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A PRINCIPLED CONFLICT OF LAWS CHARACTERISATION OF THE FRAUD EXCEPTION IN LETTERS OF CREDIT

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A principled conflict of laws characterisation of the fraud exception in letters of credit

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This paper examines the current jurisprudence on letters of credit, focusing on the question of how the fraud exception to the autonomy principle should be characterised in the conflict of laws; and consequently, which law should apply to determine if the fraud has been established. It argues that the fraud exception has been incorrectly subsumed within a unitary conflicts characterisation of the letter of credit contractual framework, rather than being correctly characterised as a separate and independent issue. On the basis of fundamental conflict of laws principles and policies, this paper advocates that the fraud exception should be characterised separately as a tortious/delictual issue. It then discusses how some of the difficulties of such a conflicts characterisation may be adequately addressed.

Keywords: Letters of credit, documentary credits, trade finance law, conflict of laws, characterisation, choice of law, fraud exception

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1 Introduction

Letters of credit (LCs) are the lifeblood of commerce,[1] as one of the foundational payment mechanisms in the international sale of goods.[2] Key to a LC's operation is its status as an autonomous undertaking independent of the underlying contract it supports. Payment cannot be stopped just because there is an issue in the underlying transaction.[3] That said, fraud is a well-established exception to this principle of autonomy. In many jurisdictions, pleading the fraud exception is the only practical way to stop the issuer from paying under the LC.[4]

However, there is no universal definition of 'fraud'. The Uniform Customs and Practice for Documentary Credits (the UCP)[5] — the international code of banking practice which is invariably incorporated into LCs — makes no provision for fraud, leaving the question to national laws.[6] The various jurisdictions in turn differ in their formulations of 'fraud'.[7] The most fundamental divergence is in the locus of fraud — at English and Singapore law, for

1 *Intraco Ltd v Notis Shipping Corporation (The Bhoja Trader)* [1981] 2 Lloyd's Rep 256, 257.

2 For a general discussion of LCs, see Christopher Hare and Dora Neo (eds), *Trade Finance: Technology, Innovation and Documentary Credits* (OUP 2021); Peter Ellinger and Dora Neo, *The Law and Practice of Documentary Letters of Credit* (Hart Publishing 2010); Ali Malek and David Quest*, Jack: Documentary Credits* (4th edn, Tottel Publishing 2009); John F Dolan, *The Law of Letters of Credit: Commercial and Standby Credits* (1st supp, 4th edn, AS Pratt & Sons 2007); James E Byrne and others, *UCP 600: An Analytical Commentary* (Institute of International Banking Law & Practice 2010).

3 Christopher Hare, 'On Autonomy' (2018) NUS Centre for Maritime Law Working Paper 18/03, 2 <https://law.nus.edu.sg/wp-content/uploads/2020/04/012_2018_Christopher-Hare.pdf> accessed 4 April 2022.

4 Xiang Gao, 'The Fraud Rule in the Law of Letters of Credit Revisited' in Hare and Neo (n 2), para 6.55.

5 The Uniform Customs and Practice for Documentary Credits (2007 Revision) ICC Publication No 600 (UCP).

6 Malek and Quest (n 2) para 1.23. However, it has been argued that it would be a futile exercise to codify fraud in the UCP because it would conflict with the formulations of fraud in domestic laws: see Janet Ulph, 'The UCP 600: Documentary Credits in the 21st century' [2007] JBL 355, 371.

7 See Xiang Gao (n 4) paras 6.13-6.44; Xiang Gao, *The Fraud Rule in the Law of Letters of Credit: A Comparative Study* (Kluwer Law International 2002).

example, the fraud exception is triggered only where there is a misrepresentation in the documents presented under the LC, either perpetrated by the beneficiary or with its knowledge,[8] whereas in the United States and Canada, the exception extends to fraud in the underlying transaction.[9] There is also divergence in the very definition of 'fraud' — there is some suggestion that English and Canadian law adopt the classic common law formulation of 'a false representation made knowingly, without belief in its truth, or recklessly, careless as to whether it be true or false',[10] whereas a recent Singapore decision has seemingly excluded from the fraud exception a beneficiary's reckless indifference to the truth of the representation.[11] These variations in national laws inevitably cause problems in light of the fact that LCs are frequently, if not predominantly, used to finance international transactions containing foreign elements.

An example will serve to illustrate the potential problems. Suppose that a UK sports retailer contracts to buy a consignment of boxing gloves from a New York manufacturer, with payment by irrevocable LC. On the buyer's application, its London bank issues a LC in favour of the seller which provides for 60 days' deferred payment and nominates a New York bank to accept presentation of documents and make payment. The seller tenders the required documents to the New York bank, evidencing shipment of a consignment of boxing gloves on a vessel for carriage from New York to London. As the documents are compliant on their face

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8 See eg *United City Merchants (Investments) Ltd v Royal Bank of Canada* [1983] 1 AC 168 (HL); *Brody, White & Co Inc v Chemet Handel Trading (S) Pte Ltd* [1992] SGCA 66, [1992] 3 SLR(R) 146.

9 See Uniform Commercial Code § 5-109 (Unif Law Com 1995); Dora Neo, 'Injunctions to Restrain Payment on Independent Guarantees: "Unconscionability" to Bolster the Fraud Exception' in Hare and Neo (n 2) para 8.14; *Bank of Nova Scotia v Angelica-Whitewear Ltd* [1987] 1 SCR 59, 83 (Supreme Court of Canada).

10 See Malek and Quest (n 2) para 9.18; *Royal Bank v Darlington* [1995] OJ No 1044 (Ontario Court of Justice (General Division)).

11 *Crédit Agricole Corporate & Investment Bank, Singapore Branch v PPT Energy Trading Co Ltd* [2022] SGHC(I) 1 [21].

with the terms of the LC, the bank accepts presentation and undertakes to pay the seller upon maturity in 60 days. When the goods are turned out in London 15 days later, the buyer discovers that the gloves are old, ripped, and mouldy, and thus completely worthless and unsellable. The buyer instructs its bank in London to withhold payment under the LC. This instruction is communicated to the New York bank as well. The two banks find themselves unsure as to whether the requisite standard of fraud has been met, and therefore take the safe path of declining the buyer's request, leaving the buyer to make a claim on the underlying sales contract. The buyer applies to the English courts for an injunction to restrain the bank from paying under the LC, arguing that the seller has acted fraudulently. Here, an English court faces a choice between two potentially applicable legal systems. If it applies English law, which will only stop payment for fraudulent misrepresentations contained in the documents,[12] the exception is not triggered and the injunction application fails because there has been no fraud on the documents — they evidence a shipment of boxing gloves, apparently compliant with the LC which specifies 'boxing gloves', and boxing gloves were indeed shipped. If it applies New York law, an injunction would be justified because such conduct would fall within New York's broader formulation of fraud in the underlying transaction as demonstrated in *United Bank Ltd v Cambridge Sporting Goods Corp*,[13] on which this example is loosely based. Thus, the choice of law governing the question of fraud can make all the difference as to whether the bank must pay.

The above example is no anomaly. Given the extensive use of LCs to support international trade, courts will frequently be asked to stop payment based on alleged fraud committed in

[12] *United City Merchants* (n 8) 183.

[13] 360 NE 2d 943 (NY Sup Ct 1976).

a foreign country. An astute court should recognise the potential conflicts problems here, necessitating an inquiry into the applicable law to determine the fraud exception. Following the traditional Savignian choice-of-law framework which continues to be the dominant model in Anglo-Common Law jurisdictions at least, a court must first characterise the issue[14] by allocating it to an appropriate juridical category, before selecting the appropriate rule or connecting factor which it applies to identify the appropriate system of law to govern the issue.[15]

Here at the outset, characterisation encounters a fundamental problem. Fraud is a concept rooted in tort or delict, but the main substantive issue that the court must analyse is the impact of the fraud 'exception' on the 'rule' of the autonomous contractual framework that makes up the LC.[16] Should the court characterise the legal issue of the fraud exception as contractual or tortious?

Perhaps a prior, even more fundamental question is this — should the fraud issue be characterised as a separate preliminary issue that is external to, or distinct from, the LC, as opposed to being subsumed within the broader analysis of the main conflicts issue of which law governs the LC? In other words, are we dealing here with two legal issues and two conflicts characterisations (with potentially two different governing laws for the fraud and the

[14] There is considerable debate — beyond the scope of this paper — as to what the subject matter of characterisation should be: see eg Christopher Forsyth, 'Characterisation Revisited: An Essay in the Theory and Practice of the English Conflict of Laws' [1998] LQR 114.

[15] For a general discussion on characterisation, see Lawrence Collins (ed), *Dicey, Morris and Collins on The Conflict of Laws* (15th ed, Sweet & Maxwell 2012) paras 2-001–2-047; Paul Torremans (ed), *Cheshire, North & Fawcett: Private International Law* (15th ed, OUP 2017) ch 3; Martin Davies and others, *Nygh's Conflict of Laws in Australia* (10th ed, LexisNexis Butterworths Australia 2020) paras 14.1–14.52.

[16] For discussion of the LC as a contractual matrix, see Sandra Booysen, 'The Letter of Credit as a Contract' in Hare and Neo (n 2).

LC) or one overarching legal issue, ie the substantive effect of the LC according to its governing law?

This question is not made any easier by the fact that the case law on the fraud exception remains unclear as to the exact substantive legal relationship between the fraud that constitutes the exception to the autonomy principle, and the autonomous contractual framework that makes up the LC itself. While some cases indicate that the fraud exception should be seen as operating as an external public policy factor vitiating the LC contractual framework (which may tend to support the former, 'two-issues' characterisation), other cases source the existence of a fraud exception in an implied term in the applicant's instructions to the issuing bank to open the LC (which may tend to support the latter, unitary contractual characterisation).[17]

This paper addresses these characterisation problems and uncertainties by examining fundamental conflict of laws principles and policies, and on that basis proposes a principled characterisation of the fraud exception.

