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# SHOULD THERE BE A NEGLIGENCE EXCEPTION TO THE AUTONOMY PRINCIPLE FOR LETTERS OF CREDIT?

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# Should there be a negligence exception to the autonomy principle for letters of credit?

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ABSTRACT

Fraud is the only widely accepted exception to the autonomy principle applicable to letters of credit. However, a recent decision of the Singapore High Court, *Bank of China Ltd, Singapore Branch v BP Singapore Pte Ltd* [2021] SGHC 120, [2021] 5 SLR 738, appears to support the possibility of a further exception: the negligence exception. Other lawsuits pending before the Singaporean courts also implicitly refer to (and plead) such a possibility. This paper argues that the negligence exception should be rejected.

Keywords: Trade finance law, letters of credit, documentary credits, autonomy principle, negligence, duty of care, foreseeability, proximity, public policy.

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## 1 Introduction

The Singapore High Court decision of *BOC*[1] revived the possibility of a negligence exception to the autonomy (or independence) principle of letters of credit (LCs). This principle isolates the LC from disputes arising out of the contract underlying the LC (typically a sale contract). A bank cannot rely on such disputes to avoid paying the beneficiary of the LC (typically the seller). Courts are loathe to interfere with the payment flow under LCs. Fraud aside, they take a hands-off approach and leave such disputes to be resolved between the parties of the underlying contract (and not the bank). Other exceptions to the autonomy principle are not widely accepted. Thus, any negligence exception faces a high barrier to entry.

The one and only widely accepted exception is fraud committed by the beneficiary.[2] Outside North America, this is a narrow exception: there must be a material falsity in the documents presented by the beneficiary to the bank.[3] The beneficiary must be aware of that falsity no later than the time of presentation. If clearly proven, the bank can resist a beneficiary's claim for payment. Third-party fraud, such as when the beneficiary is unaware of the documentary falsity, is not within the exception.[4] The falsity in *BOC* concerned documents issued by the beneficiary stating that goods sold by the applicant of the LC to the beneficiary existed.[5] The first question in *BOC* was '[w]hen a bank has paid a beneficiary under a [LC], can the bank seek to recover that payment on the basis that the beneficiary had negligently misled the bank into making payment?'.[6] Had 'negligently' been replaced with 'fraudulently', then the answer would be a clear yes.[7] It would still be yes where the bank was refusing to pay the fraudulent beneficiary. Thus, the second question is whether a bank can refuse to pay a

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1 *Bank of China Ltd, Singapore Branch v BP Singapore Pte Ltd* [2021] SGHC 120, [2021] 5 SLR 738 (*BOC*), noted in Dora Neo, 'Banking Law' (2021) 22 Singapore Academy of Law Annual Review of Singapore Cases 128, paras 5.6-5.9.

2 *United City Merchants (Investments) Ltd v Royal Bank of Canada (The American Accord)* [1983] 1 AC 168 (HL) (*UCM*); *Brody, White and Co Inc v Chemet Handel Trading (S) Pte Ltd* [1992] SGCA 66, [1992] 3 SLR(R) 146 [20]. Cf RJA Hooley, 'Bills of Exchange and Banking' in Hugh G Beale (ed), *Chitty on Contracts*, vol 2 (34th edn, Sweet & Maxwell 2021) paras 36-514–36-516 (illegality exception); *Beam Technology (Mfg) Pte Ltd v Standard Chartered Bank* [2002] SGCA 53, [2003] 1 SLR(R) 597 [31]-[36] (Chao Hick Tin JA) (limited nullity exception).

3 *Brody* (n 2) [21].

4 *UCM* (n 2).

5 *BOC* (n 1) [57]-[58].

6 Ibid*,* [1].

7 *UCM* (n 2); *Bank of Nova Scotia v Angelica-Whitewear Ltd* [1987] 1 SCR 59, (1987) 36 DLR (4th) 161 (*Angelica-Whitewear*); *Brody* (n 2) [20]–[21].

negligent beneficiary? If both questions are answered affirmatively, then there would be a negligence exception; if only the first, then a 'one-way' negligence exception arises.

Initially, an English first instance decision, *Montrod*, held that '[t]he beneficiary does not owe a duty of care to the issuing bank'.[8] This was quoted on appeal without express approval or disapproval.[9] Subsequently, a Singaporean decision, *Carrier*,[10] declared an inclination to reject the negligence exception. *BOC* doubted *Carrier*. *PPT Energy*,[11] another recent decision, did not. The plaintiffs in three other suits currently pending in the Singapore High Court have effectively pleaded the possibility of the negligence exception.[12] *BOC* was an interlocutory judgment on the beneficiary's unsuccessful attempt to strike out the bank's negligence claim. Will a negligence exception arise out of the pending suits and their judgments?

This paper argues that there ought to be no negligence exception. It will first discuss what a negligence exception might look like. The negligence exception might be framed in two ways.[13] First, by way of *Hedley Byrne* negligent misstatement.[14] On this basis, the bank would have to prove the *Hedley Byrne* elements of the beneficiary's (voluntary) assumption of responsibility and the bank's reliance on the beneficiary. There is a debate whether *Hedley Byrne* liability is tortious or contractual in nature, and whether assumption of responsibility arises out of the will of the representor (ie quasi-contractual) or otherwise.[15] Second, by way

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8 *Montrod Ltd v Grundkotter Fleischvertriebs-GmbH* [2001] 1 All ER (Comm) 368, 383 (Judge Raymond Jack QC).

9 *Montrod Ltd v Grundkötter Fleischvertriebs GmbH* [2001] EWCA Civ 1954, [2002] 1 WLR 1975 (CA).

10 *DBS Bank Ltd v Carrier Singapore (Pte) Ltd* [2008] SGHC 53, [2008] 3 SLR(R) 261 (*Carrier*).

11 *Crédit Agricole Corporate & Investment Bank, Singapore Branch v PPT Energy Trading Co Ltd* [2022] SGHC(I) 1, [2022] 4 SLR 1 [21], [117] (*PPT Energy*).

12 These are, first, the High Court Suit Number 1044 of 2021, *CTBC Bank Co Ltd, Singapore Branch v BP Singapore Pte Ltd* (HC/S 1044/2021); second, *CIMB Bank Berhad, Singapore Branch v BP Singapore Pte Ltd* (HC/S 178/2022); and third, *Natixis, Singapore Branch v BP Singapore Pte Ltd* (HC/S 186/2021). See CTBC's Statement of Claim (Amendment No 1) dated 9 March 2022 at [37] and following, CIMB's Statement of Claim dated 4 March 2022 at [42] and following, and Natixis's Statement of Claim dated 17 August 2021 at [60] and following. Interestingly, a negligence claim was not advanced in *UniCredit Bank AG v Glencore Singapore Pte Ltd* [2022] SGHC 263 [22]–[24].

13 *Robinson v Ontario New Home Warranty Program* (1994) 18 OR (3d) 269 (Ontario Court (General Division), Canada) 283g–290b.

14 *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 (HL).

15 See generally Kit Barker, Ross Grantham, and Warren Swain (eds), *The Law of Misstatements: 50 Years on from* Hedley Byrne v Heller (Hart Publishing 2015); Paul Mitchell, '*Hedley Byrne & Co Ltd v Heller & Partners Ltd* (1963)' in Charles Mitchell and Paul Mitchell (eds), *Landmark Cases in the Law of Tort* (Hart Publishing 2010); Mark P Gergen, 'Negligent Misrepresentation as Contract' (2013) 101 California Law Rev 953.

of negligence, which has four well-known elements. The key element here is 'duty of care'. There are different tests to determine whether the law should impose this duty.

In England, the *Caparo* test for foreseeability, proximity, and the final element of 'fair, just, and reasonable' appeared to hold sway as the single applicable test.[16] This, however, was doubted recently by Lord Reed JSC.[17] Nevertheless, the *Caparo* test for foreseeability, proximity, and the final element of 'fair, just, and reasonable' remains applicable for novel cases.[18] Under English law, the negligence exception is a novel case concerning the LC relationship between the bank and the beneficiary.

In contrast, Singapore applies a universal test introduced by *Spandeck*, which incorporates *Hedley Byrne* liability for pure economic loss.[19] There is a threshold test of factual foreseeability, followed by a first stage of proximity, and a second stage of policy, to ascertain whether policy negatives any prima facie duty of care found after the first stage. Although the English and Singaporean tests are not the same, it is unlikely that they will produce different results.[20]

*BOC* involved the paper sale of non-existent oil cargo between BP and 'Hin Leong Trading (Pte) Ltd' (Hin Leong), which sold oil to BP and repurchased it at a lower price.[21] Unknown to many, Hin Leong was in financial difficulty and had allegedly resorted to massive fraud.[22] The sale enabled Hin Leong to inflate its trade finance credit and obtain liquidity from the Bank of China (BOC), which financed this sale for Hin Leong's benefit.[23] BP would profit by presenting documents to BOC. BOC did not take sufficient security and relied on Hin Leong's creditworthiness as a substantial trader.[24] Under the LC issued by BOC, BP merely needed to present its invoice and a letter of indemnity (LOI) to BOC.[25] In BP's LOI, BP had to state that

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16 *Caparo Industries plc v Dickman* [1990] 2 AC 605 (HL).
17 *Robinson v Chief Constable of West Yorkshire Police* [2018] UKSC 4, [2018] AC 736 [15], [20(1)], [21].
18 MA Jones, 'Negligence' in Michael A Jones (gen ed), *Clerk & Lindsell on Torts* (23rd edn, Sweet & Maxwell 2020) para 7-18.
19 *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] SGCA 37, [2007] 4 SLR(R) 100.
20 Julian Bailey, *Construction Law*, vol 2 (3rd edn, London Publishing Partnership 2020) paras 10.09–10.14.
21 *BOC* (n 1) [5], [12]–[14].
22 Ibid, [11]–[13].
23 Ibid, [12].
24 *Standard Chartered Bank (Singapore) Ltd v Maersk Tankers Singapore Pte Ltd* [2022] SGHC 242 [2].
25 *BOC* (n 1) [10].

the oil cargo existed and provide cargo details.[26] BP's LOI appears to be for the benefit of Hin Leong only, excluding BOC.[27] BP would have to obtain cargo details from Hin Leong to issue and present BP's LOI.[28] BOC eventually paid BP. Hin Leong, facing financial difficulties, did not reimburse BOC.[29] BOC thus sued BP and the controllers of Hin Leong, alleging fraud and negligence among other things.[30] BOC did not sue on BP's LOI. It is unclear whether BP was aware of Hin Leong's fraud or the non-existent cargo. However, if someone had checked the cargo details, it might have become apparent that the cargo was non-existent.[31] If BP owed a duty of care to BOC to prepare its documents with care, then it could be argued that BP was negligent in issuing a LOI containing inaccurate information. *BOC* held that the negligence exception was arguable, and that such negligence could permit BOC to recover its payment previously made to BP.

