification to the benefit of the tenderer. Neither the banker nor the account party would be affected. As the basic objectives of the certificate of inspection are to indicate the quality of the goods; a certificate which does not indicate the merchantability of the goods should not be accepted by the banker, though *ex facie* conforming to the tenor of the credit. In effect such a certificate would not serve the interests of the customer. In the Sudan similar to the position in U.K. and U.S.A., international trade usage is observed. Such an approach is

highly indispensable, in view of the fact that it facilitates resolution of disputes that may arise in the course of trade.