The rest of the paper is structured as follows: Part 2 examines how courts in various jurisdictions have approached (or perhaps more accurately, failed to approach) conflict of laws problems in LC fraud. Part 3 discusses the role of characterisation and the principles that guide the process, and how they should apply specifically in the LC context. Part 4 explains why the present unitary characterisation of fraud which some courts have adopted is

[17] For the former approach, see eg *United City Merchants* (n 8); for the latter, see eg *Czarnikow-Rionda Sugar Trading Inc v Standard Bank London Ltd* [1999] 1 All ER (Comm) 890 (QB).

inappropriate in light of the principles of characterisation and proposes a tortious characterisation for the fraud exception separate from the rest of the LC. Part 5 concludes.

2 The current approach (or lack thereof)

Before discussing what a principled conflicts characterisation of the fraud exception to LCs might look like, it is necessary first to examine how courts currently deal with this issue.

2.1 Lex fori by default

In a nutshell, a survey of the cases paints an unfortunate picture of fealty to the law of the forum (or *lex fori*), arrived at through what seems to be an unthinking application, rather than an express and principled conflicts reasoning.

For example, the English case of *DCD Factors plc v Ramada Trading Ltd*[18] involved an application for an injunction to restrain an English issuing bank from paying under a LC. Under the terms of the LC, presentation of the documents was to be made in Pakistan. Here, the issue of fraud should logically have been determined by the law of Pakistan, regardless of which conflicts characterisation was adopted. A contractual characterisation of the fraud issue (focusing on the effect of the fraud on the LC) would have meant that the governing law of the LC was applicable — this should have been the law of the place where payment was to be made against presentation of documents, as provided at common law under the

[18] [2007] EWHC 2820 (QB), [2008] Bus LR 654.

controversial *Power Curber* rule,[19] or under the Rome Convention,[20] which should have applied in this case.[21] A tortious characterisation of fraud, as a separate issue from the LC's contractual framework, should have resulted in the same law being applicable under the *lex loci delicti*[22] — the fraudulent misrepresentation occurred when the documents were presented in Pakistan. However, the Court simply applied English law to determine whether fraud was established, and the conflict of laws issue appeared to have been overlooked altogether. The same lack of a conflicts lens is evident in an earlier English case, *Czarnikow-Rionda v Standard Bank London*,[23] where English law was applied without discussion — a choice of law analysis would have pointed to Swiss law regardless of which characterisation approach was adopted because the LC had provided for presentation to be in Switzerland.

An unthinking default to the *lex fori* in LC fraud exception cases involving similar fact patterns may be observed in Canada[24] and Australia.[25] In the US, the Supreme Court of Ohio in *Mid-America Tire Inc v PTZ Trading Ltd*[26] applied Ohio law to determine the fraud issue,

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19 *Power Curber International Ltd v National Bank of Kuwait SAK* [1981] 3 All ER 607 (CA). For further discussion, see text at n 43 below.

20 Convention on the Law Applicable to Contractual Obligations [1998] OJ C27/34 (consolidated version).

21 It was the established practice of English courts at this time to regard the law of the place of payment against presentation of documents as that which was most closely connected with the LC under art 4(5) of the Rome Convention, thus disapplying the presumption in favour of the principal place of business of the party effecting characteristic performance under art 4(2): see *PT Pan Indonesia Bank Ltd Tbk v Marconi Communications International Ltd* [2005] EWCA Civ 422, [2005] 2 All ER (Comm) 325.

22 This rule was statutorily provided for in the Private International Law (Miscellaneous Provisions) Act 1995 (UK) s 11.

23 *Czarnikow-Rionda v Standard Bank London* (n 17).

24 *Ash v Corp of Lloyds* [1992] OJ No 1585 (Ontario Court of Appeal); *Bonnie Sportswear (1978) Ltd v International Trading Co* 1993 CarswellQue 1031, JE 93-1257, EYB 1993-68893 (Superior Court of Quebec).

25 *Inflatable Toy Company Pty Ltd v State Bank of New South Wales Ltd* BC9405157 (NSW Sup Ct) 9-14. While it is not clear whether the LC in this case provided for presentation in Australia or Taiwan, the reasoning of the Supreme Court of New South Wales suggested that it was treating the beneficiary as having presented in Taiwan.

26 95 Ohio St 3d 367 (Ohio Sup Ct 2002).

notwithstanding that the LC was issued by a Chicago bank (in the state of Illinois) and payable against presentation of documents in Guernsey. In fact, this trend of '*lex forism*' across various jurisdictions has been observed not only with respect to issues of fraud, but also to the issue of the governing law of the LC as a whole.[27]

One can only speculate as to the reasons for this judicial oversight of conflicts issues in LC fraud. The most likely reason is that foreign law has simply not been argued by counsel in the cases.[28] Related to this is the fact that cases often arise as applications for injunctions or stop payment orders, before the courts in the jurisdiction of the bank liable to pay (usually the issuing bank), by an applicant from the same jurisdiction. Thus, such applications may take on the superficial complexion of a domestic case which, together with the fact that injunctive relief is often regarded as procedural, make it easier for courts (or indeed counsel) to overlook the conflicts issues and default to the *lex fori*. Another possibility is that the UCP's success as a tool for harmonising rules relating to LCs has had the effect of de-emphasising potential conflicts problems.[29] However, as discussed above,[30] any faith in the harmonising power of the UCP is sorely misplaced in the context of fraud, since the UCP is completely silent on the issue.

It goes without saying that an unthinking, blanket application of the *lex fori* in all cases is unacceptable. It undermines certainty in LCs, because the applicable law which determines

[27] See Dolan (n 2), paras 4-14–4-16. See also Mohan Gopal, 'English Courts and Choice of Law in Irrevocable Documentary Letters of Credit' in Ho Peng Kee and Helena HM Chan (eds), *Current Problems of International Trade Financing* (2nd edn, Butterworths 1990) 135.

[28] In Common Law jurisdictions, it is generally the case that a court can only apply a foreign law if it is pleaded and proved. See Collins (n 15) para 9-002; Davies (n 15) paras 17.1–17.2.

[29] See Byrne (n 2) 20.

[30] See text at n 6 above.

parties' substantive rights and obligations relating to fraud effectively depends on whichever forum a suit is subsequently brought in, thus encouraging forum shopping, and leaving no possibility for *ex ante* certainty.

2.2 An assumed unitary characterisation?

On the other hand, where courts *have* recognised that the fraud exception poses conflicts issues, they have often jumped directly into an analysis of the governing law of the LC, without addressing any potential prior characterisation issues. For example, in *Royal Bank v Darlington*, the Ontario Court of Justice, when faced with an issue of fraud on an LC stated:

> [W]hile English law respecting the obligations to pay under a letter of credit is the governing law in respect of the Letters of Credit in question, that law, for the purposes of these proceedings, is as set out by the Supreme Court of Canada in *Angelica-Whitewear*.[31]

The Court clearly subsumed the fraud exception under the broader inquiry into the governing law of the LC. This passage also illustrates the problem that in the absence of parties proving foreign law, Common Law courts are forced to make the — often dubious — assumption that it is the same as the *lex fori*.[32] Similarly, in *Olex Focas Pty Ltd v Skodaexport Co Ltd*,[33] an Australian case involving a performance bond,[34] the Supreme Court of Victoria assumed that

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[31] *Royal Bank v Darlington* (n 10) [14].

[32] See text at n 8 above for the differences between the fraud exception in English and Canadian law.

[33] [1998] 3 VR 380.

[34] Performance bonds have traditionally been regarded as analogous to letters of credit: see Ellinger and Neo (n 2) 316; Collins (n 15) para 33-318, but see Charles Debattista, 'Performance Bonds and Letters of Credit: A Cracked Mirror Image' [1997] JBL 289.

the fraud issue should be determined under the governing law of the bond, and adopted the familiar default to the *lex fori* due to a failure to prove foreign law.

In the Singapore case of *Boustead Singapore Ltd v Arab Banking Corp*,[35] the High Court appeared to operate under this same assumption in relation to counter-guarantees which were provided to be governed by and construed in accordance with English law.[36] In determining whether the beneficiary had made a fraudulent demand on the counter-guarantees, the Court called on English law experts to give evidence on the English law applicable to demand guarantees.[37] The Court specifically cited the English test:

> The classic statement of fraud is found in the English House of Lords case of *Derry v Peek* (1889) 14 App Cas 337 (*Derry v Peek*). Lord Herschell stated at 374 that fraud is proved when a false representation has been made either *knowingly*, without belief in its truth, or *recklessly*, careless as to whether it be true or false. Fraud therefore requires that [the beneficiary] made the false statements in the CG Demands either knowing that they were false, or recklessly without caring as to their truth or falsity.[38]

The Court then put the question directly to English law experts, who 'expressed views on whether the evidence would lead to the conclusion that [the beneficiary] was acting fraudulently'.[39] Thus, it is apparent here that both Court and counsel assumed that the law governing the counter-guarantees would extend to govern the fraud exception as well.

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35 [2015] SGHC 63, [2015] 3 SLR 38.
36 ibid [26].
37 ibid [49]–[60].
38 ibid [63].
39 ibid [64].

All these cases could be taken to support an implicit assumption that fraud, and the fraud exception, is subsumed under a 'unitary characterisation' of the LC, and therefore to be determined by the governing law of the LC. That provides little or no clarity, however, because the conflicts characterisation of the LC framework itself has been confused at times. In earlier cases, LCs were clearly treated as contracts for the purposes of determining their governing law. Thus, in *Offshore International SA v Banco Central SA and Hijos De J Barreras SA*, the English High Court, noting the absence of any choice of law provision in the LC, applied a range-of-factors approach and determined *for the purposes of that case* that the system of law with which the LC had its closest and most real connection was New York because that was where performance (ie payment) took place.[40] This range-of-factors approach was consistent with the traditional objective proper law test for contracts.[41]

However, the waters were subsequently muddied by the English Court of Appeal in *Power Curber* in two ways.[42] First, the Court transformed and solidified the range-of-factors approach and conclusion in *Offshore International*[43] into an authoritative, hard-and-fast rule

[40] [1977] 1 WLR 399 (QB) 401–402.