## 2 Arguments

The main problem with imposing voluntary *Hedley Byrne* liability on the beneficiary is that the beneficiary does not assume responsibility to the bank by agreeing to the terms of the LC. There is controversy over whether the beneficiary assumes responsibility to the bank when presenting documents to it. On the one hand, the orthodox position is that the beneficiary is purely acting for itself and does not assume responsibility to the bank by accepting the terms of the LC.[32] On the other hand, given that the LC arose out of the underlying contract between the beneficiary and applicant, it could be realistically argued that the beneficiary should not be allowed to act selfishly, but must act with 'care and circumspection'[33] especially when issuing documents.[34] Nevertheless, the beneficiary tends to restrict its liability under its LOI with a term that prevents the bank from enforcing the LOI as a third party.[35] That term, being

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[26] Ibid, [57], [82]. For examples of similar LOI wording, see *UniCredit* (n 12) [79]; *The STI Orchard* [2022] SGHCR 6 [13]; *Maersk* (n 24) [9]–[10], [57]–[59].

[27] Ibid, [53].

[28] Ibid, [85], [87].

[29] Ibid, [11].

[30] Ibid, [15]–[17].

[31] Ibid, [12]–[14].

[32] *Carrier* (n 10) [104]–[106].

[33] *Lambias (Importers & Exporters) Co Pte Ltd v Hongkong & Shanghai Banking Corp* [1993] SGHC 102, [1993] 1 SLR(R) 752 [68] (Goh Phai Cheng JC).

[34] *Niru Battery Manufacturing Co v Milestone Trading Ltd* [2003] EWCA Civ 1446, [2004] QB 985. See also Neo (n 1) para 5.9.

[35] *UniCredit* (n 12) [191]–[198]. Cf *PPT Energy* (n 11) [5].

part of the LOI, would have been prescribed in the LC.[36] In issuing the LC containing that prescribed LOI wording, the bank agreed to be bound by that term. The bank cannot then do a volte-face and argue that the beneficiary owes enforceable obligations to the bank by virtue of the LOI issued and presented by the beneficiary to the bank. An analogy can be drawn between that term and a disclaimer of liability. To hold the beneficiary liable to the bank despite such a restriction or disclaimer would instead be involuntary *Hedley Byrne* liability (ie against the will of the beneficiary). Such liability is subject to policy reasons discussed subsequently. Voluntary *Hedley Byrne* liability cannot arise unless the restriction or disclaimer is absent. Even then, the 'negligence exception' cannot be supported by *Hedley Byrne* liability situations where the beneficiary has voluntarily assumed responsibility[37] to the bank. Negligence fits within the boundaries of tort law, which does not provide a good fit for voluntary assumption of responsibility. *Hedley Byrne* liability situations must involve what is in effect a promise to take care and such a promise is arguably more aptly described as contractual than tortious,[38] at least insofar as the commercial context of LCs is concerned. After all, a 'voluntary assumption of responsibility as conceptualised by *Hedley Byrne* is a term of art and not a turn of phrase. It means a contract minus only consideration'.[39] If consideration is the only barrier to the 'contract' label, then that barrier is easily removed in the commercial context of LCs.[40] First, under general contract law, the requirement for consideration has been criticised[41] and described as 'almost certainly need[ing] to be reformed'.[42] Second, in the commercial context of LCs, the enforceability of promises appears to be unaffected by the doctrine of consideration:[43] judges would be 'loath to hold,

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[36] Ibid*,* [12]–[13].

[37] Assumption of responsibility remains the foundation of *Hedley Byrne* liability: *NRAM Ltd (formerly NRAM plc) v Steel* [2018] UKSC 13, [2018] 1 WLR 1190 [24] (*NRAM*).

[38] *Chu Said Thong v Vision Law LLC* [2014] SGHC 160, [2014] 4 SLR 375 [149]–[159]. See Allan Beever, *Rediscovering the Law of Negligence* (Hart Publishing 2007) ch 8; Allan Beever, 'The Basis of the Hedley Byrne Action' in Barker (n 15). But cf Christian Witting, 'What are We Doing Here? The Relationship Between Negligence in General and Misstatements in English Law' in Barker (n 15).

[39] Ibid*,* [149]; Beever (n 38) in Barker (n 15) 98–103.

[40] Cf *Kuvera Resources Pte Ltd v JPMorgan Chase Bank NA* [2022] SGHC 213 [57], [65].

[41] *White v Jones* [1995] 2 AC 207 (HL) 262H. See also Koo Zhi Xuan, 'Envisioning the Judicial Abolition of the Doctrine of Consideration in Singapore' (2011) 23 SAcLJ 463; Lee Pey Woan, 'Consideration' in Andrew Phang Boon Leong (ed), *The Law of Contract in Singapore*, vol 1 (2nd edn, SAL Academy Publishing 2022) para 04.128. But cf Mindy Chen-Wishart, 'In Defence of Consideration' (2013) 13 OUCLJ 209.

[42] *Gay Choon Ing v Loh Sze Ti Terence Peter* [2009] SGCA 3, [2009] 2 SLR(R) 332 [117] (Andrew Phang Boon Leong JA).

[43] Paul S Davies, 'Consideration' in Beale (n 2) para 6-218; Hooley (n 2) para 36-512; Edwin Peel, *The Law of Contract* (15th edn, Sweet & Maxwell 2020) para 3-161; Jack Beatson, Andrew Burrows and John Cartwright, *Anson's Law of Contract* (31st edn, OUP 2020) 118–119.

particularly in a commercial context, that a promise which both parties intended should be relied on was unenforceable for want of consideration'.[44] Furthermore, 'in construing a [LC] an obligation may appropriately be described as contractual regardless of whether a common law analysis of offer, acceptance and consideration can be shown to be strictly satisfied in relation to it'.[45] This deals with the perennially problematic issue of whether the beneficiary can be said to provide consideration. Finally, the LC is a substantial player in international commercial contracts of sale. Consideration is of 'minimal practical importance' in 'the context of international commercial contracts'.[46] Meanwhile, the United States has removed the requirement for consideration for LCs.[47] *Hedley Byrne* liability can arise in the LC context. If a beneficiary presents a LOI addressed to the LOI holder stating that the cargo exists and that it has good title in order to induce payment, the LOI holder can sue the beneficiary for breach of that LOI (a traditional contractual claim)[48] and for breach of the beneficiary's assumed promise to take care when making statements in the LOI (a claim for *Hedley Byrne* liability). The contractual claim can be defeated by a term preventing any other party (apart from the named buyer) from having rights under the LOI ('no third party rights term').[49] The *Hedley Byrne* liability claim can also be defeated by the 'no third party rights term' which negates the assumed promise to take care (like a disclaimer applicable to all save for the named buyer) because the beneficiary has not assumed responsibility to anyone apart from the named buyer, and (it would have been reasonably foreseeable to the beneficiary that) only the named buyer can reasonably rely on the beneficiary's representations in the LOI.[50] However, not all LOIs have this 'no third party rights term'.[51] Thus, the above shows that the LOI can override the autonomy principle. This should not be controversial. Due to the notion

[44] *Taurus Petroleum Ltd v State Oil Marketing Co of the Ministry of Oil, Republic of Iraq* [2017] UKSC 64, [2018] AC 690 [25] (Lord Clarke). See also Sandra Booysen, 'The Letter of Credit as a Contract' in Christopher Hare and Dora Neo (eds), *Trade Finance: Technology, Innovation and Documentary Credits* (OUP 2021) paras 2.43–2.46.

[45] *Taurus Petroleum Ltd v State Oil Marketing Co of the Ministry of Oil, Republic of Iraq* [2015] EWCA Civ 835, [2016] 1 Lloyd's Rep 42 [61] (Briggs LJ). See also Booysen, ibid.

[46] Ewan McKendrick, *Contract Law* (14th edn, Red Globe Press 2021) 117, citing art 2.101 of the Principles of European Contract Law, and art 3.1.2 of the UNIDROIT Principles of International Commercial Contracts with the note to that article.

[47] Uniform Commercial Code s 5-105.

[48] *PPT Energy* (n 11) [149]–[161].

[49] See eg *Maersk* (n 24) [10] (Ang Cheng Hock J).

[50] *NRAM* (n 37) [19].

[51] *PPT Energy* (n 11).

of party autonomy under contract law,[52] the bank and the beneficiary can agree to override the autonomy principle either in fact or in effect. For example:

(a) by subsequent agreement (eg a settlement agreement or interim settlement agreement, such as a bank agreeing to pay in exchange for the ability to recover an equivalent sum from the beneficiary's guarantor[53] as an interim measure while a dispute is pending before the court),

(b) by prior agreement, perhaps by agreeing (directly or indirectly) to subject the LC to non-standard terms,[54]

(c) by a contemporaneous agreement, perhaps agreeing to make payment under reserve[55] while presentation documents are being reviewed,

(d) by a prior agreement to accept a LOI containing contractual warranties or promises made by the beneficiary in favour of the bank, in lieu of traditional shipping documents like a bill of lading[56] and other certificates of quantity and quality issued by a carrier and surveyors respectively.

In summary, to allow a negligence exception based on voluntary *Hedley Byrne* liability is to further 'the dubious and lethal colonization by the tort of negligence of the conceptual territory of contract'. [57] Involuntary *Hedley Byrne* liability imposing liability despite a disclaimer or a 'no third party rights' term is vulnerable to the same policy reasons that guard against negligence liability.[58]

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[52] Christopher Hare, 'On Autonomy', CML Working Paper Series, No 18/03, April 2018, <https://law.nus.edu.sg/cml/publications> accessed 28 February 2023, 19–20.

[53] *PPT Energy* (n 11) [7], [110]–[111].

[54] *Sirius International Insurance Co (Publ) v FAI General Insurance Ltd* [2004] UKHL 54, [2004] 1 WLR 3251.

[55] *Banque de l'Indochine et de Suez SA v J H Rayner (Mincing Lane) Ltd* [1983] QB 711 (CA).

[56] *PPT Energy* (n 11) [5], [149]–[161].

[57] *Hamble Fisheries Ltd v L Gardner & Sons Ltd (The Rebecca Elaine)* [1999] 2 Lloyd's Rep 1 (CA) 8 (Mummery LJ) (ie, para 4 of his judgment).

[58] Witting (n 38) in Barker (n 15) 239–240; Kit Barker, '*Hedley Byrne v Heller*: Issues at the Beginning of the Twenty-First Century' in Barker (n 15) 15, 17.

## 2.2 Prima facie duty of care

As for negligence, the bank needs to first establish a duty of care. Under English law, the *Caparo* test applies because the negligence exception is novel.[59] Under Singaporean law, the *Spandeck* test applies.[60]

Foreseeability and proximity can be satisfied easily. This can be illustrated by applying the *Spandeck* test (excluding the 'second' policy stage) to the facts of *BOC*. A different result is unlikely to arise if the *Caparo* test was applied instead.[61]

***Foreseeability***. It is foreseeable that a beneficiary's negligence in the issuance of its documents might harm a class of persons:[62] banks. A beneficiary-seller might negligently issue documents for cargo honestly thought loaded onboard (but not in fact), causing the bank to have documents in respect of non-existent 'cargo'.[63] Perhaps the beneficary's supplier defrauded the beneficiary. Like consumers consuming contaminated ginger-beer, banks can suffer harm as circumstances can prevent the bank 'from discovering by inspection any defect'[64] in documents manufactured by the beneficiary.

Banks are unable to check beneficiaries' invoices or LOIs to determine if cargo was loaded (or concurrently sold to multiple buyers[65]). A bank might use the LOI to verify shipment by checking with the carrier, the 'ICC-IMB',[66] and/or vessel tracking services. But the carrier might not respond; the ICC-IMB could cross-check against the carrier, report multiple LOIs, but cannot confirm 'authenticity of [the] LOI' by itself.[67] Historical vessel tracking data might be able to indicate proximity to a cargo source for the relevant duration and provide an 'appear[ance]' of cargo being loaded[68] as per the documentary data, but cannot guarantee

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59 *Caparo* (n 16).
60 *Spandeck* (n 19).
61 Bailey (n 20) paras 10.09–10.14.
62 Gary Chan Kok Yew, *The Law of Torts in Singapore* (2nd edn, Academy Publishing 2016) para 03.042.
63 *BOC* (n 1) [13]–[14].
64 *Donoghue v Stevenson* [1932] AC 562 (HL) 579 (Lord Atkin).
65 *BOC* (n 1) [12(b)].
66 The International Maritime Bureau of the International Chamber of Commerce: *Galleria (Hong Kong) Ltd v DBS Bank Ltd* [2021] HKCA 611 [2].
67 'Richard Martin Allan's 1st Affidavit' dated 11 September 2020 in *Winson Oil Trading Pte Ltd v Standard Chartered Bank (Singapore) Limited* (HC/S 474/2020; HC/SUM 3563/2020) 115 (Allan's Affidavit).
68 'Ee Meng Yen Angela's 1st Affidavit' dated 18 June 2020 in *Re cargo presently laden on board the ship or vessel Ocean Voyager (IMO No 9388807)* (HC/OS 593/2020) [8], 73–76.

loading in fact. As explained below, vessel tracking data can also be unclear and doubtful. Multiple LOIs for the same cargo can be satisfactorily explained by the 'transaction chain'.[69]

One counterargument is that '[i]n the ordinary course of documentary credit transactions', the bank would obtain reimbursement from the buyer-applicant[70] and pass defective documents on. This is rebutted by the subsequent insolvency of the buyer-applicant, which prevents complete reimbursement. With the buyer-applicant not taking up documents, the bank is forced to 'consume' the 'contaminated' documents which could be 'worthless' as the documents might contain wording to prevent the bank from suing on it.[71] Nevertheless, the bank was not 'forced' to take on this risk. It willingly decided to do so. On one hand, it could have insisted on fuller documentation and security provided by the beneficiary and/or the applicant. On the other hand, if the trade finance market is in a 'race to the bottom' in terms of documentation and security, the bank could exit that market.

***Proximity***. There is 'sufficient legal proximity between [bank] and [beneficiary] for a duty of care to arise'.[72] Both beneficiary and bank have a close and direct relationship surrounded by a 'mesh' of commercial contracts (bank–buyer; buyer–seller); the beneficiary's compliant presentation to the bank triggers the 'contractual force' behind the bank's payment obligation; the relationship is 'akin to contract' and is 'as close as could be short of actual privity'.[73] This is circumstantial proximity. The beneficiary's act of issuing invoices and LOIs in exchange for the bank's payment can cause loss to the bank, as explained above. This is causal proximity. One counterargument is that the LOI's text (precluding anyone apart from the named buyer from suing on it) goes against any 'assumption of responsibility' by the beneficiary and that the beneficiary does not assume responsibility in the LC context.[74] Still, absence of 'assumption of responsibility' is not fatal under Singaporean law; the beneficiary should know that the bank will rely on the documents presented.[75] Furthermore, although

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69 DOCDEX 372, in Allan's Affidavit (n 67) 1003.

70 'Defence' dated 31 August 2021 [57(c)] in *Natixis* (n 12).

71 *BOC* (n 1) [53] (Andre Maniam JC).

72 *Spandeck* (n 19) [77]–[81] (Chan Sek Keong CJ).

73 Ibid*,* [45], [53], [77]. See also Booysen (n 44) paras 2.43–2.44.

74 *BOC* (n 1) [53]; *Carrier* (n 10) [106].

75 *Spandeck* (n 19) [81]; *NTUC Foodfare Co-operative Ltd v SIA Engineering Co Ltd* [2018] SGCA 41, [2018] 2 SLR 588 [40]–[41]. See Howard Bennett, 'Documentary Credits' in Michael Bridge (ed), *Benjamin's Sale of Goods* (11th edn, Sweet & Maxwell 2020) para 23-308.

not widely accepted, it has been stated that a 'fundamental principle in documentary credits' is that 'there must be care […] taken in the tender of documents by [beneficiaries]'.[76]

Thus, a prima facie duty of care owed by the beneficiary to the bank arises. Under the *Spandeck* test, the next issue is whether this duty should be negated by 'policy considerations'.[77]

The particular duty of care to be examined here is one on the beneficiary to carefully issue and present documents under the LC (such an invoice and LOI).[78] How might this duty work in practice? The beneficiary can only check against the limited information provided by LOI(s) passing through the chain of contracts, such as the vessel's identity, the quantity of cargo loaded onboard, the loading date as indicated by the bills of lading, and the loadport.[79] These enable the beneficiary to perform basic retrospective checks on the plausibility of loading. For example, reviewing records of the vessel's location (was it near the loadport?), its maximum cargo carrying capacity (could this compact vessel possibly carry the entire cargo?), maximum possible duration of cargo loading, maximum cargo loading rate, and whether operations at the loadport were interrupted by weather or strikes (was the vessel near the loadport for a sufficient period to load the entire cargo?). While similar checks might be done for documents, such as bills of lading, issued by a third party containing similar information, it is unclear how a reasonable beneficiary might be expected to check other documents (such as a surveyor's cargo certification) and whether it is sufficient to rely on the reputation of the document's issuer. A beneficiary should not be required to perform complicated checks, such as arranging at urgent notice and at great expense for an adventurous surveyor to perform real-time cargo checks by boarding a long-range helicopter so as to fast-rope down onto the vessel far out at sea and underway. In essence, the so-called careless beneficiary that fails to perform basic retrospective checks on the plausibility of loading might lose the benefit of the LC for that particular presentation of documents: the bank is entitled to refuse payment or recover payment if the beneficiary was paid.

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[76] *Lambias* (n 33) [68] (Goh Phai Cheng JC).
[77] *Spandeck* (n 19) [83] (Chan Sek Keong CJ).
[78] Neo (n 1) paras 5.8–5.9.
[79] See, eg, the LOIs reproduced in *PPT Energy* (n 11) [5], *UniCredit* (n 12) [79], and *The STI Orchard* (n 26) [13(c)].

### 2.3 Policy negates prima facie duty of care

It is unreasonable to impose a duty of care because the beneficiary is not in a suitable position to take reasonable care when issuing and presenting documents required by the LC. The reasoning for this follows.

### 2.4 Duty unreasonable in fact

The first broad point: imposing a duty of care will cause the beneficiary uncertainty. Certainty is crucial for commercial dealings. Given the case-by-case approach taken by the law of negligence, the beneficiary is likely to face many unanswerable questions when checking documents prior to presentation. What checks should the beneficiary do? A reasonable beneficiary should not be expected to perform complicated checks. It is impossible for most beneficiaries to actually check on the cargo itself. The adventurous surveyor example mentioned earlier is akin to a rescue mission. Other types of checks are difficult and do not guarantee the presence of the entire cargo. For example, a beneficiary checking on its supplier and supplier's supplier (and so on) along the string of sale contracts is not an easy task. As mentioned above, the beneficiary can only check against the limited information provided by LOI(s),[80] and is limited to performing basic retrospective checks on the plausibility of loading. Even if the beneficiary requests further information, traders might not be keen to disclose further information to conceal their own supplier and profit margin. '[T]he purchase and sale of oil products commonly involve traders dealing in string as intermediaries'.[81] Furthermore, parts of the string (or 'daisy chain') could involve 'loop[s]' (or 'circle[s]') ie circular trades; some loops might be 'entirely dry, and had no oil associated with them, because the grouping of buyers and sellers were complete'.[82] Physical delivery of the cargo bypasses the circle and there would be no need to provide specific information on the cargo within the circle.[83] Besides, there is no widely accepted system of general checks for beneficiaries to refer to, let alone one for beneficiaries dealing with a particular industry or trade. The concerned

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80 Ibid.

81 *Transpetrol Ltd v Transol Olieprodukten Nederland BV* [1989] 1 Lloyd's Rep 309, 310 (Phillips J).

82 *Voest Alpine Intertrading GmbH v Chevron International Oil Co Ltd* [1987] 2 Lloyd's Rep 547, 551–552 (Hirst J). See also *UniCredit* (n 12) [46], which also cited multiple cases involving circular oil trades at [59], [66], and [69].