[41] *Compagnie d'Armement Maritime SA* v *Compagnie Tunisienne de Navigation SA* [1970] 3 WLR 389 (HL) 411–412.

[42] *Power Curber* (n 19). This controversial decision has since been overruled by the UK Supreme Court: see *Taurus Petroleum Ltd v State Oil Marketing Company of the Ministry of Oil, Republic of Iraq* [2017] UKSC 64, where the Supreme Court held that the governing law of the LC framework should be the law of the issuing bank's jurisdiction, which was regarded by the Court as the situs of the debt on an application of the general conflicts rule, rather than the place of payment against documents exception established by *Power Curber*. See also CH Tham, 'Different Debts for Different Purposes' [2018] LMCLQ 210; Shearman Sterling, 'Situs of Debts under Letter of Credit' (2016) 31 Journal of International Banking Law & Regulation 15; GP Graham, 'International Commercial Letters of Credit and Choice of Law: So Whose Law Should Apply Anyway?' (2001) 47 Wayne L Rev 201; PJ Rogerson, 'The Situs of Debts in the Conflict of Laws — Illogical, Unnecessary and Misleading' (1990) 49 CLJ 441.

[43] *Offshore International* (n 41).

that the LC would have its closest and most real connection with the law of the place of performance (or 'payment against documents') *in all cases*, thus skipping the range-of-factors analysis. Secondly, all three Judges *additionally* adopted a proprietary characterisation, and discussed the governing law by reference to the *lex situs* of the debt.[44] This was perhaps understandable in the context of that case, where the Court had to determine if it had jurisdiction to order payment under the LC, which required the debt owed under the LC to be situated within the jurisdiction. However, this endorsement of effectively two characterisations for a single issue has left the jurisprudence in a confused state, with neither a normal contractual characterisation nor a *Power Curber*-type proprietary characterisation being applied consistently, even in cases concerning similar issues of jurisdiction.[45]

In summary, the jurisprudence shows that courts have largely ignored the potential conflicts problems with fraud and the fraud exception to LCs and have instead automatically defaulted to the *lex fori*. Even where courts have explicitly addressed the problem, they have tended to assume that the fraud issue is subsumed under a unitary characterisation of the LC, whatever characterisation that may be, and therefore is determined by the law governing the LC. This is an unsatisfactory state of affairs given that the characterisation of an issue, as discussed in Part 3, should be guided by the considered application of conflict of laws policy and principles, which may be different in the context of contract or tort, or property for that matter.

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[44] *Power Curber* (n 19) 398 (Lord Denning MR), 399 (Griffiths LJ), 400–401 (Waterhouse J).

[45] See *Sinotani Pacific Pte Ltd v Agricultural Bank of China* [1999] SGCA 53, [1999] 2 SLR(R) 970 [19]–[23], where a contractual characterisation was adopted; compare *HL Boulton & Co SACA v Banque Royale de Canada* [1995] RJQ 213 (Superior Court of Quebec) [60]; and *Taurus* (n 43) [29]–[41], where a proprietary characterisation was adopted.

3 Principles of characterisation

Before a principled characterisation of the fraud issue can be proposed, it is first necessary to discuss the conflict of laws policies and objectives which should guide any characterisation exercise.

3.1 Characterisation must be guided by policy

Much of the academic literature on characterisation is centred around the question of whether an issue should be characterised by the *lex fori* or the *lex causae* (the law applicable to the case) — thereby effectively positing a preliminary choice-of-law decision to determine the primary choice-of-law issue.[46] Confusing as that may be, the predominant discourse also creates the impression that once a system of law is chosen, the characterisation will follow as a matter of intuition and logic under that system.[47] This cannot be the case — more must surely be demanded to justify a decision which could easily alter the applicable law and therefore the outcome of a judgment. Moreover, this content-agnostic ideological interpretation of the characterisation debate omits the obvious fact that not every legal system will possess an automatic and unambiguous characterisation for every legal issue,[48] or that comparative conflicts analysis will inevitably throw up ambiguities or inconsistencies that may exist in different legal systems.

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[46] Collins (n 15) paras 2-010–2-012; Torremans (n 15) 43–45. See also Forsyth (n 14); Ernest G Lorenzon, 'The Qualification, Classification, or Characterization Problem in The Conflict of Laws' (1941) 50 Yale LJ 743.

[47] Furthermore, in the case of the European Regulations which govern conflict of laws, it has been suggested that characterisation is reduced to being a mechanical exercise in statutory interpretation: see Collins (n 15) para 2-007.

[48] ibid para 2-013.

At the other extreme is an argument from the US school of thought that characterisation is a 'shadow', which courts will manipulate whichever way they please to reach their desired result, ie the application of a law which advances their preferred interest.[49] While it is naïve to suggest that courts completely ignore the potentially applicable laws and end results when characterising an issue, it would be unfortunate overkill to advocate characterisation as purely an exercise in backward reasoning to justify result selection — to do so would inevitably be to give up on any notion of a principled choice of law. Furthermore, the interest analysis methodology upon which this argument is premised is not widely accepted outside the US.[50]

Characterisation must necessarily be guided by the same policies underpinning choice of law generally. As discussed above,[51] characterisation is a subsidiary stage within the choice of law inquiry — it is not an isolated and abstract exercise, but 'an instrument by which ends may be attained'.[52] This accords with the view of the English Court of Appeal in *Raiffeisen Zentralbank Österreich AG v Five Star General Trading LLC* that the characterisation categories in choice of law 'have no inherent value, beyond their purpose in assisting to select the most appropriate law'.[53] It would betray this purpose for characterisation to be conducted in a mechanical fashion.[54] Even in the US, where the conflict-of-laws revolution has diminished the role of

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[49] Joseph Morse, 'Characterization: Shadow or Substance' (1949) 49 Colum L Rev 1027.

[50] Davies (n 15) para 12.19.

[51] See text at n 14 above.

[52] Paul A Freund, 'Characterization with Respect to Contracts in the Conflict of Laws' in University of Michigan Law School, *Lectures on the conflict of laws and international contracts delivered at the Summer Institute on International and Comparative Law, University of Michigan Law School, August 5–20, 1949* (1951) 159.

[53] [2001] EWCA Civ 68, [2001] QB 825 [28].

[54] ibid. See also *Chaplin v Boys* [1971] AC 356, 392 (HL), where Lord Wilberforce acknowledged that policy considerations play a role in characterisation.

characterisation, [55] arguments have been made in favour of characterisation which accommodates policy. [56] There is also evidence of support for this policy-oriented characterisation prior to the conflict-of-laws revolution in the US.[57] The use of general policy to support a characterisation decision would also increase judicial accountability and the rule of law, as judges would have to articulate (and be scrutinised on) their reasons and policy in each case, rather than hide behind an opaque appeal to logic.[58]

3.2 The relevant policies for choice of law in LCs

Having established that characterisation should be a principled exercise guided by choice-of-law policies, this section discusses what those policies should be in the context of LCs.[59] These policies must also be balanced against each other, since '[i]n all but the simplest case, the objectives are likely to point in different directions'.[60]

3.2.1 Certainty and predictability

The virtues of certainty and predictability can almost be said to be self-evident in the conflict of laws. They are often cited as objectives across the Common Law world, either in court

[55] The conflict-of-laws or choice-of-law revolution refers to the shifting in US choice-of-law thinking away from the traditional single-connecting factor approach and towards a multifactorial approach which focused on the weighing of interests and policies. This movement away from single connecting factors also diminished the importance of how an issue was characterised. See generally Symeon C Symeonides, *Choice of Law* (OUP 2016) chs 5-6.

[56] Eugene F Scoles and Peter Hay, *Conflict of Laws* (2nd edn, West Publishing Co 1992) 53.

[57] See Restatement (Second) of Conflict of Laws (Am Law Inst 1971) § 7 cmt d note; *Sampson v Channell* 110 F 2d 754 (1st Cir 1940), cert den 310 US 650 (1940). See also Freund (n 53).

[58] Davies (n 15) para 14.47.

[59] A context-specific approach to characterisation should be preferred over one which relies on abstract qualities, in order to avoid ad hoc decisions: see Davies (n 15) para 14.47.

[60] Willis LM Reese, 'Choice of Law in Torts and Contracts and Directions for the Future' (1977) 16 Colum J Transnat'l L 1, 39.

decisions[61] or codification in the case of the US[62], and are regarded as equally foundational in the EU.[63] In other areas of law, arguments in favour of characterisations or new choice-of-law rules have also been justified as improving certainty and predictability.[64]

It should be wholly unsurprising to note that courts have highlighted LCs as 'an area of law where the need for precision and certainty are paramount'.[65] However, '[c]ertainty is an abstract legal value. Like a queen in chess, it can move in any direction'.[66] As an abstract virtue, certainty could be used to argue for both contractual and tortious characterisations, which would be neither here nor there. The role of certainty must be particularised by answering the following questions — who requires certainty, and for what purpose?

It is useful to look back to the foundations of LCs for this exercise. At the most basic level, a LC is a payment mechanism for commercial transactions, particularly in international trade. The value of LCs, and their commercial purpose, is their ability 'to give to the seller an assured right to be paid before he parts with control of the goods'.[67] This is meant to protect the

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61 *John Pfeiffer Pty Ltd v Rogerson* [2000] HCA 36, (2000) 172 ALR 625 [44], [136]; *Tolofson v Jensen* [1994] 3 SCR 1022 [65] (Supreme Court of Canada).

62 See Restatement (n 58) § 6(f).

63 Case C-350/14 *Lazar v Allianz SpA*, Opinion of A-G N Wahl, ECLI:EU:C:2015:586 [1], [23], which states that improving legal certainty and predictability is a primary objective of the Rome II Regulation.

64 Maisie Ooi, 'Rethinking the Characterisation of Issues relating to Securities' (2019) 15 J Priv Int L 575, 604; Michael Douglas, 'Characterisation of Breach of Confidence as a Privacy Tort in Private International Law' (2018) 41 UNSWLJ 490, 524.