83 *Voest* (n 82) 552.

beneficiary is unlikely to be assuaged by performing a standard list of checks curated by itself. As a businessperson, the beneficiary desires certainty. It will seek to tie down the applicant and the bank to a certain system of checking. In other words, the applicant and bank will have to provide the list of checks for the beneficiary to do, which might be a long list of checks (unless they decide to 'waive' checking). The beneficiary learns of the checks to be done and does them. By interpreting the data obtained from the checks, the beneficiary gains more knowledge. This is in addition to the beneficiary's existing knowledge like industry experience, rumours, allegations, and news reports. Knowledge of the beneficiary attracts the spectre of the narrow fraud exception. Such fraud requires 'the absence of an honest belief' that material statement(s) found in the documents presented to the bank are true.[84] A hypothetical all-knowing beneficiary cannot honestly believe at the time of presentation that misstatements in the documents that it presented to the bank are true and will be vulnerable to claims of fraud. There is no issue if the beneficiary's knowledge clearly points towards fraud or against fraud. The beneficiary can claim against the relevant party: its supplier in the event of fraud, or the bank otherwise. But what happens when the beneficiary's knowledge is unclear? Checks might not always provide reliable data. Data might not be available during certain disruptions. Existing knowledge might challenge the reliability of the data obtained from the checks. Data arising out of multiple sources might be unclear, doubtful, or contradicting. This might give rise to disputes as to whether the beneficiary could have honestly believed that the documents do not contain any falsity. With such equivocal data, will the law require the reasonable beneficiary to perform additional checks? What if the beneficiary has exhausted all possible checks, but doubts remain? Also, to what extent must the beneficiary honestly believe that the documents do not contain any falsity? On a balance of probabilities? Beyond reasonable doubt? A good arguable case? Suppose that some 'evidential threshold' or standard of proof is set. What happens then when the beneficiary does not meet the threshold but still wants to present documents to the bank, perhaps because it is unsure of whether there is sufficient evidence to sue the beneficiary's supplier? In such unclear circumstances, does the duty of care owed by the beneficiary to the bank include a duty of disclosure? Does the act of presentation give rise to an implied representation by the beneficiary that the requisite evidential threshold is met? Will failure

[84] *Carrier* (n 10) [49] (Andrew Ang J), citing *Derry v Peek* (1889) 14 App Cas 337 (HL) 374.

to disclose doubts amount to fraud and trigger the fraud exception? If so, should the beneficiary disclose the data, its interpretation of the data, or both? What if some of the beneficiary's knowledge arises out of confidential information, such as allegations made in an arbitration? And by when should the reasonable beneficiary provide disclosure? There might be a substantial amount of data and interpretation to disclose; however, under the UCP 600, the bank has only five banking days following presentation to evaluate everything, consult with its in-house counsel and LC applicant,[85] and to take appropriate action.[86]

Another issue as to timing: what if the LC is about to expire[87] and the beneficiary has no time to perform the necessary checks? While the law of negligence might not require the reasonable beneficiary to perform any checks at the last minute, must the beneficiary disclose this lack of time to check to the bank?

A final issue as to timing: must the beneficiary delay presentation until all necessary checks are done? Doing so would reduce the time remaining before the LC expires, and would reduce the number of chances of re-presentation in the event that the bank finds curable discrepancies in the documents presented. This might not seem reasonable to the beneficiary.

A further issue as to disclosure: how to disclose? Presenting an additional document to the bank is risky. That document 'will be disregarded and may be returned to the presenter' by an employee of the bank who decides not to exercise any discretion and refuses to depart from the strict wording of the UCP 600.[88] The person presenting documents on behalf of the beneficiary might be a layperson untrained in the law of LCs (like a courier) and might not even highlight this issue of a returned document to the beneficiary because it appears to be an unnecessary extra document that ought to be thrown away without careful consideration. Meanwhile, making a separate disclosure independent of presentation is also not ideal. It is harder to keep track of two separate things. Besides, the risk of the disclosure document being disregarded remains.

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85 UCP 600 art 16b.
86 Ibid, arts 14b, 16d.
87 Ibid, art 6d.
88 Ibid, art 14g.

A side point: if the beneficiary is made to do checks for the bank's benefit, and if things remain unclear, then the bank should be made aware of such checks, the data arising from such checks, and the beneficiary's interpretation of such data in light of any other relevant circumstances known by the beneficiary. This is because the likelihood of the fraud exception is reduced when the beneficiary makes full and frank disclosure to the bank: the (honest) beneficiary is not hiding any material fact and appears to be acting in (utmost) good faith. The best way to make the bank aware of these things is to put it into a document that the bank must check with reasonable care. This will be a document stipulated by the LC as necessary for a complying presentation. This is because the bank deals with documents,[89] focusing only on documents stipulated by the LC[90] while disregarding non-documentary conditions[91] and disregarding documents not required by the LC.[92]

In light of the many questions posed above, it does not seem reasonable to impose a duty of care. The reasonable beneficiary should not be made to bear such substantial uncertainty. Had the bank really desired that the beneficiary performed checks, it could and should easily have eliminated this uncertainty by requiring the beneficiary to present a 'checking certificate' in a format specified in the LC. This will inform the beneficiary of the checks needed and what information needs to be disclosed. Having the checks documented also enables the bank to ascertain whether the beneficiary checked properly and honestly, or fraudulently. The bank is also able to tweak requirements to match the transaction underlying the LC. However, making the beneficiary perform checks adds costs. The beneficiary is likely to pass on such costs to its counterparty, the buyer, when the beneficiary is required to do more than the simplest of checks such as checking the plausibility of cargo being loaded on the relevant vessel during the relevant timeframe specified in the documents. Requiring the beneficiary to do more advanced checks such as tracing its title over the cargo through a long string of sale contracts is impractical. Put simply, any duty of care imposed on the beneficiary has to be documented. Otherwise, there ought to be no duty of care.

[89] Ibid, art 5.
[90] Ibid, arts 14f, 14g.
[91] Ibid, art 14h.
[92] Ibid, art 14g.

*BOC* illustrates that, when applied in the oil trade, the negligence exception places the beneficiary in a difficult position. Under the LOI, the beneficiary has to warrant that it has good title to the oil cargo (ie the oil cargo is real). The negligence exception requires the beneficiary to carefully check that the oil cargo is real and that there is a good title.[93] But it is unreasonable to ask the beneficiary, who might be in the middle of the sale chain, to go back in time and undertake a different role as cargo surveyor at the loadport at the beginning of the sale chain when the cargo was due to be loaded onboard a vessel. It is impossible to fashion a commercially sensible duty owed by the beneficiary to the bank to check that cargo could plausibly be loaded on the vessel for sale under the sale contract underlying the LC. The beneficiary is not in a good position to undertake an adequate retrospective check or investigation of the past. The vessel or carrier is not obliged to respond to cargo checking requests made by someone who does not possess the bills of lading. As explained below, historical vessel location data provided by 'Automatic Identification Systems (AIS)'[94] can be unreliable, especially in the oil trade. While historical AIS data can be obtained from vessel tracking service providers,[95] it is highly unlikely that someone is taking and publicising photographs of every large vessel in the world at regular time intervals. This means that, save for closely watched waters like the Black Sea where the loading of vessels is monitored,[96] doubtful AIS data cannot be retrospectively cross-checked with vessel photography. The beneficiary might not be aware of (or have access to) eyewitnesses or vessel records kept by various parties which would indicate loading of cargo.

Although AIS records allows viewers to track the vessel, it cannot assure viewers that the cargo was loaded onboard. The vessel might be just idling alongside a cargo loading facility without actually loading anything. Due to the possibility of spoofing or tampering, one can never be entirely sure of the plausibility of a vessel loading cargo around a certain date(s)

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93 See, eg, the title check(s) performed by Glencore in *UniCredit* (n 12) [40]–[44], [63]. However, the judgment does not provide much insight into this. It reveals that Glencore performed one layer of title check(s) by communicating with Glencore's own supplier. But the judgment is silent as to whether Glencore checked beyond this first layer (or how Glencore might do so).

94 See JCP Brown, 'Automatic Identification Systems (AIS)' in Andrew Tettenborn and John Kimbell, *Marsden and Gault on Collisions at Sea* (15th edn, Sweet & Maxwell 2021) app 12.

95 See eg VesselFinder, 'Historical AIS Data' (VesselFinder) <https://www.vesselfinder.com/historical-ais-data> accessed 4 August 2022.

96 AFP, 'Bosphorus sea trade unaffected by Ukraine war, sanctions' (*The Straits Times*, 4 June 2022).

based on AIS records alone.[97] Thus, some States require certain vessels to carry an additional device, a vessel monitoring system, onboard.[98] It has been stated that '[f]rom the navigators' point of view, it is of great importance to verify the information from AIS in navigation using radar and visual look-out […] Navigators should never rely on a single source of information and should double-check the data provided by AIS'.[99] If the reasonable beneficiary is required to check other data, such as satellite imagery, in addition to the AIS, then contradictory data from multiple sources can turn simple checks into complicated and expensive ones.

As mentioned above, things are fine when the data sources are aligned. The trouble starts when the data is not clear, such as when the vessel disables its own AIS transmitter for a long period of time, making the AIS record unavailable. Alternatively:

(a) the last known AIS signal is near a State that seeks to sell oil despite sanctions[100] or near secretive ship-to-ship transfer areas;[101]

(b) there is no AIS record, but there is publicly available imagery of the vessel passing through narrow strait(s)[102] at a date not incompatible with the cargo loading data;

(c) the AIS record is nonsensical;[103]

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[97] Andrej Androjna and others, 'AIS Data Vulnerability Indicated by a Spoofing Case-Study' (2021) 11 *Applied Sciences* 5015 at 20–21, <https://www.mdpi.com/2076-3417/11/11/5015/pdf?version=1622447004> accessed 3 August 2022.

[98] Ian Urbina, *The Outlaw Ocean: Journeys Across the Last Untamed Frontier* (Alfred A Knopf 2019) 61–62.

[99] Androjna (n 97) 21.

[100] Such as North Korea, Iran, Venezuela, and perhaps even Russia. For North Korea, see Jacob Atkins, 'UN probes links between Singapore oil trader and North Korea sanctions evasion' (*Global Trade Review*, 13 October 2021) <https://www.gtreview.com/news/asia/un-probes-links-between-singapore-oil-trader-and-north-korea-sanctions-evasion/> accessed 5 August 2022. For Iran and Venezuela, see Elise Dale Sørheim, 'Sanctions and STS Transfers – legal risks' (*Skuld*, 12 October 2021) <https://www.skuld.com/topics/legal/sanctions/sanctions-and-sts-transfers--legal-risks/> accessed 5 August 2022.

[101] Michelle Wiese Bockmann, 'Russian-linked tanker STS transfers rising off Kalamata' (*Lloyd's List*, 1 July 2022).

[102] Matthew Campbell and Kit Chellel, *Dead in the Water: Murder and Fraud in the World's Most Secretive Industry* (Atlantic Books 2022) 13; Yörük Işık, '@YorukIsik' (*Twitter*) <https://twitter.com/yorukisik/> accessed 3 August 2022; Peter Kenyon, 'Istanbul Man Turns Passion For Ship Spotting Into Beneficial Hobby' (*NPR*, 18 May 2021) <https://www.npr.org/2021/05/18/997783492/istanbul-man-turns-passion-for-ship-spotting-into-a-beneficial-hobby> > accessed 5 August 2022.

[103] Androjna (n 97) 9; Matt Coyne, 'When ships fly: Tracking data shows vessels piling up outside Iranian airport' (*TradeWinds*, 13 January 2022).

(d) the same AIS signal appears in multiple places at once;[104]

(e) instances of AIS errors or spoofing casts doubt on AIS records;[105]

(f) the AIS service provider places the beneficiary in a waiting room to prevent its website from crashing due to high demand[106] and the beneficiary is unable to retrieve AIS data in time;

(g) the beneficiary's access to AIS data is legally blocked;[107]

(h) the AIS records appear sound but allegations suggest otherwise.[108] The beneficiary learns that fake AIS signals have been spotted at the relevant loading zone[109] and understands that AIS records can be faked with varying levels of sophistication[110] by various parties, such as navies practicing electronic warfare or fishing vessels.[111]

The reasonable beneficiary cannot eliminate AIS doubts. Vessel photography from satellites is not a panacea because requests must be made 'a week in advance' so that the satellite, moving around the planet in space, can be aimed at the precise spot.[112] But the vessel might already be at sea with the loading date being days in the past. It is not feasible to have a surveyor check the vessel when the vessel is already underway. It is much more feasible to

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[104] Kimbra Cutlip, 'Spoofing: One Identity Shared by Multiple Vessels' (*Global Fishing Watch*, 25 July 2016) <https://globalfishingwatch.org/data/spoofing-one-identity-shared-by-multiple-vessels> accessed 3 August 2022.

[105] Androjna (n 97) 9–10.

[106] Julia Reinstein, 'Millions Of People Tracked Nancy Pelosi's Flight To Taiwan' (*BuzzFeed News*, 2 August 2022) <https://www.buzzfeednews.com/article/juliareinstein/nancy-pelosi-taiwan-flight-tracking> accessed 3 August 2022; Flightradar24, 'Because of unprecedented sustained tracking interest in SPAR19, Flightradar24 services are under extremely heavy load. Some users may currently experience issues accessing the site, our teams are working on restoring full functionality to all users as quickly as possible.' (*Twitter*, 2 August 2022) <https://twitter.com/flightradar24/status/1554457269714264066> accessed 3 August 2022; Charlie Osborne, 'Flight tracker Flightradar24 crash caused by "international interest" in Ukraine, Russia conflict' (*ZDNet*, 24 February 2022) <https://www.zdnet.com/article/flight-tracker-flightradar24-crash-caused-by-international-interest-in-ukraine-russia-conflict/> accessed 3 August 2022.

[107] The Maritime Executive, 'Report: New Data Law Cuts Off Access to Chinese AIS Tracking' (*The Maritime Executive*, 17 November 2021) <https://maritime-executive.com/article/report-new-data-law-cuts-off-access-to-chinese-ais-tracking> accessed 3 August 2022.

[108] See, eg, the allegation made against the vessel *Dominar* (IMO: 9194139): Claire Jungman, *Oceans of Deceit: Iran's Deceptive Shipping Practices and Exploitation of the Maritime Industry* (United Against Nuclear Iran) 12–13, available at <https://www.unitedagainstnucleariran.com/oceans-of-deceit-irans-deceptive-shipping-practices-and-explotation-of-the-maritime-industry> accessed 3 August 2022.

[109] Androjna (n 97) 13.

[110] Jungman (n 108) 10–11.

[111] Androjna (n 97) 15–16.

[112] Urbina (n 98) 62.

have the surveyor check the cargo loading at the loadport during the loading process, and provide a certificate to the beneficiary for presentation to the bank, which the bank can then sue on.[113] Cargo checking is within the surveyor's expertise,[114] not the beneficiary's. The surveyor has first-hand and in-person access to the cargo, unlike the beneficiary. It is unreasonable to impose the duty of cargo checking on the beneficiary when the bank could have specified beforehand that a copy of the surveyor's certificate is to be presented under the LC.

The above shows that it is unreasonable to impose a duty of care on the beneficiary to carefully issue and present its invoice and LOI. Any such duty of care is uncertain and unclear. It is better to reduce this 'duty of care' into the beneficiary's 'checking certificate' for presentation under the LC, with wording (in favour of the bank) specified in the LC itself. This will enable the beneficiary to check and disclose with certainty and enable the bank to sue upon that certificate for breach of a contract, and/or breach of a promise to take care (ie *Hedley Byrne* liability). While there might be an argument for a negligence claim because a surveyor would be liable for its certificate,[115] it is unreasonable to impose such a duty on the beneficiary, who is far removed from the temporal and physical position of an expert surveyor. As such, the beneficiary's 'checking certificate' is unlikely to support the bank's claim in negligence. Instead, a surveyor should issue that certificate. Beneficiary fraud aside, it is a waste of time and resources to have every single beneficiary in a sale chain financed by LCs checking and investigating what might have happened in the past, when one expert surveyor at the start of the sale chain could have done so at the loadport with the benefit of contemporaneous first-hand eyewitness evidence. Even then, a requirement for anyone to check can be a little divorced from reality. The model LC relies on the security of physical cargo or its documentary proxy (such as bills of lading) to lower the risk taken by the bank. However, many of the underlying sale contracts 'function as speculative instruments'[116] because traders in an intermediary position are either hedging or speculating for profit by 'trading paper'[117] with 'no physical interest in the commodity at all'.[118] From the trader's

[113] *Niru Battery* (n 34).
[114] Ibid.
[115] Ibid.
[116] MG Bridge, *The International Sale of Goods* (4th edn, OUP 2017) para 1.42.
[117] Ibid, para 1.46.
[118] Ibid.

point of view, these are synthetic speculative trades akin to the futures contracts; the physical cargo (if any) and the requirement for its physical delivery are incidental.[119] Similarly, many banks are comfortable accepting letters of indemnity instead of bills of lading and cargo certification by surveyors.[120] Such waiver of cargo checks, which increases the risks to banks, seems to occur when the traders involved appear to be substantial entities with negligible risk of insolvency. Accordingly, it would be artificial to require anyone to check the physical cargo in which hardly anyone is interested, and, as a possible departure from what might be the norm in oil trading, not feasible as well.

Thus, it is unreasonable in fact to impose a duty of care and unreasonable in law as well.

### 2.5 Duty unfair in law

The argument for a negligence exception is an unjustifiable attempt by the bank to renege on its agreement. The theoretical basis is the 'distributive justice' theory of tort law, which is a policy reason to negate a prima facie duty of care under the *Spandeck* test.[121]

Without the bank consenting to a LC, the beneficiary bears the risk of the applicant's insolvency under the underlying sale contract. The bank bears this insolvency risk under a LC as an insolvent applicant generally cannot fully reimburse the bank. By issuing the LC, the bank clearly accepts this insolvency risk.[122] The bank might mitigate this risk by taking security or by having the beneficiary present valuable documents to the bank. The bank earns a profitable fee (or gains a chance to do so) for, among other things, accepting this insolvency risk. In effect, the negligence exception 'rescinds'[123] the LC, the contract between bank and beneficiary.[124] This places the burden and the insolvency risk on the beneficiary. Thus, the

[119] Ibid, paras 1.42–1.63.

[120] This is said to be 'customary' for '[LCs] covering the shipment of oil': Gary Collyer and Ron Katz (eds), *ICC Banking Commission Collected Opinions 1995–2001 on UCP 500, UCP 400, URC 522 & URDG 458* (ICC Publishing SA 2002) 175. For more recent examples, see *PPT Energy* (n 11) [5]; *UniCredit* (n 12) [12]–[13]; *The STI Orchard* (n 26) [12]. Cf Felipe Arizon and David Semark, *Maritime Letters of Indemnity* (Informa Law from Routledge 2014) para 7.51.

[121] *Tan Juay Pah v Kimly Construction Pte Ltd* [2012] SGCA 17, [2012] 2 SLR 549 [85].

[122] 'One of the main purposes of irrevocable credits is to guard the seller against the buyer's failure': EP Ellinger, *Documentary Letters of Credit: A Comparative Study* (University of Singapore Press 1970) 204.

[123] This is 'tantamount to granting the banker a right of revocation or cancellation of the irrevocable credit': Ellinger (n 122) 204.

[124] *Kuvera* (n 40) [37].

imposition of a duty of care disrupts the contractual allocation of LC risk,[125] which is undesirable[126] except in situations where the beneficiary's negligence was a substantial cause of the applicant's insolvency. The bank does not bear any insolvency risk unless it has paid the beneficiary, and even then it bears a significant lower insolvency risk than bargained for, being able to recover from the applicant and the beneficiary (under the negligence exception). LC 'rescission' is justifiable for the narrow fraud exception, but not for the negligence exception. The narrow fraud exception applies when the beneficiary personally knows, at the time of presentation, of the material falsity in the documents presented by itself.[127] The beneficiary, being dishonest and therefore extremely blameworthy from a policy perspective, does not deserve the protection that the LC affords. Thus, the bank should not be required to bear the insolvency risk placed on it by the LC.[128] In contrast, the negligence exception and the broader fraud exceptions[129] involve a 'more innocent' beneficiary. The law differentiates between fraudulent behavior and 'more innocent' or negligent behaviour, such as contractual misrepresentation[130] and contributory negligence in tort.[131] The 'right hand' of tort law 'must be careful to consider what the left [hand of contract law] is doing': the law should be coherent overall.[132] The non-fraudulent beneficiary arguably deserves the protection that the LC affords. It is unreasonable to use the negligence exception to place the insolvency risk back onto the beneficiary, especially when the applicant is insolvent, save for (admittedly rare) situations where the beneficiary's negligence was a substantial cause of the applicant's insolvency. One such situation might involve multiple sale contracts between the applicant and the beneficiary, financed by LCs and divided into two tranches. Throughout the series of contracts, the beneficiary failed to check AIS records for the plausibility of cargo loading and

[125] Ibid.

[126] Kit Barker, 'Economic Loss and the Duty of Care: a Study in the Exercise of Legal Justification' in Charles EF Rickett (ed), *Justifying Private Law Remedies* (Hart Publishing 2008) 185, 188–189.