65 See *Montrod Ltd v Grundkötter Fleischvertriebs GmbH* [2001] EWCA Civ 1954, [2002] 1 WLR 1975 [58]; *Beam Technology (Mfg) Pte Ltd v Standard Chartered Bank* [2002] SGCA 53, [2003] 1 SLR(R) 597 [29]. Interestingly, the English and Singapore Courts both agreed on the requirement for certainty but disagreed on whether this could justify a nullity exception to the autonomy principle.

66 John Henry Merryman and Rogelio Pérez-Perdomo, *The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America* (4th edn, Stanford University Press 2019).

67 *United City Merchants* (n 8) 183. This forms the basis for the autonomy principle — the buyer cannot stop payment on grounds of an issue with the underlying contract.

beneficiary of a LC. However, the fraud exception itself is concerned at least to a large extent with fraudulent beneficiaries or 'unscrupulous sellers'.[68] Clearly, the primary goal here is to protect the applicant or buyer, rather than the fraudulent beneficiary.

Of course, most beneficiaries are not fraudulent, and it may appear quite divorced from reality to claim that certainty is not important for them — they will undoubtedly demand certainty of payment under a LC. Here, a distinction must be drawn. An innocent seller/beneficiary's real concern is whether an unscrupulous buyer/applicant could too easily prevent payment under the LC — that is addressed by the autonomy of the LC from the underlying sales contract (a principle which is virtually universal) and is largely a matter of the *substantive* content of the applicable law, particularly the scope of the fraud exception under that law. This paper is concerned with the *conflict of laws* characterisation which will bring greater certainty about what the legal position is where fraud is alleged in a particular case — that is distinct from the substantive content of the laws.

That leaves the applicants and the banks. It is sensible that a characterisation decision should be made with the interests of these parties in mind, and it is also these parties who would invoke the fraud exception as against the beneficiary.[69] However, there is further division here, because the applicants and the different banks involved do not necessarily share the same interests regarding certainty. Between the two groups, certainty is arguably *less important* for applicants compared to banks. A return to our initial example of the financing of the boxing gloves will serve to illustrate. The UK retailer who has bought the gloves

[68] *Szetjn v Henry Schroder Banking Corp* 31 NYS 2d 631 (NY Sup Ct 1941).

[69] Ellinger and Neo (n 2) 144–146.

probably does not need to know the precise formulation of fraud which is applicable — the fact that it obviously has not received what it paid for would likely be enough for it to instruct its bank to withhold payment or, failing that, to apply for an injunction from the courts. As between the different banks, it is arguably the bank accepting presentation that requires the greater certainty. This is because fraud, at least in jurisdictions following the locus classicus case of *United City Merchants (Investments) Ltd v Royal Bank of Canada*,[70] is measured at the time of presentation. For the bank accepting presentation, the applicable law and hence, the exact content and definition of fraud, would be material since it will need to decide for itself whether to refuse payment on the allegation of fraud.

As stated above, certainty and predictability have featured prominently in the discourse over the issue of what law should govern a LC.[71] The need for certainty has no doubt played a role in the crafting of the rules to determine the governing law of a LC (specifically, the contract between the beneficiary and bank). As explained in the discussion on *Power Curber*, Anglo-Common Law courts have not applied the standard contractual choice-of-law framework to determine the governing law of a LC.[72] The usual Common Law framework is to determine if the contract contains an express choice of law or failing that an implied choice. In the absence of either, the court determines the system of law with which the contract has its closest and most real connection.[73] Since it is rare for LCs to contain any choice of law clauses,[74] one would normally expect courts to apply the second and third stages, both of which would entail

[70] *United City Merchants* (n 8).

[71] See text at n 65 above. See also Nicholas Creed, 'The Governing Law of Letter of Credit Transactions' (2001) 16 JIBL 41.

[72] See text at n 43 above.

[73] *Sinotani* (n 46) [19].

[74] Ellinger and Neo (n 2) 353; Malek and Quest (n 2) para 13.47; Michael Brindle and Raymond Cox (eds), *Law of Bank Payments* (5th edn, Sweet & Maxwell 2018) para 7-136.

considerations of a range of factors.[75] Instead, the practice of courts has been to 'short-circuit' this analysis by formulating a single connecting factor, which is deemed to be the system of law with the closest and most real connection with the LC.[76] In the US, there is also evidence of this same desire for a single connecting factor. Notwithstanding the dominance of interest analysis and multifactorial centre-of-gravity approaches adopted by the US courts,[77] the traditional single-connecting factor approach (long abandoned in other areas) has been retained for LCs via a statutory carve-out. Section 5-116(b) of the Uniform Commercial Code (UCC) provides as a default rule that 'the liability of an issuer, nominated person, or adviser for action or omission is governed by the law of the jurisdiction in which the person is located'.[78] This trend of eschewing multifactorial approaches for fixed choice of law rules is entirely consistent with the objectives of certainty and predictability.[79] Under the US position, certainty is achieved particularly for banks since they will only need to apply the law of their own jurisdiction for all LCs with which they deal.

3.2.2 Protecting the reasonable expectations of parties

Certainty, while of utmost importance, is not the be-all and end-all. The certainty brought about by a single-factor rule (as many jurisdictions have favoured) will bring no comfort to parties if the governing law selected is one which is completely unconnected to the case, or

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[75] Such as the place of contracting, currency, language, and place of performance, among others: see *Compagnie Tunisienne* (n 42) 399–400 (Lord Morris).

[76] *Sinotani* (n 46) [19]; *Power Curber* (n 19) 398.

[77] See generally Symeonides (n 56) chs 5–6.

[78] UCC § 5-116(b) (Unif Law Com 1995). There is a potential problem of circularity here because one would technically have to determine that the UCC as enacted in a particular State is the applicable law before the particular provision is applicable. However, US courts have applied § 5-116(b) as though it formed a part of the forum's conflict of laws rules: see eg *BCM Electronics Corporations v LaSalle Bank NA*, 2006 WL 760196 (ND Ill 2006).

[79] AJE Jaffey, 'The Foundations of Rules for the Choice of Law' (1982) 2 OJLS 368, 387.

in other words one which they never expected would apply. The application of such a law would be regarded as unjust. As the High Court of Australia put it, 'the law should not be applied in a way that takes ordinary expectations by surprise'.[80]

Protection of the reasonable expectations of the parties has been used to justify the *lex loci delicti* rule for torts.[81] In the case of contracts, it has been recognised as the justification for applying the legal system which has the closest connection to the contract — here the concept of the 'closest connection' is arguably used as a proxy for the parties' reasonable expectations.[82] It has also been identified as a fundamental factor to consider for choice of law in LCs.[83]

The content of 'reasonable expectations' requires further elaboration. First, there is a question of whether parties have significant expectations requiring protection in the first place. Reese has emphasised this element of forethought in his explanation of the protection of justified expectations, a choice-of-law principle under the Restatement (Second) of Conflict of Laws (Restatement).[84] Thus, he argued, the protection of justified expectations is more important in contracts, where parties have some notion of what their rights and duties will be, but less important in torts like negligence where parties 'do not customarily give thought to potential legal consequences before embarking on a given course of conduct'.[85] That is not

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80 *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491 [130], where Kirby J relied on the ordinary expectations of parties as a justification for applying the *lex loci delicti* rule to international torts.

81 ibid; *Tolofson v Jensen* (n 62) [43].

82 Davies (n 15) para 12.20; See also Douglas (n 50) 524, and Ooi (n 50) 599-601, where the author uses the concept of 'market expectations' in her critique of choice-of-law rules for securities.

83 Andrea Markstein, 'The Law Governing Letters of Credit' (2010) 16 Auckland U L Rev 138.

84 Restatement (n 58) § 6(d).

85 Reese (n 61) 37–38.

to say that parties involved in tort have no expectations — one cannot deny the intuitive assumption best described by the maxim *locus actum regit* (or 'the place rules the act') which justifies the *lex loci delicti* rule for torts. However, in the absence of forward planning of the sort that contracting parties engage in when negotiating an express governing law clause, reasonable expectations may carry less weight compared to other choice-of-law principles. Similar sentiments were expressed by the UK Law Commission, which only recommended applying the *lex loci delicti* rule to accord with parties' expectations 'to the extent that the parties have any expectations at all'. [86] That invites the question — what expectations, if any, would parties have in relation to LC fraud, and are these the same expectations which they would have in relation to the LC in general?

It may be argued that commercial parties entering into a LC transaction expect all related issues, including fraud, to be governed by the same law.[87] This may be defensible if one analogises LC fraud to other instances of tort arising out of contractual relationships, such as, for example, a claim against a cruise ship company by a passenger who has suffered injury from crew negligence.[88] However, this view faces doctrinal and practical difficulties, given that the LC does not consist of merely one contract between the applicant and the beneficiary, but rather a series of interlocking autonomous contracts, of which the key one giving rise to

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[86] Law Commission, *Private International Law: Choice of Law in Tort and Delict* (Law Com No 193, 1990) para 3.2.

[87] Such a view would be consistent with the position in Europe, and ostensibly English common law, that issues going to reality of consent to contract (such as fraud) are governed by the putative governing law of the contract: see Regulation (EC) 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations [2008] OJ L 177/ 6 (Rome I), art 10(1); Collins (n 15) paras 32-107–32-108.

[88] Peter E Nygh, 'The Reasonable Expectations of the Parties as a Guide to the Choice of Law in Contract and in Tort' (1995) 251 Collected Courses of the Hague Academy of International Law / *Recueil des Cours de l'Académie de La Haye* 356, 358.

the payment obligation is the contract between the beneficiary and bank. One may take a broader view of parties' expectations of the entire LC transaction, perhaps justified by the fact that LC terms are also negotiated when the applicant and beneficiary (usually as buyer and seller respectively) enter into the underlying transaction. Of course, this is an overly simplistic argument which, taken to its logical conclusion, would justify an application of the proper law of the underlying contract to govern the LC as well — an approach which would contravene the autonomous nature of the LC, and one which has been roundly rejected.[89] Even if that argument were accepted, it is highly unlikely that fraud or its legal consequences would figure in negotiations such that parties would build up any expectations regarding applicable law. After all, the only parties who enter into such transactions with fraud at the forefront of their minds will probably be the fraudsters themselves — and the law should not protect the expectations of fraudsters. Thus, it is unlikely that the commercial parties have significant expectations that should be protected in a choice of law decision.