[127] *UCM* (n 2) 183G.

[128] Beneficiary fraud aside, there are other instances where the bank should not bear the applicant's insolvency risk despite the LC: eg collateral contractual arrangements between the bank and the beneficiary, or the beneficiary's voluntary assumption of responsibility to the bank to take care when presenting documents.

[129] See the 'broad' and 'half-way house' propositions: *UCM* (n 2) 184CD, 187B (Lord Diplock).

[130] Misrepresentation Act 1967, s 2(2), which qualifies the right to rescind a contract for non-fraudulent misrepresentation, unlike fraudulent misrepresentation. There is a similar differentiation found in the common law of remedy of rescission: *Lord Gilbert Kennedy v The Panama, New Zealand, and Australian Royal Mail Co (Ltd)* (1867) LR 2 QB 580, 587.

[131] *Standard Chartered Bank v Pakistan National Shipping Corp (No 4)* [2002] UKHL 43, [2003] 1 AC 959 (HL) [15]–[18] (Lord Hoffman), [42]–[44] (Lord Rodger of Earlsferry).

[132] Barker (n 58) in Barker (n 15) 21–22.

could have easily discovered its implausibility. For the first tranche of contracts, the applicant's bank accepted the beneficiary's documents and paid; the applicant reimbursed its bank and obtained the documents. The applicant then ran low on working capital and utilized its overdraft account with its bank. The applicant then sought to obtain funds by re-selling the cargoes. However, strange sightings of unladen tankers sailing away from the loadport were reported, generating suspicion. The applicant was accordingly unable to find a buyer for the cargoes. The applicant's bank threatened to liquidate the applicant. Meanwhile, prior to these reports, the beneficiary presented compliant documents for the second tranche of contracts. Having placed the applicant into liquidation, the applicant's bank refused to pay the beneficiary for the second tranche of contracts. The bank argued that the beneficiary's negligence had caused the applicant's insolvency. If it had paid the beneficiary, the beneficiary would have to pay the applicant for non-delivery of cargo, and the insolvent applicant would have to pay the bank those very same funds, subject to the rights of superior and competing creditors, which arose out of the beneficiary's negligence. Among other things, the costs of the liquidators, legal fees, court fees, and interest payable on sums owed would reduce the amount of funds payable to the bank. This loss to the bank would not have occurred but for the applicant's insolvency. In such a situation, it is the beneficiary (and not the applicant's bank) who should bear the insolvency risk of the applicant, and the bank should be allowed to refuse LC payment for the second tranche of contracts to avoid incurring further and unnecessary losses arising out of the beneficiary's negligence. The bank might have a slightly stronger argument to recover payment from the negligent beneficiary for the first tranche of contracts.

If beneficiary negligence is not a substantial cause of the applicant's insolvency, then because one cannot perfectly predict the date on which the LC applicant becomes insolvent, this insolvency risk justification is always in play, even if the applicant appears solvent. Besides, a solvent LC applicant is likely to reimburse the bank, while an insolvent applicant typically leads the bank to sue the beneficiary in tort [133] because the easier route of obtaining full reimbursement under contract from the applicant is blocked. If the bank was concerned about the applicant's solvency, it should have taken security. A reimbursed bank makes

[133] *PPT Energy* (n 11) [34]; *Carrier* (n 10) [16]; *BOC* (n 1) [11]; *Trafigura Beheer BV v Kookmin Bank Co* [2005] EWHC 2350 (Comm) [15].

exceptions to the autonomy principle moot. Even if not reimbursed, the bank could have the applicant join the lawsuit as a co-claimant to sue the beneficiary and other relevant parties.[134] With the applicant as co-claimant, the autonomy principle becomes moot.

There is another way of showing that it is unreasonable to place the insolvency risk back on the beneficiary. The LC and its autonomy principle[135] envisions a flow of payment liability from the applicant to the bank, and then from the bank to the beneficiary, and then (excess payment) from the beneficiary back to the applicant. If the funds do not flow according to this cycle, then suppliers like the beneficiary will risk losing cash flow. Insolvent suppliers, like insolvent contractors supplying labour and materials in the construction industry, can hurt the progress of projects, commerce, trade, and industry.[136] Thus, when the bank seeks to refuse or recover payment, the first party that the bank should target is the applicant. The second target should be either the carrier of cargo sold in the transaction underlying the LC, or the surveyor of the cargo, or the insurer of the applicant's credit risks, or all of them. The third and last target should be the beneficiary. The bank's inability to obtain compensation from the 'higher priority targets' does not justify the bank from going against this flow of funds and targeting the beneficiary. It is within the bank's ability to specify for a 'safety blanket' of compensation from other parties.

The bank in *BOC* is a useful example. It agreed to issue a LC on risky terms even though the bank was in the perfect position to control the amount of risk from the LC to be borne by the bank. The bank took the risk of being out-of-pocket in exchange for the possibility of earning substantial profits. As the risk-taker and fee earner, the bank should also take the burden and must pay the price.

First, the bank agreed to lose its rights against the carrier and surveyor. It permitted LOIs to be presented in lieu of standard documentation[137] of bills of lading and surveyor's certificates, which provide valuable rights against the carrier and the surveyor (ie 'security'). Bills of lading can provide a right to either take delivery of the cargo or sue the carrier for misdelivery.

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[134] *Niru Battery* (n 34) [2], [5]–[8], [32].

[135] UCP 600 arts 4a, 5.

[136] *WY Steel Construction Pte Ltd v Osko Pte Ltd* [2013] SGCA 32, [2013] 3 SLR 380 [18], [20].

[137] Not a rare occurrence: *PPT Energy* (n 11) [5]; *UniCredit* (n 12) [12]–[13]; *The STI Orchard* (n 26) [12]; cf Arizon and Semark (n 120) para 7.51.

Certificates can provide the right to sue the surveyor in contract or negligence for failure to verify cargo loading of right quantity or quality. By renouncing surveyor certification, the bank deliberately waived any requirement to have contemporaneous cargo checking done by an expert, perhaps to align with what might be the norm for oil trading. The bank could have avoided watering-down its LC requirements, albeit at the risk of losing LC business from its customer, who might be forced by the seller to water-down LC requirements.

Second, the bank failed to express a contractual right to sue the beneficiary when the bank could have easily done so under the LC.[138] The bank specified the format of the LOI in the LC, which precluded any third party apart from the named buyer from suing on the LOI addressed from the seller to the buyer.[139] Insofar as the bank is concerned, the LC did not expressly require the beneficiary to take due care in issuing and presenting documents, or to ensure that the documents presented are correct. The bank could have specified protective terms either in the LC itself or in the LC's prescription of the format of documents to be presented, such as 'To: [Bank] for account of [Buyer]'.[140] There should be wording that enables banks to sue beneficiaries in contract for breach of LOI warranties even after the LOI 'expires' upon substitution with a (potentially fake) bill of lading. However, this is not realistic if the seller, desiring back-to-back contractual coverage, insists on providing LOI wording that matches the LOI wording given to the seller by the seller's own supplier. The bank's customer might be forced by the seller to remove protective LOI wording.

Third, the bank agreed not to take sufficient security from its customer to protect the bank from insufficient reimbursement from an insolvent customer. If the bank took sufficient security, then the bank would not be suing the beneficiary. However, requiring sufficient security could place the bank at risk of losing LC business from its customer who might be unwilling and/or unable to provide security/insurance/guarantees. Thus, the bank relied

[138] *UniCredit* (n 12) [192]–[193].

[139] *BOC* (n 1) [53]–[54]. See also *Trafigura* (n 133) [27], [31(iii)], [33], [34]; *Trafigura Beheer BV v Kookmin Bank Co (No 2)* [2006] EWHC 1921 (Comm), [2007] 1 Lloyd's Rep 669 [19]; *UniCredit* (n 12**Error! Bookmark not defined.**) [12]–[13], [192]–[197]; *Maersk* (n 24) [52]–[59].

[140] *PPT Energy* (n 11) [5].

solely on the creditworthiness of the buyer and/or 'sellers acceptable to the [b]ank'[141] and did not insist on the buyer making 'payment in advance' when 'it could'.[142]

Fourth, although relying solely on its customer's creditworthiness, the bank could have obtained insurance cover for its customer's credit risk. Unlike the first three points above, the customer cannot prohibit the bank from obtaining insurance cover. The insurance premium will reduce the bank's profits and, if the customer is clearly creditworthy, the premium payable should not be prohibitive in cost.

Furthermore, the average bank should have a legal department. The bank's in-house counsel can easily foresee these risks, which case law also reveals.[143] 'In issuing the [LCs], the [b]ank assumed the risk that its customer might be unable to pay'.[144] Having deprived itself of 'security for [its] advances, which is a cardinal feature of [trade finance] by [LCs]', the bank as a willing risk-taker should pay the price.[145]

It is therefore unreasonable to impose a duty of care on the beneficiary.

### 2.6 The negligence exception is generally unsupported by commentators

Judicial comment on the negligence exception, though limited, is generally not supportive of its existence and ambivalent at best.[146] While *Niru Battery* and *Montrod* are factually distinguishable because they do not deal with a bank suing a beneficiary,[147] they can be used with *Lambias*[148] to provide some fuel for the notion of a beneficiary's duty especially when it issues documents for presentation. If accepted as a matter of principle, the negligence exception could arise. However, *Carrier* is one indicator that this notion is not highly

[141] *BOC* (n 1) [7] (Andre Maniam JC).
[142] Peter Ellinger and Dora Neo, *The Law and Practice of Documentary Letters of Credit* (Hart Publishing 2010) 133.
[143] *Trafigura* (n 133) [27], [31(iii)], [33], [34].
[144] *Banco del Estado v Navistar International Transportation Corp* 942 F Supp 1176 (ND Illinois 1996) 1180 (Brian Barnett Duff DJ).
[145] *United City Merchants (Investments) Ltd v Royal Bank of Canada* [1982] 2 QB 208 (CA) 246G–H (Ackner LJ).
[146] *Carrier* (n 10); *PPT Energy* (n 11) [21], [117].
[147] *Niru Battery* (n 34); *Montrod* (n 8); *Montrod* (n 9).
[148] *Lambias* (n 33) [68].

persuasive. *BOC* is the lonely and tentative supporter of the negligence exception for the time being.[149]

Commentators have generally doubted the existence of a duty of care owed by the beneficiary to the bank; they have expressed a preference to go outside of tort law and into other doctrines such an implied warranty or unjust enrichment[150] due to 'broader and more damaging ramifications on the general law of [LCs]'.[151] To be fair, there is criticism for both implied warranty[152] and unjust enrichment[153] as well. Furthermore, one commentator reviewed *BOC* and briefly expressed agreement with *BOC* on the basis that: first, the autonomy principle does not shield a paid beneficiary from claims that might deprive the beneficiary of that payment even if the claimant is the issuing bank; second, a beneficiary might owe a duty of care when issuing its documents for forthcoming presentation; and third, 'there is no reason why the mere fact that the plaintiff is an issuing bank suing the beneficiary of a credit should prevent it from bringing such an action'.[154] Arguments were made earlier against the second basis. The first and third bases are also doubtful due to the United States Court of Appeals decision of *Amwest*.[155] *Amwest* reasoned that permitting a bank to recover payment based on misstatements 'conflicts with the independence principle' because most statements required by LCs 'concern the performance of the underlying contract'.[156] Thus, a bank recovering payment 'because of the falsity of such assertions amounts to allowing the [bank] to recover because of nonperformance of the underlying contract' and this 'transform[s] the [bank] into a third party meddling in the underlying contractual relations'.[157] *Amwest* also reasoned that although LCs are arguably 'used merely to ensure that beneficiaries have ready access to the money during any dispute about the underlying

[149] *BOC* (n 1) [30], [55].

[150] Roy Goode, 'Reflections on Letters of Credit – III' [1980] JBL 443, 444; Ewan McKendrick, *Goode and McKendrick on Commercial Law* (6th edn, LexisNexis 2020) paras 35.119–35.120.

[151] Krishna S Dighe, 'Letter of Credit Strict Compliance and Autonomy – Robinson v Ontario New Home Warranty Program' (1995) 10 Banking & Finance L Rev 275, 282–283.

[152] Bennett (n 75) para 23-307, citing the abandonment of art 5-111(1) of the Uniform Commercial Code (1962 Version) (USA) and its implied warranty; Lazar Sarna, *Letters of Credit: The Law and Current Practice* (3rd edn, Carswell 1989) 5 – 22, 5 – 23.

[153] Goode (n 150) 445–446; McKendrick (n 150) paras 35.119–35.120.

[154] Neo (n 1).

[155] *Amwest Surety Insurance Co v Republic National Bank* 977 F 2d 122 (4th Cir 1992) 129 (Circuit Judge Niemeyer).

[156] Ibid.

[157] Ibid.

contract', this 'argument cannot be extended to enable someone other than the customer to raise such a dispute'.[158] '[I]n the eyes of the beneficiary', such an extension 'would be the result of a warranty of truthfulness'.[159] *Amwest* casts doubt on the United States District Court decision of *Mellon*,[160] which *BOC* indirectly relied upon as precedential support.[161] '[C]ontroversial' and unlikely to be 'good law' today,[162] *Mellon* was a case where the bank sued the beneficiary to recover payment because statutory warranties were breached. The court in *Mellon* held that the beneficiary could not rely on the independence principle as a defence because the beneficiary had been paid. It also held that the independence principle was inapplicable for breach of statutory warranties because it would nullify statutory warranties otherwise.[163] *Amwest* casts doubt on the former holding. The latter holding is compatible with the independence principle restricting the application of the common law of negligence. The independence principle is based upon the common law, transnational law or custom, or both. Using it to restrict other areas of the common law, such as negligence, is much more palatable than using it to overthrow legislative intent. Furthermore, Anglo-Common Law jurisdictions have not legislated for beneficiaries to provide warranties of truthfulness when presenting documents. Applying *Amwest*'s reasoning, to allow the bank to recover payment based on beneficiary negligence amounts to judicially legislating for a warranty of reasonable truthfulness.

### 2.7 The negligence exception causes upheaval in law

The negligence exception is much broader than the narrow fraud exception. It covers more kinds of mistakes occurring on a daily basis. A beneficiary's failure to check something in the documents is more likely to occur than a beneficiary's failure to act honestly when presenting documents. The former merely requires the beneficiary to forget to check and is an 'absent' attempt to obtain knowledge; the latter requires the beneficiary to have knowledge of a

[158] Ibid, citing and disagreeing with *Mellon Bank NA v General Electric Credit Corp* 724 F Supp 360 (WD Pa 1989) 365 (Cohill CJ).
[159] *Amwest* (n 155) 129 (Circuit Judge Niemeyer).
[160] *Mellon* (n 158).
[161] *BOC* (n 1) [32], quoting a passage from *Bachmann Pty Ltd v BHP Power New Zealand Ltd* [1998] VSCA 40, [1999] 1 VR 420 [51] that was originally from *Bachmann*'s quotation of *Mellon* (n 158) 365.
[162] *International-Matex Tank Terminals-Illinois v Chemical Bank* 2010 WL 2219396 (WD Michigan 2010) 8 (Magistrate Judge Scoville).
[163] *Mellon* (n 158) 365.

material falsity in the documents. Unlike fraud, negligence simply requires the beneficiary to act carelessly; there is no requirement for the beneficiary to act dishonestly. The incremental approach taken in negligence cases for the duty of care element means that, following modification by the courts, the negligence exception can cover an ever-increasing multitude of careless mistakes made by the beneficiary. Left unrestrained, the ever-expanding negligence exception is a death knell to the certainty provided by the autonomy principle and the assurance of payment provided by the LC. It will reduce the scope of the autonomy principle as presently perceived by the commercial and judicial world. While the autonomy principle might be narrowly defined as some sort of irrevocable mandate to pay from the applicant to its bank,[164] it has been claimed:

> that the true commercial and practical significance of [autonomy] lies more in its aspirational, harmonizing and confidence-inspiring effects. […] autonomy has been, and remains a marketing tool. That marketing by the International Chamber of Commerce has been so effective that the notion of autonomy has been almost universally endorsed both commercially and judicially, thereby reassuring parties to international sales that, whatever the particular circumstances of the case, autonomous payment undertakings will not be impeded by some domestic principle of an unfamiliar legal system or by the operations of a foreign (often unforeseen court).[165]

To be fair, there seems to be an existing move away from LCs[166] and a negligence exception might merely accelerate this. Besides, courts can restrain the negligence exception. While accepting an unconscionability exception for performance bonds, Singaporean courts have also 'explicitly sanctioned the use of exemption clauses to exclude the unconscionability exception', thereby restraining the exception and preserving the assurance of payment when the relevant party is able to insist on the relevant clause.[167]

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[164] Hare (n 52) 16–17; cf *Amwest* (n 155).
[165] Hare, ibid, 18.
[166] Hare, 'Something Old, Something New' in Hare and Neo (n 44) ch 14.
[167] *CEX v CEY* [2020] SGHC 100, [2021] 3 SLR 571 [34] (Lee Seiu Kin J), citing *CKR Contract Services Pte Ltd v Asplenium Land Pte Ltd* [2015] SGCA 24, [2015] 3 SLR 1041 [24], [41].

Nevertheless, the negligence exception will increase the list of exceptions to the 'aspired version' of the autonomy principle. If the negligence exception deems a negligent beneficiary unworthy of payment, surely a reckless beneficiary is also unworthy. While older cases were cautious alluding to the notion of a beneficiary duty going beyond the edges of fraud, *BOC* had stepped beyond fraud with a huge step.[168] A negligence exception would also allow a previously rejected[169] broader fraud exception, third party fraud in addition to beneficiary fraud, to tag along. However, no Anglo-Common Law jurisdiction has adopted either a recklessness or a broader fraud exception. The Canadian Supreme Court expanded the fraud exception, which was confined to the documents presented, as including the beneficiary's 'fraud in the underlying transaction'.[170] It declined to extend the fraud exception to include 'fraud by third party of which the beneficiary is innocent'.[171]

One counterargument is to limit the negligence exception to payment recovery as a 'one-way negligence exception'. The bank cannot use the negligence exception to refuse payment and the beneficiary will receive payment. However, this detracts from *Amwest*'s definition of the autonomy principle. In contrast, *BOC* held that the negligence exception could arguably exist because once the beneficiary is paid, the autonomy principle becomes spent. There is a distinction between recovering and refusing payment because the autonomy principle can be defined as 'pay first argue later'.[172] Assuming for the sake of argument that *BOC*'s definition applies, then the autonomy principle is not undermined by subsequent recovery.

The autonomy principle doubtless includes a principle to pay first and argue later. Grounds for refusing payment must be restricted so that the autonomy or independence principle is upheld and the beneficiary's right to payment ('cash in hand') respected.[173] However, after payment, the beneficiary's right becomes moot and the autonomy principle would have been served 'substantially' and 'have far less relevance'.[174] Thus, grounds for recovering payment

[168] A 'recklessness exception' was noted as having 'certain attractions': *Montrod* (n 9) [59]–[60] (Potter LJ). See also *Lambias* (n 33) [68] and *Niru Battery* (n 34).
[169] *UCM* (n 2).
[170] *Angelica-Whitewear* (n 7); cf *Brody* (n 2) [20]–[21].
[171] Ibid.
[172] *BOC* (n 1) [31]–[35] (Andre Maniam JC).
[173] Ibid, [23], [34].
[174] Richard F Dole Jr, 'Warranties by Beneficiaries of Letters of Credit under Revised Article 5 of the UCC: The Truth and Nothing but the Truth' (2002) 39 Houston L Rev 375, 388; John S Dolan, *The Law of Letters of Credit, vol 1* (4th edn, AS Pratt 2007) 9-78; *Mellon* (n 158) 365 (Cohill CJ).

could be broader.[175] That the autonomy principle remains relevant immediately after payment might also be rebutted. Beneficiary insolvency aside, a 'back door' freezing injunction ordered against the beneficiary immediately after payment freezing much of the payment (eg 70%[176]) is similar to a 'front door' injunction against payment. The *Carrier* equation of refusing and recovering payment might be justified within this limited duration.[177] However, if the autonomy principle applies post-payment, then the 'cash in hand' beneficiary gets 'greater protection than that enjoyed by a recipient of cash'.[178] That cannot in principle be correct[179] because the LC 'ranks as cash'.[180]

Put differently, the bank cannot use the negligence exception without first making payment. Post-payment, the bank is free to argue any exception to the autonomy principle, including negligence. This 'one-way negligence exception' might work as follows. The bank's claim for recovering payment will be stayed until payment is made, prohibiting set-off. Upon payment, the bank may obtain a *Mareva* injunction against the beneficiary to freeze that payment: this does not offend the autonomy principle.[181] This protects the bank to some extent.[182] Suppose the bank knows that the negligent beneficiary presented documents containing falsities that were created by a third party but cannot refuse payment and pays. Subsequently, the bank sues under the negligence exception and recovers in full. The beneficiary, now aware of the falsity due to the lawsuit, cannot negligently present the same documents to get payment and the fraud exception applies. The negligence exception thus prevents the bank from wasting money and time in an endless cycle of 'pay, recover, pay again, recover again, and so on'.