What then of the expectations of the banks? As illustrated by our boxing gloves example, LC transactions frequently involve not only an issuing bank which makes the fundamental undertaking to pay the beneficiary upon a complying presentation, but also a correspondent bank (usually in the beneficiary's jurisdiction) nominated to accept presentation of the documents.[90] The correspondent bank may even confirm the LC, making an identical payment undertaking to the beneficiary.[91]

[89] Ellinger and Neo (n 2) 337.

[90] UCP (n 5) arts 2, 12.

[91] ibid art 8.

Regard should be had especially to the perspective of the bank accepting presentation — it is that bank's decision to accept a presentation as complying which binds the issuing bank (and any confirming bank) to pay.[92] From the viewpoint of such a bank, the act of a beneficiary presenting fraudulent documents for presentation would be akin to any other tortious action in fraudulent misrepresentation. While these expectations may be thought to arise from a general intuition that the law of the place rules the act rather than considered negotiation, and hence should not be given too much weight, they are nonetheless expectations which the law should respect.

Conversely, an issuing bank which has contracted out the task of accepting presentation to another bank arguably has less significant expectations relating to fraud. It is reliant on its professional agent, the correspondent bank,[93] to act properly in terms of its mandate, to determine whether the presentation is complying, and to detect any fraud at the point of presentation. Short of express provision in the contract between the banks, the issuing bank can only expect that the agent will apply its own domestic law to determine what constitutes fraud. In the case of a LC available with any bank (ie where any bank can be a nominated bank),[94] the issuing bank permits presentation to take place anywhere, and thus cannot reasonably expect that each and every possible presentation bank would apply a law other than that bank's own local law.[95] Alternatively, where a LC is made available with any bank in

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92 ibid art 7(a), 8(a).

93 Nominated and confirming banks are agents of the issuing bank: see *Bank Melli Iran v Barclays Bank (Dominion, Colonial & Overseas)* [1951] 2 Lloyd's Rep 367, 376 (KB); *Grains and Industrial Products Trading Pte Ltd v Bank of India and another* [2016] SGCA 32, [2016] 3 SLR 1308 [75]; Dolan (n 2) para 2.08[3].

94 UCP (n 5) art 2.

95 Cf *Sinopec International (Singapore) Pte Ltd v Bank of Communications Co Ltd* [2021] SGHC 245 [75], where the Court took the view that in the case of such an LC, parties would contemplate presentation in the beneficiary's place of business, and thus expect the law of that jurisdiction to govern the LC. With respect,

a particular country (usually the beneficiary's country), [96] it is arguable that the issuing bank which has made provision for presentation in that country would reasonably expect the banks there to apply the local standard of fraud. If an issuing bank is unwilling to take this risk, it always has the option to instruct correspondent banks simply to forward the documents and make its own decision whether to accept presentation. In this situation, the correspondent bank would simply be a collecting bank presenting on behalf of the beneficiary, [97] and presentation will be taken to have occurred at the counters of the issuing bank (ie in the issuing bank's own jurisdiction).[98]

3.2.3 Furthering the policy of the underlying rule

The third, and perhaps most important, principle is that the choice of law should further the purpose or policy of the relevant underlying rule.[99] This value is emphasised by the authors of *Dicey, Morris and Collins on The Conflict of Laws,* who argue that in the characterisation exercise, an English court should 'consider the rationale of the English conflict rule and the purpose of the rule of substantive law to be characterised'.[100]

In the context of LC fraud, several policies are at play. At the most general level is a desire to protect the integrity of the system of international trade: 'Honest commerce requires that

this analysis is unsatisfactory in light of the discussion above that it is the reasonable expectation of the bank accepting presentation which should be given primacy.

96 Frans P de Rooy, *Documentary Credits* (Kluwer Law and Taxation Publishers 1984) 58.

97 Malek and Quest (n 2) para 7.2.

98 See eg *Marconi* (n 21), where Standard Chartered Bank acted as collecting bank. See also the role of Commerzbank in *Montrod* (n 59).

99 Restatement (n 58) § 6(e). See also Christopher Forsyth, '"Mind the Gap Part II": The South African Supreme Court of Appeal and Characterisation' (2006) 2 J Priv Int L 425.

100 Collins (n 15) para 2-039.

those who put important documents, like bills of lading, into circulation do so only where the bill of lading, as far as they know, represents the true facts'.[101]

Unfortunately, this policy provides little practical guidance. Virtually all jurisdictions have recognised the concept of a fraud exception to LCs. Where they differ is in the standard and definition of fraud — that is a matter for the substantive content of the governing law. One could conceivably turn to the US approach of interest analysis to assist in making a choice. The official comment to the Restatement states that where the policies of interested States are largely the same, but their relevant local law rules nonetheless contain minor differences, the law of the State which best achieves the basic underlying policies of the particular field of law should apply. [102] However, this would effectively require judges to determine which is the better rule of law, akin to Leflar's approach[103] — an approach which has been rightly criticised for thrusting upon judges the invidious role of making value judgments, or appearing to advocate reform of another country's law (where they determine their own law to be better).[104] The same criticism applies here.

The academic literature has also identified the autonomy principle as a policy which guides the choice of law inquiry in LCs,[105] but this logically cannot apply to fraud, which is by definition an *exception* to the autonomy principle. Letter of credit law attempts to balance

[101] *Standard Chartered Bank v Pakistan National Shipping Corp* [1995] 2 Lloyd's Rep 365, 374 (QB).

[102] Restatement (n 58) § 6(2) cmt h.

[103] Luther L McDougal III, Robert L Felix, Ralph U Whitten, *American Conflicts Law* (5th edn, Transnational Publishers 2001) ch 11.

[104] Torremans (n 15) 31; David F Cavers 'Symposium: Conflict of Laws Round Table: The Value of Principled Preferences' (1971) 49 Tex L Rev 211, 215.

[105] Ellinger and Neo (n 2) 375. Thus, the governing law of the underlying contract does not influence the governing law of the LC.

upholding the autonomy principle and preventing fraud in transactions.[106] The question of exactly what that balance should be is a matter for the substantive law in each jurisdiction. Similar to the use of interest analysis, it is arguably not the place of a judge to prefer one system of law over another because that system in his or her opinion strikes a better balance between the two.

Another key policy which must be noted is the smooth functioning of the international documentary credits system.[107] The focus of analysis in respect of this policy would be on the banks which are the operators of the system, and in particular those banks which undertake to accept presentations on behalf of other banks. At any one time, a bank could be engaged as a nominated bank by multiple issuing banks in different jurisdictions, with the potential for a different governing law under each presentation. This conundrum is mostly resolved by the uniformity of the rules created by the UCP, but it does not solve the issue of fraud, which the UCP does not cover. In this respect, the system would operate much more smoothly and efficiently if a bank applied the same law to all presentations made at its counters — that could only be its own local law. This policy consideration was highlighted in the English case of *Offshore International*, where Ackner J highlighted that 'very great inconvenience would arise' if a bank had to constantly seek to apply 'a whole variety of foreign laws'.[108] This concern supports the position that a characterisation approach should ideally enable a bank to apply the same law to all presentations made to it.

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[106] *Angelica-Whitewear* (n 9) [11]; Felicity Monteiro, 'Documentary Credits: The Autonomy Principle and the Fraud Exception: A Comparative Analysis of Common Law Approaches and Suggestions for New Zealand' (2007) 13 Auckland U L Rev 144, 144.

[107] See *Brody* (n 8) [19]; *Angelica Whitewear* (n 9) [41].

[108] *Offshore International* (n 41) 404.

4 A principled characterisation of the fraud exception

Having discussed the principles of characterisation, we are now ready to reach a conclusion on how the fraud exception should be characterised.

4.1 A flawed unitary characterisation

As discussed in Part 2.2 above, the current paradigm is that those courts which have expressly addressed potential conflicts problems arising from the fraud exception (as we saw, many have overlooked these issues altogether)[109] have tended to subsume the fraud exception under a unitary characterisation, such that fraud is characterised as an issue to be decided by the law governing the LC. That characterisation itself has given rise to confusion — some cases have recognised it to be contractual, in light of the autonomous contractual framework making up the LC, while others have analysed it as proprietary, focusing on the situs of the debt created by the LC undertaking. That confusion aside, more fundamental questions must be asked of this unitary characterisation — does it accord with the principles of characterisation discussed in Part 3, and is it even appropriate for fraud to simply take on the characterisation of the LC framework, whatever that may be?

The second question will be addressed first. What it ultimately comes down to is whether there is one single issue of the bank's obligation to pay under the LC, with one governing law to determine all sub-issues, including fraud; or whether fraud should be treated as a separate

[109] See Part 2.1 above.

issue with its own characterisation and governing law. Such a question is recognised in the conflicts discourse as a problem of *dépeçage*,[110] and each choice comes with its own dangers. As highlighted by the authors of *Cheshire, North & Fawcett: Private International Law*:

> Although a failure to distinguish separate issues may produce an unjust and distorted result, it might also be said that the decision to pick and choose may be motivated by a desire to avoid the application of a rule that is regarded as undesirable.[111]

However, the latter danger arises only if there is agreement that an issue should be characterised separately, but not on what that characterisation ought to be. If a separate characterisation is determined through commonly accepted principles and applied consistently, it can avoid unjust and distorted results, without the countervailing risks of an arbitrary and ad hoc choice of law.