It is true that '[w]hen the [LC] beneficiary presents documents for the payment that misrepresent the facts (even inadvertently), it should not […] retain the benefits of its wrongful acts'.[183] The real question then is who is entitled to claim against the beneficiary,

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[175] *BOC* (n 1) [31].
[176] *Banco Santander SA v Bayfern Ltd* [2000] 1 All ER (Comm) 776 (CA) 778D–G.
[177] *Carrier* (n 10) [96], [99].
[178] See 'Plaintiff's Written Submissions for HC/RA 65/2021 and HC/RA 66/2021' dated 21 April 2021 [75(3)] in *BOC*'s (n 1) court file.
[179] Ibid.
[180] *Power Curber International Ltd v National Bank of Kuwait SAK* [1981] 1 WLR 1233 (CA) 1241 (Lord Denning MR).
[181] RM Goode, 'Reflections on Letters of Credit–II' [1980] JBL 378, 380.
[182] Cf beneficiary insolvency.
[183] Dighe (n 151) 283.

and recover monies from the beneficiary? Is it the applicant, or the bank, or both? The UCP 600 is silent. But the rule against double recovery indicates that the applicant's claim against the negligent beneficiary will be spent if the bank recovers directly from the beneficiary.

It is better for the applicant to have the right to claim against the beneficiary and obtain recovery directly from the beneficiary. The bank's role should be limited to claiming against and recovering from the applicant. Alternatively, if the applicant, solvent or otherwise, refuses to take action, then any right of the bank to claim against and obtain recovery directly from the beneficiary[184] must be subject to the applicant and the applicant's creditors. The applicant has the better right to directly recover from the beneficiary.

When a bank seeks to recover payment from a beneficiary, there is very likely another party seeking similar recovery, the applicant. Despite the beneficiary receiving payment from the authorised payor of the applicant, the beneficiary has failed to comply with the sale contract by providing the 'correct' documents to the bank but not the correct cargo. This is a breach of the underlying sale contract, which is a separate contract not within the bank's concern.[185] Thus, if the negligence exception is allowed, then both the applicant and the bank can sue the beneficiary. This is because the applicant has incurred a liability arising out of the beneficiary's presentation. The applicant is obliged to reimburse the bank. The beneficiary is only obliged to repay a limited amount: the moneys received from the bank under the LC. If the applicant is insolvent, the applicant's creditors and the bank will be fighting over this limited amount. The bank, seeking reimbursement under the LC, is also one of the applicant's creditors. In essence, it is a competition between the applicant's creditors. It is an unfair preference to have the LC moneys 'refunded' to the bank alone and such a movement of money is liable to be set aside upon an application by the other creditors of the applicant. Besides, the party 'who is in the money has the upper hand'.[186] It is unwise to allow the bank (as creditor) to be in a commanding position over the applicant's liquidators and other creditors while this insolvency issue remains unresolved. The liquidator is more likely to run out of funds before the bank does, potentially stymying the liquidators' expensive lawsuit against the bank to recover funds. Thus, the

[184] For example, a creditor's right to step into the 'shoes' of the insolvent applicant to sue the beneficiary for and on behalf of the insolvent applicant.
[185] UCP 600 art 4a.
[186] Neo (n 1) para 5.9.

negligence exception does not make sense, unless the moneys are repaid to the applicant for a fair distribution to all the creditors of the applicant. If moneys are repaid directly to the applicant, then the bank is really suing as one of the applicant's creditors, despite appearing to be suing the beneficiary to recover payment under the 'negligence exception'. Put simply, the bank is suing the beneficiary while wearing the clothes of the 'applicant'. The applicant suing the beneficiary for a negligent draw under the LC based on a tortious duty of care owed by the beneficiary to the applicant[187] and/or for breach of the underlying contract due to a wrongful draw under the LC does not offend the autonomy principle. This recovery of payment action, even if it uses the 'negligence exception' as a label, is thus not an exception to the autonomy principle.

Meanwhile, the fraud exception can be justified because, unlike the one-way negligence exception, the fraud exception allows and requires the bank to refuse payment if it discovers the fraud in time. No monies should have reached the beneficiary in the first place. The applicant's creditors cannot complain about these monies. The bank was not supposed to become a creditor of the applicant. There is no competition between creditors and therefore no possibility of unfair preference. The above reveals a key difference between refusing and recovering payment. In the 'refusing payment' scenario, the applicant and its creditors can have no interest in the bank's funds. In the 'recovering payment' scenario, the interest of the applicant's creditors must be accounted for. If the applicant is not at risk of becoming insolvent, no such interest exists and the negligence exception is unlikely to arise in fact because the bank would not be suing the beneficiary. It is far easier for the bank to claim contractual reimbursement from the solvent applicant as opposed to a tortious negligence claim against the beneficiary. Thus, the negligence exception is useless to the bank when the applicant is solvent, and unfairly preferential to the bank when the applicant is insolvent.

Another counterargument is that the 'innocent of fraud' beneficiary who obtains documents containing falsity(s) is always able to sue someone other than the buyer or the bank.[188] But

[187] It is quite likely that such a duty of care already exists: *Robinson* (n 13) 288c–290b. Such a duty of care would be independent of any duty of care (assuming it exists) possibly owed by the beneficiary to the bank.

[188] Sarna (n 152) 8 – 2.

this counterargument is of little weight. It has not encouraged the law to accept other exceptions to the autonomy principle.

A further counterargument is that '[t]he beneficiary is in a better position than the bank to check documents'.[189] This counterargument could rely on the fact that the bank, while playing the role of a document checker, is only expected to check the 'face' of the documents for compliance.[190] So it might 'be argued that the burden of risk should lie on the presenter of the documents',[191] the beneficiary. It has been stated that:

> […] the seller is the party best situated to detect such third party misconduct who takes the required documents from third party in its own country and with whom the seller often has a lengthy business relationship and is familiar with the practice of the third party; and the cost to the seller is slight since it only adds to its pre-existing obligation to tender documents required […][192]

While this statement might be true in static commodity trades, it is doubtful that this statement holds water in the fluid nature of oil trading. There is no guarantee that the seller has a longstanding business relationship with its supplier and is familiar with the practice of its supplier. As explained earlier, imposing a duty on the beneficiary to check on cargo loading is artificial and unreasonable. It is artificial because the underlying transaction is not so much in the physical oil cargo as in the market itself, where speculation or hedging is prolific. Furthermore, it is unreasonable because this is the surveyor's job. The surveyor at the loadport is the party best situated to check for any 'cargo misconduct'.

## 3 Conclusions

This paper has argued against the negligence exception. Should banks deserve additional protection, banks could lobby for legislation stating that 'beneficiar[ies] warran[t] that all

[189] Ibid.
[190] UCP 600 arts 5, 14a.
[191] Sarna (n 152) 8 – 2.
[192] Chiam Tah Kui, 'Fraud Exception to the Autonomy of Documentary Credit: Towards an Equitable Fraud Standard' [1999] 4 MLJ lxii, lxxxvii.

statements made in documents presented to obtain payment are true'.[193] This is the implied warranty in statutory form.

As foreshadowed by Hare,[194] LCs have been exposed to the law of negligence when *BOC* interpreted the autonomy principle as 'pay first argue later',[195] which is similar to Hare's irrevocable mandate to pay.[196] A series of judgments on LCs might be around the corner. Due to the Hin Leong saga, LCs might be exposed to other general principles of private law,[197] such as unjust enrichment,[198] subrogation,[199] and implied warranty.[200]

In the meantime, *Carrier*, *BOC*, and *PPT Energy* collectively present an uncertain legal position on the negligence exception in Singapore.[201] This is undesirable and goes against Singapore's status as a 'global commodities trading hub'.[202] Indeed, *BOC* represents a missed opportunity. BOC's negligence claim could (and should) have been struck out. If such striking out was affirmed on appeal, uncertainty in Singaporean LC law on the negligence exception would have been eliminated. As things stand, uncertainty reigns in light of *BOC* and will persist until the negligence exception is fully discussed in the judgments to come.

Meanwhile, banks should revise the specifications of their LCs, especially LOI wording, in their favour. Traders should perform 'due diligence' to comply with any potential duty of care imposed. Banks and traders should create a due diligence code to provide a standard of care

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193 *Sun Marine Terminals Inc v Artoc Bank and Trust Ltd* 797 SW 2d 7 (Tex 1990) 11 (Hecht J), citing the Uniform Commercial Code §5.111(a) prior to its revision.

194 Hare (n 52) 29–30.

195 *BOC* (n 1) [31]–[35] (Andre Maniam JC). Similarly, 'pay now, argue later' is also used to describe security of payment legislation enacted in various jurisdictions for the construction industry: *W Y Steel* (n 136) [20].

196 Hare (n 52) 16.

197 Ibid, 29–30.

198 *BOC* (n 1) [108]; Dighe (n 151) 282–283.

199 See, for example, the discussion (and the articles cited) in Agasha Mugasha, *The Law of Letters of Credit and Bank Guarantees* (Federation Press 2003) 104–107. See also Goode (n 150) 444–445; McKendrick (n 150) paras 35.119–35.120.

200 Parties in two pending suits have recently pleaded implied warranty in the Singaporean courts: see the Statement of Claim dated 4 May 2022 [47(b)] filed in *CIMB* (n 12); and the Statement of Claim (Amendment No 1) dated 9 March 2022 [42(b)] filed in *CTBC* (n 12). But cf *United City Merchants (Investments) Ltd v Royal Bank of Canada (The American Accord)* [1979] 1 Lloyd's Rep 267, 278 col 2 (Mocatta J). See also Goode (n 150) 445–446; McKendrick (n 150) paras 35.119–35.120; Dighe (n 151) 283.

201 *Carrier* (n 10); *BOC* (n 1); *PPT Energy* (n 11).

202 Monetary Authority of Singapore, 'Reply to Parliamentary Question on the recent cases of trade financing fraud' (5 October 2020) <https://www.mas.gov.sg/news/parliamentary-replies/2020/reply-to-parliamentary-question-on-the-recent-cases-of-trade-financing-fraud> accessed 11 October 2021.

for future courts to apply in the event that the negligence exception becomes a part of Singaporean law.