Returning to the question of when a separate characterisation is justified, it is arguably so if 'policies, interests or considerations differ as they apply to the different issues'.[112] The difference in underlying policies and interests is the reason why one would not automatically apply the governing law of a contract to determine a tortious issue between contracting parties, unless they have consented to it in their exercise of party autonomy.[113] The policies,

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[110] For the purposes of this paper, *dépeçage* is used in the sense of a recognition that 'not all issues arising out of contractual relations will necessarily be governed by the same law': see Collins (n 2) para 32-024.

[111] Torremans (n 15) 55. See also Symeon C Symeonides, 'Issue-by-Issue Analysis and Dépeçage in Choice of Law: Cause and Effect' (2014) 45 U Tol L Rev 751; Willis LM Reese, 'Dépeçage: A Common Phenomenon in Choice of Law' (1973) 73 Colum L Rev 58.

[112] McDougal (n 104) 352.

[113] See eg *Trafigura Beheer BV v Kookmin Bank Co* [2006] EWHC 1450 (Comm), [2006] 2 All ER (Comm) 1008, where an express choice of law clause in a LC was applied to a claim in the tort of deceit. See also TM Yeo, 'The Effective Reach of Choice of Law Agreements' (2008) 20 SAcLJ 723.

interests, and considerations to be considered for the fraud exception will, naturally, be those discussed under the principles of characterisation in Part 3 above.

Before even examining these principles, it appears jarring to argue that the issue of what constitutes fraud might be treated as one of contract, or even property, for the purposes of characterisation. While it is accepted that characterisation categories 'must be given a wide meaning in order to embrace "analogous legal relations of foreign type"'[114] and 'should not be constrained by particular notions or distinctions of the domestic law',[115] they surely cannot escape the constraints of common sense. The different characterisation categories and respective choice-of-law rules exist precisely because different policies underlie each category. The subsuming of an issue like fraud under a characterisation with ostensibly unrelated underlying policies should therefore be closely scrutinised.

Upon such scrutiny, the unitary characterisation for fraud in the context of LCs does not accord with fundamental principles of characterisation. Taking certainty first, it has been established that certainty is most important for the bank accepting presentation, rather than the commercial parties (ie the buyer/applicant and seller/beneficiary). A presentation bank faced with a question of fraud will then first have to determine the governing law of the LC before it can determine the law applicable to the fraud — here it will have to dive into the same confused analysis which has resulted from *Power Curber*,[116] having to choose between two different characterisations (one contractual, one proprietary) which could lead to two

[114] Torremans (n 15) 44; See also AH Robertson, *Characterization in the Conflict of Laws* (Harvard University Press 1940) 33.

[115] *Macmillan Inc v Bishopsgate Investment Trust plc (No 3)* [1996] 1 WLR 387, 407 (CA).

[116] *Power Curber* (n 19).

different governing laws, with arguably little or no connection with the fraud itself.[117] As illustrated in Part II above, different courts will have different answers to that question. While this difficulty can ostensibly be resolved with an express choice of law clause in the LC, such clauses remain relatively rare.[118]

Secondly, considering the reasonable expectations of parties, it has been established that the commercial parties have no significant expectations to be protected because of fraud, and its ensuing consequences are unlikely to feature in their negotiations on the terms of the LC. Here, the overriding expectation is the presentation bank's expectation that its own local law will govern fraud in respect of all presentations at its counters. That expectation is not protected under a unitary characterisation. Under a unitary characterisation, fraud would be determined by the governing law of the LC, which may be the *lex situs* under a debt characterisation,[119] or in the case of a contractual characterisation, the law with the closest and most real connection with the contract — a contract to which the presentation bank is not party (unless it is the issuing bank) and has no role in negotiating.[120] In other words, the presentation bank's expectations would simply be irrelevant to determine the law governing fraud under a unitary characterisation.

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[117] See text at n 45 above.

[118] Richard Gwynne, 'The Governing Law(s) of a Letter of Credit' [2018] LMCLQ 450, 452; Geoffrey Wynne, 'Documenting around letters of credit' (*Trade Finance*, March/April 2017) <https://www.sullivanlaw.com/assets/htmldocuments/Trade%20Finance%20-%20Documenting%20around%20Letters%20of%20Credit%20-%20GGW%20-%20March%20April%202017.pdf>

[119] See *Taurus* (n 43).

[120] Furthermore, since LCs in most cases do not contain an express choice of law, there is much less scope to argue that parties have built up significant expectations. Still less can it be argued that these expectations are being protected by a court's ex post facto imposition of a governing law on the contract in the absence of such a choice.

Thirdly, it has been discussed in Part 3.2.3 above that the key underlying policy of the smooth operation of the LC system favours a characterisation which would allow the presentation bank to apply its own local law to determine fraud in all cases. This will not be achieved under a unitary characterisation where, depending on the jurisdiction, the presentation bank may have to apply the law of the issuing bank,[121] or even the law of the place of payment.[122] The warning in *Offshore International* of the bank having to apply a whole variety of foreign laws across all its LCs will then have materialised.[123]

Thus, a unitary characterisation of fraud, having failed the first 'sniff test' of common sense, is now shown to be unsupportable under the principles of characterisation. Its use will lead to potentially inappropriate governing laws, and thus distorted results in the determination of whether there has been fraud.

4.2 A separate, tortious characterisation

The inadequacy of the unitary characterisation having been demonstrated, it is the primary submission of this paper that in order to avoid unjust and distorted results, the fraud exception should be characterised as a distinct issue from the LC framework, and that it is more appropriately characterised in tortious terms.

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[121] *Taurus* (n 42).

[122] The acceptance of documents and payment on the credit are separate functions which will not necessarily be performed by the same nominated bank: see *Grains* (n 93) [70]–[71]. See also UCP (n 5) art 12(a), which makes clear that a bank which has been nominated to accept presentation of documents is not necessarily also the bank which must pay under the LC.

[123] *Offshore International* (n 41) 404.

This characterisation is more sensible as it assigns fraud to the much more natural category of tort. Under this characterisation, the general choice of law rule, at least in Anglo-Common Law jurisdictions, would be the *lex loci delicti* rule, [124] to the effect that fraud is governed by the law of the place where it is committed — which is likely to be at the counters of the bank accepting presentation. [125] This aligns better with the principles of characterisation enumerated above.[126] It ensures that the bank accepting presentation (whether the issuing bank or a nominated bank) can determine fraud by its own local law in most cases. This ensures greater certainty for the presentation bank (as the party for which certainty is most important). It accords with that bank's reasonable expectations to apply its own local law. It also facilitates the smooth operation of LCs, since the presentation bank will not need to apply a different foreign law to determine fraud under every LC for which it is instructed to accept presentation.[127]

This separate characterisation of fraud will not introduce undue complications to LCs generally. The need for this characterisation arises only where fraud is alleged, and the fraud exception is invoked. In the absence of this issue, other issues relating to the LC will continue to be determined by the governing law of the LC.

[124] See text at n 86 above.

[125] This is true at least in jurisdictions requiring fraud to be on the documents presented. As for jurisdictions which more broadly recognise fraud in the underlying transaction, see Part 4.3.1 below.

[126] See Part 3.2 above.

[127] This resolves the concern highlighted by Ackner J in *Offshore International* (n 41) 404.

4.3 Possible difficulties with a tortious characterisation

All this is not to say that there are no difficulties with a tortious characterisation. There may be problems, first, with localising fraud in some jurisdictions; and secondly, with the fact that not all jurisdictions apply the *lex loci delicti* rule to govern torts.

4.3.1 Difficulties with localising fraud

The first issue arises primarily under US and Canadian law, where fraud in the context of the fraud exception encompasses not only a direct misrepresentation made to the presentation bank in the form of documents, but also includes fraud in the underlying transaction[128] — the question is whether the same characterisation approach should apply for the latter type of fraud. One could conceivably argue for fraud to be subsumed within the underlying contract in this situation on the ground that it the connection is much closer here — the fraud here could have been effected in relation to the seller's performance of the sale contract,[129] or to its very formation.[130]

However, a tortious characterisation should prevail even in this scenario. While on the broader US and Canadian approach, fraud arising within the contractual matrix of the underlying transaction is relevant to the fraud exception, the focus nonetheless remains on the fact of the fraud and its impact on presentation under the LC (which triggers the bank's liability to pay), rather than any particular legal issues to do with the underlying contract.

[128] See text at n 12 above for an illustration of the two different formulations. See also *United City Merchants* (n 8) (UK) and *Brody* (n 8) (Singapore); compare *Mid-America Tire* (n 26) (US) and *Bonnie Sportswear* (n 24) (Canada).

[129] See eg *Bonnie Sportswear* (n 24).

[130] See eg *Ash v Corp of Lloyds* (n 24).

Ultimately, it is the presentation bank making the decision whether there is fraud, whether that is fraud on the documents or more broadly in the underlying transaction.

Furthermore, to apply the characterisation of the underlying transaction to fraud (even fraud which has arisen within that matrix) would create tremendous difficulties in practice. This may be illustrated with reference to our original example of the sale of boxing gloves between the UK buyer and New York seller, with payment by a deferred payment LC issued by a London bank which has nominated a New York bank to accept presentation.[131] When presented with evidence of the mouldy and ripped gloves, the London bank must make a decision whether to withhold payment from the seller. Adopting the proposed tortious characterisation of the fraud exception, the London bank will know that the presentation occurred in New York, and the New York standard of fraud would apply. The bank may not itself know what that standard is, but at least it would know which counsel to engage for advice and seek the assistance of its New York nominated bank which will presumably be familiar with its own local standard.

Contrast this with a situation where fraud is subsumed under the characterisation of the underlying contractual transaction. In this situation, the bank would first have to determine the governing law of the underlying contract before it can proceed to find out what standard or definition of fraud to apply, which entails examining the terms of the sale contract. There are at least two obstacles which arise here. The first is the autonomy principle. The LC and the bank's obligations under it are separate from the sale contract, and '[b]anks are in no way concerned with or bound by such contract, even if any reference whatsoever to it is included

[131] See text at n 11 above.

in the credit'.[132] The UCP itself discourages the inclusion of copies of the underlying contract in the credit.[133] Thus, requiring the bank to examine the terms of the sale contract with each presentation would run afoul of the autonomy principle and the UCP. The second obstacle is that such a course of action is plainly impractical. The sale contract is not typically included in the documentary package required for presentation under a LC.[134] In many cases, the sale contract may not exist as a document at all — it is not uncommon for international sales transactions to be agreed through an exchange of emails.[135] In the latter case, the bank would have to trawl through a chain of email correspondence (assuming it can obtain them from its client in the first place).[136] Furthermore, the existence of a sale contract in documentary form is no guarantee of certainty in relation to governing law — the contract may contain no express choice of law clause, leaving the bank to undertake the work of a judge in weighing all the elements of the transaction to determine the legal system most closely connected with the contract. This is simply an impossible task for bankers, who are 'neither lawyers nor judge'.[137] All this is before one considers the time pressures on bankers, 'who generally must respond reasonably quickly to the demand for payment under a letter of credit'.[138]

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[132] UCP (n 5) art 4(a).

[133] ibid art 4(b).

[134] This package typically consists of the invoice, transport documents and insurance documents, but may also include other documents such as a packing list and numerous certificates: see Malek and Quest (n 2) para 3.11.

[135] See eg *Bonnie Sportswear* (n 24).

[136] Further, a bank engaging in such action would clearly be investigating the underlying facts, thereby exceeding the scope of its duty to examine the documents presented and '[not to] take into account matters or circumstances that are extraneous to the documents': see *Abani Trading Pte Ltd v BNP Paribas and another appeal* [2014] SGHC 111, [2014] 3 SLR 909 [21].

[137] *Royal Bank v Darlington* (n 10) [186].

[138] Ibid [197]. Furthermore, art 14(b) of the UCP (n 5) provides only five banking days for the bank to make the determination of whether to accept presentation.

Thus, even in the case of fraud arising in the underlying transaction, a tortious characterisation is preferable, not only because it is concordant with the principles of characterisation, but also it is eminently more practical.

4.3.2 Application of the lex loci delicti in different jurisdictions

The second issue — that not all jurisdictions apply the *lex loci delicti* rule for torts — is more difficult to address. This paper does not propose a reform of the conflict of laws rules of all jurisdictions. Nonetheless, some suggestions are offered to achieve the desired effect of a tortious characterisation of the fraud exception within the bounds of existing rules.

(a) Anglo-Common Law jurisdictions

First, while the *lex loci delicti* rule applies with little difficulty in Anglo-Common Law jurisdictions like Australia,[139] Canada[140] and New Zealand,[141] Hong Kong and Singapore have retained the double-actionability rule which would require fraud to be actionable under both the *lex loci delicti* and *lex fori*.[142] The *lex fori* can, however, be avoided through the well-established exception which allows a court to apply only one of the two laws if the application of both would result in injustice and unfairness.[143] The use of this exception for LC fraud would be likely to be justified in order to avoid distorted results. As an illustration, if a Singapore court deciding an injunction application is faced with an allegation that a fraudulent

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[139] *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538, 568 (HCA); Davies (n 15) paras 20.17–20.18.

[140] *Tolofson v Jensen* (n 62).

[141] The *lex loci delicti* rule is statutorily embodied in the Private International Law (Choice of Law in Tort) Act 2017 (NZ) s 8.

[142] See eg *Rickshaw Investments Ltd and Another v Nicolai Baron von Uexkull* [2006] SGCA 39, [2007] 1 SLR(R) 377.

[143] ibid.

presentation had occurred at the counters of the nominated bank in New York, the default position would be that the alleged presentation would have to constitute fraud under both New York and Singapore law. However, the court may (and arguably should) find that utilising the Singapore standard for fraud committed in New York would not accord with the reasonable expectations of the banks or further the smooth operation of the documentary credits system, and thus it would result in distortion and unfairness, such that only the New York standard for fraud should be applicable.

Another potential snag is that even with a tortious characterisation, courts determining the governing law may nonetheless be influenced by the contractual matrix of the LC framework. This occurred in *Trafigura Beheer BV v Kookmin Bank Co*,[144] which involved a claim in deceit by an issuing bank to recover money paid to the beneficiary under an LC. The English High Court adopted a tort characterisation for fraud, but nonetheless found that that tort was more closely connected with English law because of the parties' pre-existing contractual relationship under the LC — effectively, the parties would have had no connection without the LC contract.[145] It is difficult to see why this would justify displacing normal principles of characterisation to the effect that any fraud must necessarily be determined by the law governing the LC. Recalling the principle of protecting reasonable expectations, while the parties are undoubtedly connected by the LC contractual framework, they did not negotiate for the consequences of the beneficiary's fraud, and there are no contractual expectations to

[144] *Trafigura* (n 114). This case was decided before the current regime of the Rome II Regulation, on the basis of the Private International Law (Miscellaneous Provisions) Act 1995 (UK), which statutorily codified the *lex loci delicti* rule. See also Adam Rushworth and Andrew Scott, 'Rome II: Choice of Law for Non-contractual Obligations' [2008] LMCLQ 274, 297.

[145] *Trafigura* (n 114) [104]–[116].

protect which would warrant the fraud being governed by the law of the LC contract. Furthermore, this case was a rare instance where the LC contained an express governing law clause, which could arguably extended to the effect that the parties in the exercise of their autonomy had also intended their choice of governing law to apply to fraud.[146] In the absence of such an express choice by the parties for the law governing their relationship under the LC, the court would have had to impute to the parties an objective proper law — in that case it would arguably have been much harder to justify any close connection between the tort of deceit and this imputed proper law.

(b) USA

Secondly, as discussed above, US courts have long eschewed single-factor jurisdiction selecting rules like the *lex loci delicti* rule in favour of interest analysis and range-of-factors methodologies.[147] However, there is some force in arguing for courts to exceptionally adopt a firm rule for LCs in the interests of certainty and smooth operation of the LC system. Support for this practice can be found in the Restatement, which provides a general range-of-factors approach, but also establishes clear rules for specific torts.[148] In fact, § 148(1), which establishes a *lex loci delicti* rule for fraud where the 'plaintiff's action in reliance took place in the state where the false representations were made and received', is arguably directly applicable to LC fraud. While the Restatement is obviously not a statute and is not necessarily adopted wholesale by courts in every State, it is nonetheless a model for establishing a clear and certain conflicts rule for the fraud exception in the modern US conflicts model.

[146] See text at n 114 above.

[147] See text at n 56 above.

[148] Restatement (n 58) §§ 145–149.

US courts must also contend with § 5-116(b) of the UCC which provides that in the absence of an express choice of law, 'the liability of an issuer, nominated person, or adviser for action or omission is governed by the law of the jurisdiction in which it is located'.[149] On its face, the wording of this provision would require the application of the issuing bank's local law where its liability to pay under the LC is in issue — that would include a question of whether such liability is negatived by reason of the beneficiary's fraud.[150] While US case law on this precise issue is scarce, this was the approach adopted by at least one Court.[151] While that provision could be seen as including fraud, the better view would be to exclude the fraud issue from it — that is consistent with the recognition that fraud is characterised as a separate issue from the substantive effect of the LC.

(c) EU and UK

Lastly, under the Rome II Regulation which applies in the EU and the UK post-Brexit,[152] the general rule for torts is not the *lex loci delicti*, but rather the *lex loci damni* or law of the place where the damage occurs.[153] Notwithstanding this, courts may rely on the art 4(3) exception to the effect that the law of the place of presentation should apply because that is manifestly more closely connected to the tort.[154] That finding is justified if it is accepted (as discussed

[149] See text above at n 79.

[150] See Graham (n 43) 229–230.

[151] *Societe Anonyme Marocain De L'industrie Du Raffinage v Bank of America* 31 NYS 3d 924 (NY Sup Ct 2016). However, the reasoning in this case was not entirely clear, as the Court first determined Pennsylvania law was applicable on the basis of the place of issuance and presentation, before proceeding to the seemingly superfluous step of applying § 5-116(b) of the UCC as applied in Pennsylvania.

[152] The Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc) (EU Exit) Regulations 2019, SI 2019/834 reg 4.

[153] Council Regulation (EC) 864/2007 of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) [2007] OJ L199/40 art 4(1).

[154] This would be consistent with the practice of the English courts with respect to determining the governing law of the LC under the prior Rome Convention: see *Marconi* (n 21).

above)[155] that a 'close connection' is really a proxy for the reasonable expectations of parties, and it is bolstered by the conclusions based on the other principles of characterisation.

4.3.3 Implications for recourse after payment

Thus far, the discussion of a principled characterisation of fraud in the context of the fraud exception has focused on the situation where fraud is discovered *before* the bank has paid under the LC, and the fraud exception is used as a basis for justifying the bank's refusal to pay. However, this is obviously not invariably going to be the case. The timing of the bank's discovery of fraud will depend on various factors such as the nature of the fraud, the astuteness of the bank and applicant, the timing and nature of receipt of information or evidence, and the agreed timing of payment.[156] Returning to our starting example, there would have been no opportunity for an injunction if the bank had issued a sight payment LC whereby the beneficiary was paid immediately upon the nominated bank's acceptance of the presentation. Therefore, this necessitates some discussion of the role of a tortious characterisation of fraud and the fraud exception in the context of recourse after payment.

(a) Recourse between banks

In cases where the issuing bank has appointed a correspondent bank to accept presentation, whether it is a nominating or confirming bank, questions of liability are likely to arise between the banks if payment has been made upon a fraudulent presentation. An issuing bank which has paid out upon acceptance of a presentation by its nominated bank may look to the latter

[155] See text at n 83 above.

[156] See eg *Banco Santander SA v Bayfern Ltd* [2000] 1 All ER (Comm) 776 (CA), where the beneficiary's fraud was discovered before it was due to be paid under a deferred payment LC, but after it had already been paid through the confirming bank's early discounting of the LC. See also *Standard Chartered Bank v Sin Chong Hua Electronic & Trading Pte Ltd* [1991] SGHC 121, [1991] 2 SLR(R) 445.

for compensation. A more complicated scenario is where the correspondent bank is a confirming bank or a nominated bank which has been authorised to honour or negotiate the LC and has already paid the beneficiary by the time fraud is discovered. Problems then arise as to the issuing bank's obligation to reimburse those banks.[157] However, these are issues relating to the contract between the banks — here, the autonomy principle and its corresponding exceptions are not in play.[158] These issues are to be determined by the terms of the contract between the issuing bank and its correspondent bank, and by the proper law of that contract. Indeed, the UCP itself has made provision for the latter scenario.[159] Thus, the characterisation of fraud is unlikely to be a major issue here.

(b) Banks' recourse against beneficiaries

The bank may also seek recourse against the fraudulent beneficiary itself. This may be pursued in the alternative to an inter-bank reimbursement claim, or indeed after one — either by an issuing bank which has reimbursed the correspondent bank, or by a correspondent bank which has failed to obtain reimbursement from its issuing bank. Such recourse is likely to be

[157] For illustrations of this situation, see *Banco Santander* (n 157); *Credit Agricole Indosuez v Generale Bank* [1999] 2 All ER (Comm) 1009 (HC); *European Asian Bank AG v Punjab and Sind Bank (No 2)* [1983] 2 All ER 508 (CA).

[158] See *Angelica-Whitewear* (n 9) [10], where it is made clear that the autonomy principle is concerned with the independence of the issuing bank's liability to pay the beneficiary from disputes in the underlying contract.

[159] In the case of deferred payment LCs, arts 7(c) and 8(c) of the UCP (n 5) (which were amended to address complications such as those which arose in *Banco Santander* (n 157)) require the issuing bank and confirming bank respectively to reimburse their nominated bank at maturity, even if the nominated bank had prepaid before maturity. Thus, there is a contractual obligation to reimburse even if fraud is discovered after prepayment by the nominated bank.

If the issuing bank has arranged for a third-party bank to carry out the reimbursement, then one must also consider the application of the Uniform Rules for Bank-to-Bank Reimbursements under Documentary Credits (2008 Revision), ICC Publication No. 725 (URR). That reimbursement arrangement would be even further removed, as art 3 URR makes clear that the reimbursing bank is not concerned with the terms of the LC — by extension it is not concerned with whether a presentation was complying, let alone fraudulent.

a more difficult proposition given that the fraudster may have absconded. However, if a bank can find and sue its beneficiary, there are two primary avenues available to it.

Deceit

The bank's first option is to make a claim against the beneficiary for tortious damages. This course of action requires little elaboration beyond what has already been discussed in the context of seeking an injunction. Under the *lex loci delicti* rule, it should be governed by the law of the place of presentation, where the fraud has occurred.[160]

Restitution of unjust enrichment

The second option is to make a restitutionary claim on the basis of unjust enrichment.[161] This recourse is only available to a bank which has actually made the payment to the beneficiary[162] — this would typically be a nominated or confirming bank which has paid the beneficiary but for some reason is unable to obtain reimbursement from the issuing bank. The benefit of a restitutionary claim over tort (at least at English and Singapore law) is that it can potentially be brought against parties other than the beneficiary, such as a collecting bank or other agent which received the money.[163] If the beneficiary disperses the monies through further

[160] But see Parts 4.3.2(b) and (c) for issues with the different choice-of-law rules in the USA and EU.

[161] See Ellinger and Neo (n 2) 164–165, Malek and Quest (n 2) paras 9.48–9.49, Brindle and Cox (n 75) para 7-058.

[162] Ellinger and Neo (n 2) 165. This is because a claim of unjust enrichment generally requires (although there are a few exceptions) a direct transfer of value from the claimant to the defendant: see *Wee Chiaw Sek Anna v Ng Li-Ann Genevieve (sole executrix of the estate of Ng Hock Seng, deceased)* [2013] SGCA 36, [2013] 3 SLR 801 [113]; *ITC v HMRC* [2017] UKSC 29, [2018] AC 275 [46]–[47].

[163] Ellinger and Neo (n 2) 164.

transfers, the doctrine of tracing may also be available to assist the bank in recovering from the subsequent recipients.[164]

Unsurprisingly, there are variances across different jurisdictions for a claim in unjust enrichment, and choice of law rules are thus relevant. Generally, unjust enrichment focuses either upon an enrichment in circumstances where an unjust factor is proved, or where there is no legal basis or juristic reason for the enrichment, depending on the jurisdiction.[165] At English and Singapore law, unjust enrichment is founded upon: (1) a benefit received by the defendant, (2) at the claimant's expense, with (3) the establishment of an unjust factor and (4) the lack of any defences.[166] It has been established that the unjust factor where a bank pays against a fraudulent presentation is that of a mistake of fact.[167] The equivalent claim under German law of unjustified enrichment focuses not on the presence of an unjust factor,

[164] *Standard Chartered Bank v Sin Chong Hua Electric & Trading Pte Ltd* [1991] SGHC 121, [1991] 2 SLR(R) 445 [25]–[29], where an issuing bank which was entitled to recover its payment to the beneficiary as money paid under a mistake was held to also be entitled to trace the money founded on a persistent equitable proprietary interest. Notwithstanding that authority, the availability of tracing in unjust enrichment is ambiguous and requires further development, not least because it is controversial whether unjust enrichment can give the claimant a traceable proprietary interest. For further discussion, see generally *Wee Chiaw Sek Anna* (n 160) [112]–[128]; Stephen Watterson, '"Direct Transfers" in the Law of Unjust Enrichment' (2011) 64 CLP 435; Lionel D Smith, 'Tracing and Electronic Fund Transfers' in Francis D Rose (ed), *Restitution and Banking Law* (Mansfield Press 1998).

[165] There may be other important differences between the jurisdictions such as in the availability of different remedies and defences. See generally Gerhard Dannemann, *The German Law of Unjustified Enrichment and Restitution: A Comparative Introduction* (OUP 2009).

[166] Andrew Burrows, *The Law of Restitution* (3rd edn, OUP 2011) 27; Tang Hang Wu, *Principles of the Law of Restitution in Singapore* (Academy Publishing 2019) para 01.021.

[167] However, there is some debate as to the nature of this mistake: see Malek and Quest (n 2) para 9.49; Ellinger and Neo (n 2) 164.

but on an enrichment without a valid legal ground.[168] This absence of basis approach is also adopted in the US and Canada.[169]

In the EU (and the UK), the relevant choice of law rule is art 10(1) of the Rome II Regulation, which provides that where an obligation arising out of unjust enrichment is closely connected with a pre-existing relationship between the parties, it shall be governed by the law governing that relationship.[170] In LC terms, the issuing bank's relationship with the beneficiary is clearly established to be contractual,[171] to be governed by the governing law of the LC.

Where does that leave us with fraud? It is clear from the above discussion that fraud is not an ingredient forming part of the cause of action in unjust enrichment, and that the governing law of the LC would appear to govern such a restitutionary claim in most jurisdictions. This does not mean that the fraud is irrelevant — one cannot simply disregard the fact that the fraud has generated the unjust enrichment in the first place. A court inquiring into whether the unjust factor of a mistake of fact was established, or whether the bank's payment was without legal basis or juristic reason, would in any case have to determine if there was indeed fraud. However, to allow the fraud issue to be subsumed within the broader unjust

[168] Dannemann (n 166) 11.

[169] See *Kerr v Baranow* [2011] 1 SCR 269 (Supreme Court of Canada) [32]; Restatement (Third) of Restitution and Unjust Enrichment (Am Law Inst 2011) § 1 cmt b. However, the differences in position between US and English law may be more illusory than real, since §§ 5–6 of the Restatement expressly provide for mistaken payment to be a positive ground for restitution.

[170] In the US, consistent with the positions for contract and tort, the governing law for restitution is generally determined through a range of factors approach. However, significant weight is given to the pre-existing relationship between the parties: see Restatement (n 58) § 221 cmt d.

[171] This is notwithstanding that the LC framework does not fit comfortably with the Common Law contractual requirements of offer and acceptance, and consideration: see Booysen (n 2) paras 2.13–2.23.

enrichment claim (and determined by the governing law of the LC) would bring us back to square one — it does not tally with the reasonable expectations of parties and would serve to distort results. That cannot be appropriate.

One possible solution would be to fashion a special choice of law rule for unjust enrichment claims in the LC context, which would select the law of the place of presentation. However, that would be a brute-force distortion of the entire cause of action just to accommodate one subsidiary issue — an application of similar logic which has led to fraud being subsumed under the ambiguous unitary characterisation of the LC.[172] Thus, no such rule is proposed here.

The better solution would be to apply the same philosophy of separate characterisation which has been advocated in this paper. In other words, where the *issue* of fraud arises in a restitutionary claim by the bank, it should equally be given a separate characterisation as a tort, and thus be determined by the law of the place of presentation. This would not result in a uniformity of substantive results across jurisdictions in terms of the success of an unjust enrichment claim — such uniformity of outcomes will not be possible as long as there remains a variance in the laws of different jurisdictions. What such an approach would hopefully ensure, however, is that in any case where fraud has been alleged, courts in different jurisdictions will apply the same consistent standard to determine whether there has been such fraud, regardless of whether a claim is one for an injunction, for tortious damages or for restitution of unjust enrichment.

[172] See Part 2.2 above.

5 Conclusion

As this paper has demonstrated, the application of conflict of laws principles to LCs remains murky and relatively under-developed, notwithstanding the importance of these instruments to the world of cross-border commercial transactions. While there are many issues yet to be explored, this paper has focused particularly on the fraud exception and the sorry state of the jurisprudence surrounding the deceptively simple question of 'was there fraud in this case?'. This has been approached and analysed fundamentally as a conflicts characterisation problem. With that backdrop, it has been argued that on the basis of conflict of laws principles such as promoting certainty and predictability, protecting the reasonable expectations of the (right) parties, and ensuring the smooth operation of the international LC system, any subsummation of the fraud issue within the rest of the LC contractual framework must be rejected. Instead, fraud must be given a separate and more natural characterisation as a tort.